

UNCITRAL Arbitration

Antonio del Valle Ruiz and Others

The Claimants

v.

The Kingdom of Spain

The Respondent

FINAL AWARD

ARBITRAL TRIBUNAL

Professor Gabrielle Kaufmann-Kohler, Presiding Arbitrator

Professor William Park, Arbitrator

Mr. Alexis Mourre, Arbitrator

Secretary of the Arbitral Tribunal

Dr. Michele Potestà

Registry

Mr. Julian Bordaçahar

Permanent Court of Arbitration

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FREQUENTLY USED ABBREVIATIONS

August Hearing	Hearing held between 27 and 28 August 2021
BBVA Bancomer or Claimant 11	B.B.V.A. Bancomer, S.A., Institución de Banca Múltiple, Grupo Financiero BBVA Bancomer
BMN	Banco Mare Nostrum
BRRD	European Commission, European Parliament Directive establishing a framework for the restructuring and resolution of credit institutions and investment service companies and amending Council Directive 82/891/EEC and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No. 1093/2010 and (EU) No. 648/2012 of the European Parliament and the Council, 15 May 2014, found at Exh. RL-0139.
C-Costs Submission	Claimants' submission on costs dated 18 February 2022
CER	Claimants' expert reports
CJEU	Court of Justice of the European Union
CJEU Proceeding	Process initiated by the Claimants before the CJEU against the European Commission and the SRB (Case T-510/17)
CNMV	National Securities Market Commission
CNMC	National Commission on Markets and Competition
C-PHB1	Claimants' first post-Hearing brief dated 19 November 2021
C-PHB2	Claimants' reply post-Hearing brief dated 21 January 2022
CWS	Claimants' witness statement
ECB	European Central Bank
ECB's Non-Objection	ECB's non-objection to the provision of ELA required where the size of ELA operations envisaged by one or more NCBs for a given financial institution or a given group of financial institutions exceeds a threshold of € 2 billion
ELA	Emergency Liquidity Assistance
EU	European Union
ESMA	European Securities and Markets Authority
FET	Fair and equitable treatment
FOLTF	Failing or likely to fail
FROB	Fund for the Orderly Restructuring of Banks

ICSID Arbitration	Arbitration under the ICSID Convention commenced on 23 August 2018 by certain Claimants, i.e., 35 physical persons who are nationals of Mexico and by 11 companies organized under the laws of Mexico, which was joined into the UNCITRAL Arbitration
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965
Joinder Agreement	Joinder agreement by which, pursuant to Article 17(5) of the UNCITRAL Rules, the Parties agreed to the consolidation of the UNCITRAL Arbitration and the ICSID Arbitration into a single arbitration to be conducted under the UNCITRAL Rules dated 9 April 2019, Annex A of the Terms of Appointment
May Hearing	Hearing held between 17 and 26 May 2021
MFN clause	Most-favored nation clause
NT	National Treatment
NCB	National Central Bank
NOA Waiver	Waiver contained in the body of the Notice of Arbitration
NPA	Non-performing assets
Notice of Arbitration	Notice of Arbitration filed pursuant to the UNCITRAL Rules by eight physical persons who are all dual nationals of Mexico and Spain dated 23 August 2018
PCA	Permanent Court of Arbitration
PHC	Pre-hearing conference held on 13 April 2021
PO	Procedural Order
PO1	Procedural Order No. 1 dated 2 July 2019
PO2	Procedural Order No. 2 dated 2 July 2019
PO3	Procedural Order No. 3 dated 28 November 2019
PO4	Procedural Order No. 4 dated 10 December 2019
PO5	Procedural Order No. 5 dated 24 June 2020
PO6	Procedural Order No. 6 dated 16 April 2021
PO7	Procedural Order No. 7 dated 1 June 2021
PO8	Procedural Order No. 8 dated 31 August 2021
Response to the Notice of Arbitration	Response to the Notice of Arbitration submitted by the Respondent pursuant to Article 4 of the UNCITRAL Rules dated 21 September 2018
Reply	Claimants' Reply Memorial dated 30 October 2020

Rejoinder	Respondent's Rejoinder Memorial dated 5 March 2021
R-Costs Submission	Respondent's submission on costs dated 18 February 2022
Response to the Trifurcation Request	Response to the Trifurcation Request dated 18 October 2019
R-PHB1	Respondent's first post-Hearing brief dated 19 November 2021
R-PHB2	Respondent's reply post-Hearing brief dated 21 January 2022
RWS	Respondent's witness statements
Side Letters	Side letters appended to the Notice of Arbitration
SSM	Single Supervisory Mechanism
SRB	Single Resolution Board
Statement of Claim or SoC	Claimants' Statement of Claim dated 16 August 2019
Statement of Defense or SoD	Statement of Defence and Objections to Jurisdiction dated 6 March 2020
TOA	Terms of Appointment dated 18 June 2019
Treaty or BIT	Agreement on the Promotion and Reciprocal Protection of Investments between the United Mexican States and the Kingdom of Spain of 2006
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Arbitration	Arbitration filed pursuant to the UNCITRAL Rules by eight physical persons who act as Claimants and are all dual nationals of Mexico and Spain
UNCITRAL Rules	UNCITRAL Arbitration Rules, as revised in 2013
VLCT	Vienna Convention on the Law of Treaties
Withheld Documents	Documents that have been produced in connection with Spanish judicial proceedings before the <i>Audiencia Nacional</i> related to Banco Popular Español, S.A., subject to confidentiality obligations

I. INTRODUCTION

1. This is an *ad hoc* arbitration brought under the Agreement on the Promotion and Reciprocal Protection of Investments between the United Mexican States and the Kingdom of Spain of 2006 (the “Treaty” or “BIT”)¹ pursuant to the United Nations Commission on International Trade Law (“UNCITRAL”) Arbitration Rules, as revised in 2013 (the “UNCITRAL Rules”).²

A. THE PARTIES AND THEIR REPRESENTATIVES

2. The Claimants are:

1. Antonio del Valle Ruiz
2. Abraham Abadi Tawil
3. Alejandra Pérez Mina
4. Alejandro Finkler Kudler
5. Alejandra Rojas Velasco
6. Alonso de Garay Gutiérrez
7. Antonio Cosío Ariño
8. Antonio del Valle Perochena
9. Arantzazu del Valle Diharce
10. Arturo Grinberg Kreimerman
11. BBVA Bancomer Servicios, S.A., Institución de Banca Múltiple, Grupo Financiero BBVA Bancomer, as trustee of Trust F/703850
12. Carlos Ruiz Sacristán
13. Consultores CGEK, S.C.
14. David Troice Jalife
15. Divo Milan Haddad
16. Edmundo del Valle Diharce

¹ Agreement on the Promotion and Reciprocal Protection of Investments between the United Mexican States and the Kingdom of Spain, Mexico City, 10 October 2006, 2553 UNTS 271.

² Excluding the application of the UNCITRAL Rules on Transparency, since the Parties acknowledge that the Respondent to date has not agreed to the application of those rules. See Joinder Agreement, p. 2; TOA, para. 35(b).

17. Elías Abadi Cherem
18. Enrique Rojas Blasquez
19. Eugenio Santiago Clariond Reyes
20. Fernando Ramos González de Castilla
21. Francisco Javier del Valle Perochena
22. Fondo Administrado 5, S.A. de C.V., Fondo de Inversión de Renta Variable
23. GBM Capital Bursátil, S.A. de C.V., Fondo de Inversión de Renta Variable
24. GBM Fondo de Inversión Total, S.A. de C.V., Fondo de Inversión de Renta Variable
25. GBM Global, S.A. de C.V., Fondo de Inversión de Renta Variable
26. GBM, S.A. de C.V., Casa de Bolsa, as trustee of Trusts F/000138; F/000139; F/101; and F/100
27. Gerardo Madrazo Gómez
28. Germán Larrea Mota Velasco
29. Georgina Rojas Velasco
30. Grow Investments S.A. de C. V.
31. Hechos con Amor, S.A. de C.V.
32. Inmobiliaria Asturval, S.A. de C.V.
33. Isabel Rojas Velasco
34. Jacobo Troice Jalife
35. Jaime Abadi Cherem
36. Jaime Ruiz Sacristán
37. Jorge Esteve Recolons
38. Jorge Rojas Mota Velasco
39. José Eduardo del Valle Diharce
40. José María Casanueva y Llaguno³
41. José Manuel Fierro Von Mohr
42. Juan Pablo del Valle Perochena

³ As discussed *infra* at paras. 393-394, the Claimants “dropped” Mr. Casanueva y Llaguno from the arbitration in the course of the proceedings.

43. Julio Andrés Maza Casas
 44. Luis de Garay Russ
 45. Luis Francisco Suinaga Aguilar
 46. María Blanca del Valle Perochena
 47. María de Guadalupe del Valle Perochena
 48. María Eugenia Velasco Fernández
 49. María Rojas Velasco
 50. Pedro de Garay Montero
 51. Rogelio Barrenechea Cuenca
 52. Simple Investments, S.A. de C.V.
 53. Sofía de Garay Montero
 54. Xochitl de Guadalupe Montero Motta (Xochitl Montero De De Garay)
3. The Claimants are represented by Mr. Javier H. Rubinstein, Ms. Lauren F. Friedman, Ms. Lucila I. M. Hemmingsen, Mr. Kevin Mohr, Mr. Fernando Rodriguez-Cortina, Mr. Enrique Molina, Ms. Rikki Stern, Ms. Tamsin Parzen from KING & SPALDING LLP.
 4. The Respondent is the Kingdom of Spain.
 5. The Respondent is represented by Ms. María del Socorro Garrido Moreno, Ms. Gabriela Cerdeiras Megías, Mr. Pablo Elena Abad, Ms. Lorena Fatás Pérez, Ms. Ana Fernández-Daza, Mr. José Manuel Gutiérrez Delgado, Ms. Amaia Rivas Kortazar, Mr. Alberto Torro Molés, Mr. Luis Enrique Vacas Chalfoun, Mr. Juan Antonio Quesada Navarro, Ms. Ana María Rodríguez Esquivias, Ms. María José Ruiz from the Spanish ABOGACÍA GENERAL DEL ESTADO.

B. THE ARBITRAL TRIBUNAL

6. The Tribunal is composed of:

Prof. Gabrielle Kaufmann-Kohler (President of the Tribunal)

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7. With the consent of the Parties, the Arbitral Tribunal appointed as Secretary to the Tribunal:

Dr. Michele Potestà

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C. LANGUAGE OF THE ARBITRATION AND PLACE OF ARBITRATION

8. Pursuant to paragraph 30 of the Terms of Appointment ("TOA") executed by the Parties and the Tribunal, English and Spanish are the languages of the arbitration.⁴ Thus, this Final Award is issued in both English and Spanish. In case of any discrepancy between the two versions, the English version of this Award shall prevail.
9. By agreement of the Parties, as reflected in paragraph 31 of the TOA, The Hague, the Netherlands is the place of arbitration.

⁴ See also Procedural Order No. 1 ("PO1"), para. 3.

II. PROCEDURAL HISTORY

10. This section provides a summary of the procedural history in this case. Given the complexity of the proceeding and the numerous procedural issues and exchanges, for ease of readability the Tribunal has organized the procedural history by topics and, within those topics, has set out the procedural steps in chronological order.

A. COMMENCEMENT OF THE ARBITRATION AND CONSTITUTION OF THE TRIBUNAL

11. On 22 January 2018, pursuant to Article IX of the Treaty, the Claimants sent a notice of dispute informing the Respondent of a dispute between them and the Kingdom of Spain under the Treaty.
12. On 23 August 2018, the Claimants initiated two arbitrations against the Respondent by way of (i) a Notice of Arbitration filed pursuant to the UNCITRAL Rules (the "Notice of Arbitration") by eight physical persons who are all dual nationals of Mexico and Spain (the "UNCITRAL Arbitration"); and (ii) a Request for Arbitration pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 (the "ICSID Convention")⁵ by 35 physical persons who are nationals of Mexico and by 11 companies organized under the laws of Mexico (the "ICSID Arbitration"). In their Notice of Arbitration, the Claimants proposed the use of the 2013 version of the UNCITRAL Rules for the present case and appointed Professor William W. Park as arbitrator.
13. On 21 September 2018, the Respondent submitted its Response to the Notice of Arbitration, pursuant to Article 4 of the UNCITRAL Rules (the "Response to the Notice of Arbitration"), wherein it agreed to the Claimants' proposal for the application of the 2013 version of the UNCITRAL Rules. In its Response to the Notice of Arbitration, the Respondent appointed Mr. Alexis Mourre as arbitrator.
14. On 14 November 2018, the Parties jointly nominated Professor Gabrielle Kaufmann-Kohler to act as Presiding Arbitrator.
15. Professors Kaufmann-Kohler and Park and Mr. Alexis Mourre accepted their respective nominations to serve on the arbitral tribunal hearing the UNCITRAL Arbitration on 15 November 2018, 1 November 2018, and 17 October 2018, respectively.

⁵ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, D.C., 18 March 1965, 575 UNTS 159.

B. THE JOINDER AGREEMENT AND THE FIRST PROCEDURAL MEETING

16. On 9 April 2019, the Parties signed a joinder agreement by which, pursuant to Article 17(5) of the UNCITRAL Rules, they agreed to the consolidation of the UNCITRAL Arbitration and the ICSID Arbitration into a single arbitration to be conducted under the UNCITRAL Rules before the Arbitral Tribunal (the “Joinder Agreement”). Specifically, the Parties agreed that “[t]he arbitration will be heard by the UNCITRAL Arbitral Tribunal [i.e. the Tribunal consisting of Professors Kaufmann-Kohler, Park and Mr. Mourre], with all Claimants from both Arbitrations participating as claimants in the UNCITRAL Arbitration”.⁶ Additionally, the claimants of the ICSID Arbitration agreed to terminate their claim before ICSID.
17. On 24 April 2019, in accordance with the Joinder Agreement, the Arbitral Tribunal approved the joinder of the ICSID Arbitration into the UNCITRAL Arbitration and issued an order in the form of Appendix III to the Joinder Agreement (the “PO on Joinder Agreement”), which, in turn, would subsequently be added as an Annex B to the TOA to be executed by the Parties and the Tribunal.
18. On 25 April 2019, the Parties and the Arbitral Tribunal held a first procedural hearing via telephone conference in which they addressed, *inter alia*, the Joinder Agreement and a previously-circulated draft of the TOA.

C. THE RESPONDENT’S CHALLENGE TO PROF. PARK

19. On 1 May 2019, the Respondent filed a challenge against Prof. Park before the Secretary-General of the Permanent Court of Arbitration (the “PCA”).
20. On 7 May 2019, the Claimants submitted their reply to the Respondent’s challenge against Prof. Park.
21. On 21 May 2019, the Respondent provided its additional observations on its request for disqualification of Prof. Park.
22. On 28 May 2019, the Claimants filed their response to the Respondent’s additional observations on the challenge against Prof. Park.

⁶ Joinder Agreement, para. 2.

23. On 3 June 2019, the Secretary-General of the PCA, in his role as appointing authority,⁷ dismissed the Respondent's challenge against Prof. Park.

D. THE EXECUTION OF THE TERMS OF APPOINTMENT

24. By 18 June 2019, the TOA were executed by the Parties and the members of the Tribunal. In the TOA, it was agreed by the Parties that the PCA would act as registry and administer the proceedings and that its Secretary-General would act as appointing authority.

25. Additionally, the Parties confirmed that they had no objection to the constitution of the Tribunal and to the appointment of the arbitrators in respect of matters known to them at the date of signature of the TOA.

E. THE WRITTEN SUBMISSIONS PHASE

26. On 2 July 2019, after consultations with the Parties, the Tribunal issued Procedural Orders Nos. 1 and 2 (respectively, "PO1" and "PO2"). In PO1, the Tribunal addressed certain procedural matters and fixed the procedural calendar. In PO2, the Tribunal established the confidentiality and transparency rules for the proceedings.
27. On 6 August 2019, in consultation with the Parties, the Tribunal issued a revised procedural calendar.

1. The Claimants' Statement of Claim and the so-called Withheld Documents

28. On 17 August 2019 (Central European Time), the Tribunal received the Claimants' Statement of Claim (the "Statement of Claim" or "SoC"), which was due on 16 August 2019 (Central European Time) pursuant to PO1. The Statement of Claim was accompanied by factual exhibits ("Exh. C-") C-1 through C-268; legal authorities ("Exh. CL-") CL-1 through CL-90; witness statements ("CWS-") from Mr. Antonio del Valle Ruiz (CWS-1), Mr. Jaime Ruiz Sacristán (CWS-2), Mr. Ignace Bulnes (CWS-3), and Mr. Sergio Lagunes (CWS-4); and expert reports ("CER-") from Dr. Manuel Abdala and Mr.

⁷ While the TOA, where the Secretary-General of the PCA was designated as appointing authority for all purposes under the UNCITRAL Rules, were yet to be formally finalized, the Parties agreed that the challenge against Prof. Park would be decided by the Secretary General of the PCA.

Michael Seelhof (CER-1), Dr. Miguel de la Mano (CER-2), and Professor Itay Goldstein (CER-3).

29. In the cover letter to their Statement of Claim, the Claimants requested that the Tribunal “confirm the relevance of the Withheld Documents (the ‘Withheld Documents’) and admit them as evidence in this arbitration”. The Claimants defined the Withheld Documents as “documents that have been produced in connection with Spanish judicial proceedings [...] [and] subject to confidentiality obligations”.
30. On 22 August 2019, the Claimants submitted to the Tribunal the decision from the Spanish *Audiencia Nacional* regarding the Withheld Documents.
31. On 29 August 2019, the Respondent provided its comments on the production of the Withheld Documents.
32. On 6 September 2019, the Claimants filed their response regarding the production of the Withheld Documents.
33. On 12 September 2019, the Respondent moved to demand that the Claimants duly explain why the Statement of Claim was filed after the deadline established by the Tribunal, and requested the termination of proceedings should the Claimants fail to do so.
34. On 13 September 2019, the Respondent submitted its final comments regarding the Withheld Documents.
35. On 17 September 2019, the Tribunal rejected the Claimants’ request for confirmation of the relevance of the Withheld Document, and rejected the Respondent’s request that the factual allegations regarding the Withheld Document be disregarded.
36. On 18 September 2019, the Claimants replied to the Respondent’s request for termination of the proceedings on the ground of their allegedly belated submission of their Statement of Claim.
37. On 23 September 2019, the Tribunal rejected the Respondent’s request for termination of the proceedings on the ground of the Claimants’ allegedly belated submission of their Statement of Claim.

2. The Respondent's Request for Trifurcation and the European Commission's Request to Intervene as a Non-Disputing Party

38. On 20 September 2019, the Respondent submitted its Request for Trifurcation (the "Request for Trifurcation"), accompanied by factual exhibits ("Exh. R-") R-1 through R-5; and legal authorities ("Exh. RL-") RL-1 through RL-43.
39. On 11 October 2019, the European Commission filed an Application for Leave to intervene as a Non-disputing Party.
40. On 18 October 2019, the Claimants submitted their response to the Respondent's Request for Trifurcation (the "Response to the Trifurcation Request").
41. On 24 October 2019, the Tribunal informed the Parties that it had denied the Request for Trifurcation, so that the proceedings would advance on a non-bifurcated basis, and that a reasoned decision on this matter would be communicated to the Parties shortly.
42. On 28 October 2019, following the Tribunal's directions, the Parties provided their respective comments on the European Commission's application for leave to intervene.
43. On 21 November 2019, the Respondent alleged that the Claimants relied on certain confidential documents for their submission on the European Commission's application for leave to intervene, and made related petitions to the Tribunal.
44. On 28 November 2019, the Tribunal issued Procedural Order No. 3, whereby it granted the European Commission's application for leave to intervene, subject to certain procedural limitations ("PO3"). Specifically, it decided that (i) the European Commission should file its *amicus* brief after the Respondent's submission of the Statement of Defense; (ii) the brief shall not exceed 10,000 words including footnotes; and (iii) the Parties would have an opportunity to provide their comments on the European Commission's submission in the Reply and Rejoinder, respectively.
45. On 28 November 2019, the Claimants filed their reply to the Respondent's allegations regarding their alleged use of confidential documents.
46. On 2 December 2019, the Tribunal informed the Parties of its decision regarding the Claimants' reliance on certain allegedly confidential documents, striking C-271 from the record while keeping C-22 as part of it.

47. On 10 December 2019, the Tribunal issued Procedural Order No. 4, providing reasons for its decision on the Respondent's Request for Trifurcation ("PO4").

48. On 20 January 2020, the Parties agreed to certain revisions to the procedural calendar.

3. Further Incidences Regarding the Withheld Documents

49. On 14 February 2020, the Claimants asked that the Tribunal request the production of the Withheld Documents from the *Audiencia Nacional* in order to lift the confidentiality of these documents.

50. On 19 February 2020, the Respondent filed its comments on the Claimants' request regarding the Withheld Documents, opposing it.

51. On 21 February 2020, the Claimants submitted their reply to the Respondent's comments on the Withheld Documents.

52. On 24 February 2020, the Respondent submitted its final comments on the Claimants' request regarding the Withheld Documents.

53. On 6 March 2020, the Tribunal denied the Claimants' application that the Tribunal request the Withheld Documents from the *Audiencia Nacional*.

4. The Respondent's Statement of Defense

54. On 6 March 2020, the Respondent filed its Statement of Defence and Objections to Jurisdiction (the "Statement of Defence" or "SoD"). The Statement of Defence was accompanied by factual exhibits ("Exh. R-") R-6 through R-324; legal authorities ("Exh. RL-") RL-46 through RL-291; witness statements ("RWS-") from Mr. Jaime Carvajal (RWS-1), Mr. Javier Torres Riesco (RWS-2), Dr. Juan Ayuso (RWS-3), Mr. Antonio Marcelo (RWS-4), and Mr. Rodrigo Buenaventura (RWS-5); and expert reports ("RER-") from Professor Rosa M. Lastra (RER-1), and Mr. Garrett Rush and Mr. Kiran Sequeira (RER-2).

5. The EU Commission's *Amicus Curiae* Submission

55. On 12 March 2020, the EU Commission filed its "*Amicus Curiae* Submission by the European Union", which the Tribunal sent to the Parties on 13 March 2020. In its submission, the EU Commission provided information on the EU legal framework for

the recovery and resolution of credit institutions and investment firms;⁸ commented on the process leading to the resolution of Banco Popular;⁹ made certain observations regarding the fork-in-the-road clause in the Treaty;¹⁰ and put forward a number of observations on the merits of the case.¹¹

6. The Passing Away of the Claimant Jaime Ruiz Sacristán

56. On 22 April 2020, the Tribunal was informed that the Claimant Jaime Ruiz Sacristán had passed away on 12 April 2020.

57. On 28 May 2020, after concerns were raised by the Respondent on 25 May 2020 and addressed by the Claimants on 28 May 2020, the Tribunal decided that the arbitration would proceed as scheduled while the identification and substitution of Mr. Jaime Ruiz Sacristán's heirs remained underway.

58. On 1 June 2020, the Respondent filed a submission regarding the passing away of Claimant Jaime Ruiz Sacristán and his substitution in these proceedings and made related requests to the Tribunal.

59. On 8 June 2020, the Claimants submitted their response to the Respondent's comments on the substitution of Claimant Jaime Ruiz Sacristán.

60. On 10 June 2020, the Tribunal addressed the substitution of Claimant Mr. Jaime Ruiz Sacristán and decided that there was no need for directions at that time.

61. On 5 March 2021, the Respondent requested that the Tribunal direct the Claimants to provide an update as to the substitution of Mr. Ruiz Sacristán in this proceeding.

62. On 12 March 2021, the Claimants confirmed that Mr. Ruiz Sacristán would be succeeded in this arbitration by Ms. Maria Isabel Ocejo Gutiérrez, Ms. Isabel Ruiz Ocejo, Ms. Valeria Ruiz Ocejo, and Ms. Priscila Ruiz Ocejo and indicated that they would provide the identity documents of each of the confirmed successors.

⁸ *Amicus Curiae* Submission by the European Union, paras. 5-25.

⁹ *Ibid.*, paras. 26-66.

¹⁰ *Ibid.*, paras. 67-77.

¹¹ *Ibid.*, paras. 78-120.

63. On 27 April 2021, the Claimants provided the identity documents of Mr. Ruiz Sacristán's successors as well as powers of attorney authorizing King & Spalding to represent them in this arbitration.

64. On 29 April and 6 May 2021, the Respondent and the Claimants submitted respectively further comments on this matter.

7. Document Production Phase

65. On 27 March 2020, each side served on the other a request for the production of documents.

66. On 13 April 2020, the Parties requested a postponement of the time limits for the document production phase of the proceedings, to which the Tribunal agreed on 14 April 2020.

67. On 5 May 2020, the Parties requested further modifications to the procedural calendar for the document production phase of the proceedings, to which the Tribunal agreed on 6 May 2020.

68. On 29 May 2020, each Party submitted its objections to the other Party's document production requests, and complied with each other's non-objected document production requests.

69. On 12 June 2020, each Party provided its replies to the objections to each other's document production requests.

70. On 24 June 2020, the Tribunal issued Procedural Order No. 5, whereby it decided each Party's document production requests ("PO5").

71. On 15 July 2020, the Respondent informed the Tribunal that, with regard to such documents related to actions of the European Union (the "EU"), it would not be able to produce them by the time set in PO5. On the same day, the Claimants submitted their comments.

72. On 17 July 2020, the Tribunal gave directions on the production of the EU-related documents.

73. On the same date, the Parties made the productions ordered in PO5.

74. On 22 July 2020, the Respondent provided further details regarding its alleged inability to produce certain documents related to actions of the EU within the time fixed in PO5. On the same date, the Respondent produced certain documents the production of which was ordered in PO5.
75. On 24 July 2020, the Claimants submitted their comments on the Respondent's delay in the production of the EU-related documents.
76. On 31 July 2020, the Respondent informed the Tribunal of the European Central Bank ("ECB")'s reply regarding the production of certain documents related to the latter's actions.
77. On 3 August 2020, the Claimants provided their comments on the Respondent's communication regarding the ECB and requested the Tribunal's assistance in obtaining the Withheld Documents from the *Audiencia Nacional*.
78. On 6 August 2020, the Respondent alleged that the Claimants failed to comply with certain document production orders.
79. On 7 August 2020, the Tribunal addressed the Parties' communications regarding the ECB's reply on the production of certain documents.
80. On 11 August 2020, the Respondent provided its comments on the Claimants' request regarding the Withheld Documents.
81. On 13 August 2020, the Claimants submitted further comments on their request for the Tribunal's assistance in obtaining the Withheld Documents.
82. On 19 August 2020, the Respondent submitted further comments on the Claimants' request for the Tribunal's assistance in obtaining the Withheld Documents.
83. On the same date, the Claimants alleged that the Respondent had failed to comply with certain document production orders.
84. Also on 19 August 2020, the Claimants replied to the Respondent's document production allegations of 6 August 2020, and produced certain additional documents.
85. On 21 August 2020, the Tribunal invited the Parties' further comments on the Withheld Documents and requested that certain rulings from the *Audiencia Nacional* be disclosed.

86. On 28 August 2020, the Claimants submitted their comments on the Withheld Documents and produced the requested rulings from the *Audiencia Nacional*.
87. On 31 August 2020, the Claimants requested an extension for the filing of their Reply on the basis of the Respondent's alleged deficiencies in producing documents. Furthermore, that Claimants produced additional documents responsive to Respondent's Request Nos. 59 and 61 noting that they had recently come into their possession and had previously been inaccessible because of restrictions related to the ongoing COVID-19 pandemic in Mexico.
88. On 1 September 2020, the Respondent replied to the Claimants' document production allegations of 19 August 2020.
89. On the same date, the Respondent sent a second letter replying to the Claimants' letter of 19 August 2020 regarding alleged document production deficiencies on the part of the Claimants.
90. On 3 September 2020, the Respondent objected to the Claimants' extension request of 31 August 2020.
91. On 4 September 2020, the Respondent submitted its comments on the Withheld Documents in response to the Claimants' letter of 28 August 2020.
92. On the same date, the Claimants replied to the Respondent's letter of 1 September 2020 regarding the alleged document production deficiencies.
93. On 7 September 2020, the Claimants provided further comments on the allegations by the Respondent of 1 September 2020 regarding the Claimants' alleged deficient document production, and produced certain requested documents.
94. On 8 September 2020, the Tribunal, after taking into consideration the Parties' positions, extended the time limits for the Claimants' Reply and the Respondent's Rejoinder.
95. On 14 September 2020, the Tribunal informed the Parties of its decision to grant the Claimants' request for assistance in obtaining the Withheld Documents from the *Audiencia Nacional*.

96. On 14 September 2020, the Respondent replied to the Claimants' letter of 4 September 2020 regarding alleged document production deficiencies on the part of the Respondent.
97. On 15 September 2020, the Claimants provided the Tribunal with a draft letter for the *Audiencia Nacional* requesting the Withheld Documents.
98. On 22 September 2020, the Tribunal addressed the allegations about document production which each Party had raised against the other and ordered the production of certain documents.
99. On 25 September 2020, the Respondent produced a communication from the Single Resolution Board ("SRB") regarding the production of certain EU-related documents.
100. On the same date, the Respondent provided its comments on the draft letter to the *Audiencia Nacional* regarding the Withheld Documents.
101. On 29 September 2020, the PCA delivered a letter on behalf of the Tribunal to the *Audiencia Nacional* regarding the Withheld Documents.
102. On 30 September 2020, the Claimants submitted their comments on the SRB's communication regarding the production of certain EU-related documents.
103. On 6 October 2020, the Respondent and the Claimants produced certain documents in response to the Tribunal's letter of 22 September 2020.
104. On the same date, the PCA informed the Parties that it had transmitted a copy of the "Tribunal's Request to the *Audiencia Nacional*" to the email address provided by the Claimants.
105. On 8 October 2020, the Claimants alleged that the Respondent had failed to provide certain documents the production of which the Tribunal had ordered on 22 September 2020.
106. On 9 October 2020, the Respondent replied to the Claimants' communication of 8 October 2020.
107. On 13 October 2020, the Claimants submitted their comments on the Respondent's alleged failure to comply with the Tribunal's letter of 22 September 2020.

108. On 15 October 2020, the Respondent submitted its reply to the Claimants' letter of 13 October 2020.

109. On 20 October 2020, the Tribunal ruled on Claimants' requests of 13 October 2020.

8. The Claimants' Reply

110. On 30 October 2020, the Claimants filed their Reply (the "Reply"), which was accompanied by Exhs. C-275 through C-368; Exhs. CL-186 through CL-318; rebuttal CWS from Mr. Antonio del Valle Ruiz (CWS-5), and Mr. Sergio Lagunes (CWS-6), as well as CER from Mr. Manuel Abdala and Mr. Michael Seelhof (CER-4), Dr. Miguel de la Mano (CER-5), Prof. Itay Goldstein (CER-6), Mr. Rubén Manso Olivar (CER-7), and Mr. José Jiménez-Blanco (CER-8).

111. Together with their Reply, the Claimants submitted an Annex B with an application for adverse inferences. In this Annex, the Claimants set forth the legal basis for the drawing of specific adverse inferences and provided a chart listing (1) each category of documents that Respondent allegedly refused to produce, (2) the Tribunal's order of production in respect of each category, and (3) the specific adverse inferences proposed.

9. Further Incidents Regarding the Withheld Documents

112. On 23 November 2020, the Claimants informed the Tribunal that, on 16 November 2020, the *Audiencia Nacional* had denied the Tribunal's request for the production and use of the so-called Withheld Documents in this arbitration. Thus, the Claimants requested that the Tribunal order the Respondent to promptly produce the documents. Alternatively, if the Respondent failed to produce the Withheld Documents, and if the Claimants were unsuccessful in appealing the *Audiencia Nacional* decision, the Claimants reserved their right to seek a postponement of the merits hearing until such date after the investigation phase of the criminal proceedings was closed and the oral phase was opened, thereby allowing the Claimants then to make use of those documents.

113. On 4 December 2020, the Respondent opposed the Claimants' request of 24 November 2020.

114. On 7 December 2020, the Respondent provided a privilege log to the Tribunal, attaching correspondence from the ECB addressing the production of certain EU-related documents.

115. On 8 December 2020, the Tribunal informed the Parties that in light of the decision of the *Audiencia Nacional* and the Claimants' intention to file an appeal, the Tribunal would not make any further document production orders. The Tribunal also advised the Parties that, should the documents be produced in this arbitration at a later stage, the Parties would be given an opportunity to comment.
116. On 14 December 2020, the Claimants commented on the Respondent's letter of 7 December 2020 and requested that the Tribunal (i) reiterate its directions contained in PO5; (ii) grant the Claimants an opportunity to comment on any new documents that the Respondent may produce; (iii) take into account the Respondent's further withholding of documents in the assessment of adverse inferences; and (iv) take into account the Respondent's conduct in its award of costs.
117. On 18 December 2020, the Tribunal ruled on the Claimants' requests of 14 December 2020.
118. On 8 January 2021, the Respondent provided a further privilege log to the Tribunal, attaching a letter from the SRB. On 13 January 2021, the Respondent provided an update to its privilege log.
119. On 25 January 2021, the PCA received a letter from the *Audiencia Nacional*, which it transmitted to the Tribunal and the Parties on the same day.
120. On 26 February 2021, the Claimants provided the Tribunal with the decision of the Court of Appeals of the *Audiencia Nacional* upholding the denial of the production and use of the Withheld Documents, indicating that no further appeal was available.
121. On 2 March 2021, in light of the decision of the *Audiencia Nacional*, the Respondent requested that the Tribunal (i) set aside the Claimants' written submissions to the extent they referred to or were based on the Withheld Documents, and (ii) instruct the Claimants, their experts, and witnesses from testifying or making representations based on the Withheld Documents.
122. On 8 March 2021, the Claimants commented on the Respondent's requests, confirming that they would not seek to rely on the Withheld Documents but asking the Tribunal to deny the Respondent's request to set aside the Claimants' written submissions.
123. On 10 March 2021, the Tribunal refused to set aside the Claimants' written submissions relying on the Withheld Documents, held that witnesses and experts should not testify

or make representations based on the Withheld Documents, and took note of the Claimants' representation that they would not seek to rely on or use the Withheld Documents.

10. The Respondent's Rejoinder

124. On 5 March 2021, the Respondent filed its Rejoinder (the "Rejoinder"), which was accompanied by Exhs. R-325 through R-509; Exhs. RL-292 through RL-414; rebuttal RWS from Mr. Jaime Ponce Huerta (RWS-6), Mr. Javier Torres Riesco (RWS-7), Mr. Andrés Ribón (RWS-8), Dr. Juan Ayuso (RWS-9), Mr. Luis Manuel González Mosquera (RWS-10), and Mr. Rodrigo Buenaventura (RWS-11); and RER from Professor Rosa M. Lastra (RER-3), Dr. Francesco Papadia (RER-4), Professor Ignacio Tirado (RER-5), Mr. Antonio Sainz de Vicuña (RER-6), Dr. Íñigo Ortiz de Urbina (RER-7), Mr. Antonio Rivela Rodríguez and Dr. Ricardo Queralt Sánchez de las Matas (RER-8), Mr. Garret Rush and Mr. Kiran P. Sequeira (RER-9), and Mr. Carlos Dieguez, Mr. Javier Morera and Mr. Luis Alaix (RER-10).

125. On 15 March 2021, the Tribunal granted the Respondent's request for an extension to file the English translation of its Rejoinder and accompanying documentation until 9 May 2021.

126. On 26 March 2021, the Respondent submitted the English translation of its Rejoinder and accompanying documents, as well as an errata list and corrected version of its Rejoinder in Spanish.

11. Further Requests Regarding Document Production

127. On 14 April 2021, the Claimants filed requests for (i) partial reconsideration of the decision in PO5 to order production of three documents, (ii) leave to submit six publicly available documents into the record, and (iii) leave to submit new documents and a rejoinder on jurisdiction. They also submitted an update to Annex B to their Reply, regarding adverse inferences and burden shifting.

128. On 16 April 2021, the Respondent commented on the Claimants' three requests regarding document production. It also requested that the Tribunal disallow the Claimants' updated Annex B, or in the alternative grant the Respondent time to respond.

129. On 17 April 2021, the Claimants commented on the Respondent's letter of 16 April 2021.

130. On 20 April 2021, the Tribunal decided to strike the Claimants' updated Annex B from the record. However, it recalled that the Parties would be free to make their arguments on adverse inferences and burden shifting both at the hearing and in post-hearing submissions.
131. On 23 April 2021, the Respondent provided further comments on the Claimants' requests of 14 April 2021.
132. On 27 April 2021, the Tribunal accepted the Claimants' first and third requests of 14 April 2021 and rejected their second request.
133. On 30 April 2021, the Respondent commented on the Tribunal's decision of 27 April 2021, reserving its rights with respect to the Claimants' production of additional documents as decided by the Tribunal.
134. On the same date, the Claimants produced the documents pursuant to the Tribunal's decision of 27 April 2021 and requested leave to introduce an additional document into the record.
135. On 4 May 2021, the Respondent provided its comments on the Claimants' letter of 30 April 2021.
136. On the same date, the Claimants provided their comments on the Respondent's letter of 30 April 2021.
137. On 7 May 2021, the Respondent commented on the three documents on jurisdiction produced by the Claimants on 30 April 2021.
138. On the same date, the Tribunal ruled on the Parties' outstanding requests, providing further directions in connection with its decision of 27 April 2021 and denying the Claimants' request of 30 April 2021 to introduce an additional document into the record.

F. HEARING ORGANIZATION

139. On 1 May 2020, after consultations with the Parties, the Tribunal fixed the dates for the hearing from 17 to 26 May 2021, excluding 22 and 23 May 2021.
140. On 20 January 2021, the Tribunal confirmed the Parties' agreement regarding the date for the notice of experts and witnesses for cross-examination.

141. On 26 January 2021, the Tribunal invited the Parties' comments on the possibility of holding the hearing remotely using a videoconferencing platform, in light of the continuing uncertainties associated with the COVID-19 pandemic.
142. On 4 and 9 February 2021, the Parties provided their comments on the possibility of holding the hearing remotely, expressing their preference for an in-person hearing at a later date if an in-person could hearing not proceed as scheduled.
143. On 11 February 2021, the Tribunal indicated their availability for an in-person hearing in the first half of 2022 and invited the Parties' comments on the dates and organization of the hearing.
144. On 22 February 2021, the Parties provided their comments on the dates, format and organization of the hearing.
145. On 11 March 2021, the Tribunal circulated a draft Procedural Order No. 6 ("PO6") about the organization of the hearing. It also decided that the hearing would proceed as scheduled in May 2021, while reserving its decision on the specific format of the hearing until around 1 April 2021.
146. On 16 March 2021, the Parties provided comments on the Tribunal's letter of 11 March 2021.
147. On 18 March 2021, the Tribunal granted the Parties' requested extension to provide their comments on draft PO6 until 24 March 2021.
148. On 19 March 2021, the Parties provided the names of the witnesses and experts they wished to cross-examine at the hearing.
149. On 24 March 2021, the Parties submitted their comments on draft PO6.
150. On 30 March 2021, the Respondent provided further comments on the organization of the hearing.
151. On 31 March 2021, the Claimants commented on the Respondent's letter of 30 March 2021.
152. On 6 April 2021, the Tribunal indicated that in light of the prevailing sanitary situation, the related health risks, and the travel restrictions to and from The Netherlands, the hearing would either be held fully virtually in May 2021 or, if the Parties so wished,

postponed to 2022. The Tribunal also gave further directions regarding hearing organization if the hearing proceeded in May 2021. It also invited the Parties to consider adding two hearing days in 2021 to allow for the examination of certain witnesses.

153. On 7 April 2021, the Claimants provided their comments on the Tribunal's letter of 6 April 2021, agreeing to a fully virtual hearing in May 2021 and indicating their availability for two additional hearing days.
154. On 12 April 2021, the Respondent indicated the names of its experts and witnesses who were unavailable to attend the two additional hearing days later in 2021.
155. On 12 and 13 April 2021, the Parties provided the Tribunal with their list of attendees for the pre-hearing conference (the "PHC").
156. On 13 April 2021 at 17:00 (Central European Time), the Tribunal and the Parties held the PHC to discuss outstanding matters pertaining to the organization of the hearing. The PHC was attended by the following persons:

Tribunal

Professor Gabrielle Kaufmann-Kohler, Presiding Arbitrator
Professor William Park, Arbitrator
Mr. Alexis Mourre, Arbitrator

Dr. Michele Potestà, Secretary to the Tribunal

PCA

Mr. Julian Bordaçahar, Permanent Court of Arbitration

Claimants

Javier Rubinstein
Lauren Friedman
Lucila Hemmingsen
Kevin Mohr
Margarita Hugues Vélez
Jonatan Graham Canedo

Respondent

José Manuel Gutiérrez Degaldo
Alberto Torró Molés
Gabriela Cerdeiras Megias
Pablo Elena Abad

Ana Fernandez-Daza Alvarez
Maria del Socorro Garrido Moreno
Luis Enrique Vacas Chalfoun

157. During the PHC, which was recorded, the President of the Tribunal and the Parties discussed the items set out in draft PO6, as well as other matters raised by the Parties during the PHC.
158. On the same day, the Parties provided written comments regarding the scheduling and organization of additional hearing days later in 2021.
159. On 16 April 2021, the Tribunal issued PO6, which provided that the hearing would take place between 17 and 26 May 2021 (the “May Hearing”) and 27 and 28 August 2021 (the “August Hearing”). Paragraphs 2 to 25 of PO6 recount in detail the procedural steps that led the Tribunal to hold the hearing in a fully virtual setting.
160. Between 6 April 2021 and 16 May 2021, the Parties, the Tribunal and the PCA exchanged correspondence about the logistics of the May Hearing.

G. THE MAY 2021 HEARING

161. On 30 April 2021, the Parties provided their lists of attendees at the May Hearing. The Parties updated their lists of attendees on 8 May 2021 and 11 May 2021.
162. Pursuant to section 53 of PO6, the Claimants and the Respondent filed the PowerPoint presentations or demonstrative exhibits 30 minutes prior to their use at the May Hearing.
163. The May Hearing took place from 17 to 26 May 2021 virtually using the Zoom videoconferencing platform. The following persons attended the May Hearing (not necessarily throughout the hearing):

The Tribunal

Prof. Gabrielle Kaufmann-Kohler, Presiding Arbitrator
Professor William Park, Arbitrator
Mr. Alexis Mourre, Arbitrator

Dr. Michele Potestà, Secretary to the Tribunal

The Claimants

Mr. Javier Rubinstein

Ms. Lauren Friedman
Ms. Lucila (Luli) Hemmingsen
Mr. Kevin Mohr
Mr. Fernando Rodriguez-Cortina
Mr. Ed Bruera
Ms. Isabel San Martín
Ms. Rikki Stern
Mr. Tamsin Parzen
Mr. Alonso Gerbaud
Ms. Teresa Sandoval
Ms. Margarita Hugues Vélez
Mr. Juan Pablo del Río
Mr. Almaquio Basurto Rosas
Ms. Macarena González Bueyes
Mr. Jonatan Graham
Ms. Maria Emilia Miquel Verges
Mr. Alonso de Garay Gutiérrez
Mr. Jorge Rojas
Mr. Alonso de Garay
Ms. Blanca del Valle Perochena
Mr. Antonio del Valle Perochena
Mr. Bernardo Gutiérrez de laRoza Perez
Mr. Pedro Rubio
Ms. Berta Aguinaga
Mr. Ramón Ruiz de la Torre
Mr. Federico Gonzalez Loray
Mr. Erik Dix
Ms. Ángela López Serrano
Mr. Felix del Toro

The Respondent

Dr. José Manuel Gutiérrez Delgado
Dr. Pablo Elena Abad
Dr. Alberto Torró Molés
Dr. Maria del Socorro Garrido Moreno
Dr. Gabriela Cerdeiras Megias
Dr. Luis Vacas Chalfoun
Dr. Luis Serrano
Dr. Ana Fernandez-Daza Alvarez
Ms. Gloria de la Guarda Limeres
Mr. Juan Quesada Navarro
Ms. Ana M^a Rodríguez Esquivias
Ms. Paula Conthe Calvo
Dr. Amaia Rivas Kortazar
Mr. Miguel Ángel Cabello
Mr. Ignacio Caparroso

Mr. Odysseas Stergianopoulos
Mr. Ricardo Mier Y Teran
Ms. Gabriela Alvarez Avila
Ms. Arianna Sanchez
Mr. Justin M. Jacinto
Mr. Marija Ozolins
Ms. Lucía Arranz Alonso
Ms. María Martelo Moreno
Mr. Jorge Ruiz Jiménez
Mr. Christopher P. Moore
Dr. Laurie Ahtouk-Spivak
Mr. Pablo Mateos Rodriguez
Mr. Ernest Morales
Mr. Miguel Martínez Gimeno
Mr. Matías Nuño Cervero
Mr. Yago Fernández Badía
Ms. Verónica Gonzalo Gómez
Mr. Juan Antonio Aliaga Méndez
Ms. Teresa Royo-Villanova Navasques
Mr. Paul Baez
Mr. Alexander Messmer
Ms. Katrina Breidenbach
Mr. Antonio Díaz
Dr. Bernardo Gómez Jiménez

The PCA

Mr. Julian Bordaçahar, PCA Legal Counsel
Ms. Magdalena Legris, PCA Case Manager
Ms. Marina Arraiza Shakirova, PCA Assistant Legal Counsel
Mr. Jan Nato, PCA Assistant Legal Counsel

Court Reporter (English)

Mr. David Kasdan

Court Reporters (Spanish)

Mr. Dante Rinaldi
Mr. Paul Pelissier

Interpreters

Mr. Daniel Giglio
Ms. Silvia Colla

Audio Visual Equipment Services

Mr. Andrew Skim
Mr. James Watkins
Mr. Jamey Johnson

164. Pursuant to the Tribunal's decision at the May Hearing, the PCA circulated a list of the attendees present during each hearing day.
165. During the May Hearing, the Tribunal heard opening submissions by counsel, asked questions to the Parties which counsel answered orally and in their post-hearing submissions, and heard evidence from the following witnesses and experts:

Witnesses

Mr. Antonio del Valle Ruiz
Mr. Sergio Lagunes
Mr. Joseph Ignace Bulnes
Dr. Javier Torres Riesco
Dr. Jaime Ponce Huerta
Dr. Andrés Ribón
Dr. Juan Ayuso
Dr. Luis González Mosquera
Dr. Antonio Marcelo
Dr. Rodrigo Buenaventura

Experts

Prof. Itay Goldstein
Dr. Miguel de la Mano
Dr. Manuel Abdala
Mr. Michael Seelhoff
Mr. Rubén Manso Olivar
Prof. Rosa Lastra
Prof. Ignacio Tirado
Dr. Francesco Papadia
Dr. Garrett Rush
Dr. Kiran Sequeira
Dr. Antonio Sainz de Vicuña
Dr. Iñigo Ortiz de Urbina
Mr. Antonio Rivela
Prof. Dr. Ricardo Queralt
Dr. Carlos Dieguez
Dr. Javier Morera
Dr. Luis Alaix

H. POST-MAY HEARING DEVELOPMENTS

166. Following consultations with the Parties at the end of the May Hearing, on 1 June 2021 the Tribunal issued Procedural Order No. 7 in relation to post-hearing matters and the organization of the August Hearing ("PO7").

167. On 6 August 2021, following an extension granted by the Tribunal, the Parties provided agreed corrections to the transcripts of the hearing and indicated those on which they had not been able to agree. Thereafter, the Tribunal resolved outstanding issues with the transcripts.

I. THE AUGUST 2021 HEARING

168. On 16 August 2021, the Parties provided their lists of attendees at the August Hearing.

169. Pursuant to section 53 of PO6, the Claimants and the Respondent filed the PowerPoint presentations or demonstrative exhibits 30 minutes prior to their use at the August Hearing.

170. The August Hearing took place from 27 to 28 August 2021 virtually using the Zoom videoconferencing platform. The following persons attended the August Hearing (not necessarily throughout the hearing):

The Tribunal

Prof. Gabrielle Kaufmann-Kohler, Presiding Arbitrator

Professor William Park, Arbitrator

Mr. Alexis Mourre, Arbitrator

Dr. Michele Potestà, Secretary to the Tribunal

The Claimants

Mr. Javier Rubinstein

Ms. Lauren Friedman

Ms. Lucila (Luli) Hemmingsen

Mr. Kevin Mohr

Mr. Fernando Rodriguez-Cortina

Mr. Ed Bruera

Ms. Rikki Stern

Mr. Tamsin Parzen

Mr. Alonso Gerbaud

Ms. Margarita Hugues Vélez

Mr. Juan Pablo del Río

Mr. Almaquio Basurto Rosas

Ms. Macarena González Bueyes

Mr. Jonatan Graham

Ms. Maria Emilia Miquel Verges

Mr. Alonso de Garay Gutiérrez

Mr. Jorge Rojas

Mr. Alonso de Garay

Ms. Blanca del Valle Perochena
Mr. Antonio del Valle Perochena
Mr. Bernardo Gutiérrez de la Roza Perez
Ms. Berta Aguinaga
Ms. Beatriz Fenández
Mr. Álvaro Barro
Mr. Jorge Álvarez Ontier

The Respondent

Dr. José Manuel Gutiérrez Delgado
Dr. Pablo Elena Abad
Dr. Alberto Torró Molés
Dr. María del Socorro Garrido Moreno
Dr. Gabriela Cerdeiras Megias
Dr. Luis Vacas Chalfoun
Dr. Luis Serrano
Ms. Ana María Rodríguez Esquivias
Dr. Ana Fernandez-Daza Alvarez
Ms. Paula Conthe Calvo
Dr. Amaia Rivas Kortazar
Mr. Miguel Ángel Cabello
Ms. Elvira Medecalf
Mr. Ignacio Caparroso
Mr. Odysseas Stergianopoulos
Mr. Ricardo Mier Y Teran
Ms. Gabriela Alvarez Avila
Ms. Arianna Sanchez
Ms. Claudia Frutos-Peterson
Mr. Justin M. Jacinto
Mr. Marija Ozolins
Ms. Lucía Arranz Alonso
Ms. María Martelo Moreno
Mr. Jorge Ruiz Jiménez
Mr. Christopher P. Moore
Dr. Laurie Achtouk-Spivak
Mr. Pablo Mateos Rodriguez
Ms. Patricia Munoz González-Ubeda
Mr. Matías Nuño Cervero
Mr. José Luis Gomara
Mr. Yago Fernández Badía
Ms. Verónica Gonzalo Gómez
Mr. Juan Antonio Aliaga Méndez
Ms. Teresa Royo-Villanova Navasques

The PCA

Mr. Julian Bordaçahar, PCA Legal Counsel

Ms. Magdalena Legris, PCA Case Manager
Ms. Marina Arraiza Shakirova, PCA Assistant Legal Counsel
Mr. Jan Nato, PCA Assistant Legal Counsel

Court Reporters (English)

Mr. David Kasdan

Court Reporters (Spanish)

Mr. Dante Rinaldi

Mr. Leandro Iezzi

Interpreters

Mr. Daniel Giglio

Ms. Silvia Colla

Audio Visual Equipment Services

Mr. Andrew Skim

Mr. James Watkins

Mr. Jamey Johnson

171. During the August Hearing, the Tribunal heard opening submissions by counsel, asked questions to the Parties which counsel answered orally and in their post-hearing submissions, and heard evidence from the following experts:

Experts

Dr. Manuel A. Abdala

Mr. Michael Seelhof

Dr. Garrett W. Rush

Dr. Kiran P. Sequeira

Dr. José Jiménez Blanco

Dr. Carlos Diéguez

Dr. Javier Morera

Dr. Luis Alaix

J. POST-AUGUST 2021 HEARING DEVELOPMENTS

172. Following consultations with the Parties at the end of the August Hearing, the Tribunal issued Procedural Order No. 8 in relation to post-hearing matters on 31 August 2021 (“PO8”).
173. On 30 September 2021, the Parties provided agreed corrections to the transcripts of the hearing and indicated those on which they had not been able to agree. Thereafter, the Tribunal resolved outstanding issues with the transcripts.

K. THE SUN-FLOWER AWARD, POST-HEARING BRIEFS AND RELATED MATTERS

174. On 10 September 2021, the Claimants requested that the Respondent be ordered to disclose the award issued in ICSID Case No. ARB/16/17, *Sun-Flower Olmeda GmbH & Co. KG and others v. Spain*, as well as the dissenting opinion of Professor Kohen, both of which were reportedly issued on 22 June 2021.
175. According to the Claimants, from the publicly available information, the award contained critical aspects of quantum relevant to this case, which justified Claimants' request to introduce it to the record.
176. On 16 September 2021, the Respondent commented that the Claimant's request was late and untimely, since it should have been made as soon as the Claimants had become aware of the existence of the award. It also argued that the request was unfounded, insofar as it failed to comply with the requirements of Section 27 of PO 1 and Article 27.3 of the UNCITRAL Rules. Finally, it argued that the award was irrelevant to this case.
177. On 22 September 2021, the Tribunal concluded that the Claimants' request was not untimely. However, prior to deciding whether to grant the request, it invited the Respondent to secure the consent to disclose the award from the claimants in the Sun-Flower arbitration.
178. On 1 October 2021, the Respondent advised that the claimants in the Sun-Flower arbitration had consented to the disclosure of those sections of the Award relating to the tax gross up, and that a redacted version of the award would be transmitted shortly.
179. On 4 October 2021, the Respondent submitted the redacted version of the Sun-Flower award. Accordingly, the Tribunal invited either Party to assign an appropriate exhibit number to the Sun-Flower Award and to submit such award into the record with its first post-hearing brief.
180. On 19 November 2021, the Claimants and the Respondent filed their first post-hearing briefs (respectively, "C-PHB1" and "R-PHB1"). The Claimants introduced the Sun-Flower award as CL-319. The C-PHB1 was also accompanied by an Annex 1. With R-PHB1, the Respondent introduced legal authorities RL-0415 through to RL-0421.
181. On 29 November 2021, the Claimants requested the Tribunal to strike from the record legal authorities RL-0415, RL-0417, RL-0419, RL-0420. It argued that according to

PO8, the Respondent was permitted to introduce new legal authorities in its PHB only to the extent that these authorities were published after the date of its last written submission (i.e., 5 March 2021). However, the legal authorities in question had been published before the date of the Respondent's Rejoinder (its last written submission) and as such, were inadmissible.

182. On that same date, the Tribunal invited the Respondent's comments on this issue.
183. On 3 December 2021 the Respondent requested the Tribunal to deny Claimants' request.
184. On 7 December 2021, the Tribunal decided to strike RL-0415 and RL-0417 from the record, insofar as the Respondent had not sufficiently established that the exception set out in para. 8 of PO8, second sentence, applied to these legal authorities, nor had it requested leave to introduce them into the record. As to RL-0419 and RL-020, the Tribunal considered that these were authorities submitted in the context of the tax gross up claim, and as a reaction to the introduction of Sun-Flower award pursuant to the request from the Claimants. As such, the Respondent was authorized to introduce them into the record at that stage.
185. On 13 December 2021, the Respondent requested the Tribunal to strike Annex 1 to the Claimants PHB from the record. According to the Respondent, this document contained new factual information, which was being introduced outside the procedural timetable.
186. On 20 December 2021, the Claimants commented on the Respondent's request, arguing that Annex 1 did not contain any new factual information nor was it submitted outside of the procedural timetable.
187. On 27 and 30 December 2021, the Respondent and the Claimants respectively presented further comments on this issue.
188. On 3 January 2022, the Tribunal concluded that Annex 1 to the Claimants' PHB should not be struck from the record, since it merely consisted of a 2-page table summarizing information regarding the investors and their investments, which had been previously introduced into the record by the Claimants. Furthermore, it indicated that the Respondent would have the opportunity to comment on it in the second round of PHBs.
189. On 17 January 2022, the Respondent sought leave to introduce seven new documents into the record together with its forthcoming second PHB, which consisted of six news

articles summarizing events related to Banco Popular's assets and accounting practices, as well as the first publicly available decision issued by the Court of Justice of the European Union ("CJEU") in proceedings brought by shareholders of Banco Popular in connection with the resolution of the bank.

190. On 19 January 2022, the Claimants opposed this request on the basis that it was untimely and that the documents in question did not bear directly and materially on a central issue in dispute.
191. On 20 January 2022, regarding the six press reports, the Tribunal decided that the Respondent had not sufficiently established the exceptional circumstances that would warrant their introduction into the record. Regarding the decision of the CJEU, however, the Tribunal concluded that it could be of assistance to the Tribunal, and thus requested the Respondent to file it after the second round of PHBs, due on the next day.
192. On 21 January 2022, the Claimants and the Respondent filed their reply post-Hearing briefs (respectively, "C-PHB2" and "R-PHB2"). Together with its second PHB, the Respondent filed Annex 1.
193. On 4 February 2022, the Respondent introduced the decision of the CJEU into the record as Exhibit RL-422 together with brief comments, to which the Claimant responded on 18 February 2022.

L. COSTS SUBMISSIONS AND CLOSURE OF THE PROCEEDINGS

194. On 18 February 2022, the Claimants and the Respondent filed their submissions on costs (respectively, "C-Costs Submission" and "R-Costs Submission").
195. On 22 April 2022, the Tribunal provided an update on its progress in connection with the Final Award. In that regard, it also inquired whether the Parties would agree that the Tribunal issue the Award in English only, in derogation to Section 3(d) of Procedural Order No. 1, with a view to saving time and costs.
196. On 26 April 2022, the Respondent objected against the Tribunal issuing the Award in English only. On the same date, the Claimants advised that they agreed with the Tribunal's proposal to issue the Award only in English and regretted that the Respondent had not provided its agreement.

197. On 29 April 2022, the Tribunal took note of the Parties' positions on the translation of the Award and, in light of the fact that there was no agreement to derogate from Section 3(d) of Procedural Order No. 1, confirmed that the Award would be issued in both English and Spanish.
198. On 13 May 2022, the Respondent informed the Tribunal that it wished to introduce into the record a new decision from the CJEU, of 5 May 2022 in Case No. C-410/20 but proposed to introduce it into the record together with other legal authorities that it expected would be forthcoming in the course of the summer. On the same date, the Tribunal invited the Respondent to provide further details on the CJEU judgment which it wished to introduce into the record and on any other legal authorities that it expected may be forthcoming in the coming months.
199. In accordance with the Tribunal's directions, on 17 May 2022, the Respondent provided its comments on the CJEU judgment and other legal authorities it wished to introduce into the record. On 20 May 2022, the Claimants provided their comments.
200. On 30 May 2022, the Tribunal provided directions in connection with Spain's request to file into the record the CJEU decision of 5 May 2022 in Case No. C-410/20 and the forthcoming decisions from the CJEU.
201. On 9 June 2022, in accordance with the Tribunal's directions, the Respondent followed up with a request to submit into the record additional decisions from the CJEU. The Claimants provided their comments on 16 June 2022.
202. On 21 June 2022, the Tribunal (i) denied Spain's request to introduce the CJEU decision in Case C-410/20 into the record; (ii) granted Spain leave to file five CJEU decisions issued on 1 June 2022 into the record, giving directions to both Parties to provide their comments on those decisions; and (iii) denied Spain's request to file the so-called Valuation Decision referred to at paragraph 11 of the Respondent's letter of 9 June 2022.
203. In accordance with the Tribunal's directions, on 11 July 2022, the Respondent provided its comments in connection with the five CJEU decisions of 1 June 2022. On 29 July 2022, the Claimants provided their reply comments.
204. On 22 December 2022, the PCA informed the Parties, on behalf of the Tribunal, that the Award would be issued both in English and Spanish around the end of February or the beginning of March 2023. In that same communication, the PCA asked the Parties

to verify the list of the Parties' representatives to be recorded in the Award, as well to make a final payment into the arbitration deposit.

205. On 4 December 2022, the Parties communicated their amended list of Parties' representatives to be recorded in the Award.
206. On 27 February 2023, the Tribunal closed the proceedings in accordance with Article 31 of the UNCITRAL Rules.
207. On 3 March 2023, the President of the Tribunal made a disclosure to the Parties.

III. REQUESTS FOR RELIEF

A. THE CLAIMANTS' REQUEST FOR RELIEF

208. In its C-PHB2, the Claimants sought the following relief:

"For the foregoing reasons and those previously set forth in their submissions, and subject to their reservation of the right to submit evidence from the Audiencia Nacional proceedings upon the conclusion of the ongoing Investigation Phase, Claimants respectfully request that the Tribunal issue an Award:

- Finding that this dispute falls within the Tribunal's jurisdiction;
- Finding that Respondent has breached its obligations under Articles III, IV and V of the Treaty;
- Ordering Respondent to pay compensation to Claimants in the amount of €492 million, grossed up to €647.1 million;
- Ordering Respondent to pay interest on the above amount at a reasonable commercial rate of 8% for stocks and 7.25% for subordinated debt, compounded from 16 August 2019 until full payment has been made; and
- Ordering Respondent to pay Claimants' legal fees and costs incurred in these proceedings."¹²

B. THE RESPONDENT'S REQUEST FOR RELIEF

209. In its R-PHB1, the Respondent sought the following relief:

"As a consequence of the foregoing, Respondent respectfully requests that the Arbitral Tribunal render an award:

- (i) Declaring its lack of jurisdiction over the claims of the Claimants or, if applicable, the inadmissibility of said claims;

¹² See C-PHB2, para. 217. See also SoC, para. 436; Reply, para. 946.

(ii) Dismissing, in the alternative to (i) above, all of the Claimants' claims on the merits and declaring that the Kingdom of Spain has not breached the BIT in any way;

(iii) Dismissing, in the alternative to (i)-(ii) above, all of the Claimants' claims for damages as said claims are not entitled to compensation; and

(iv) Requiring Claimants to bear all the costs of the arbitration, including Respondent's legal and expert fees and costs, and Respondent's internal costs, together with interest on such fees and costs."¹³

210. This request for relief remained unchanged.

IV. PRELIMINARY MATTERS

211. In this section, the Tribunal will address the scope of this Award (A); the applicable laws (B); the relevance of prior awards (C); the language of the Treaty (D); and the transparency of the proceeding and other Treaty provisions (E).

A. SCOPE OF THIS AWARD

212. This Award deals with jurisdiction, admissibility and merits.

B. THE APPLICABLE LAWS

1. Law Governing the Arbitration Proceedings

213. Paragraph 35 of the TOA provides as follows in connection with the applicable procedural rules:

"This arbitration shall be governed by (in the following order of precedence):

a. The mandatory rules of the law on international arbitration applicable at the seat of the arbitration;

b. The 2013 UNCITRAL Rules (except the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration), save where modified by these Terms of Appointment;

c. The procedural rules contained in the Treaty, save where modified by these Terms of Appointment;

d. These Terms of Appointment and the procedural rules issued by the Tribunal, as will be reflected in Procedural Order No. 1 and any amendments thereto."

¹³ R-PHB1, para. 376. See also Rejoinder, para. 1197; SoD, para. 1196.

214. In addition, paragraph 36 of the TOA sets forth that “[i]f the provisions therein do not address a specific procedural issue, that issue shall be determined by agreement between the Parties or, in the absence of such agreement, by the Tribunal”.

2. Law Governing the Merits of the Dispute

215. Article XV of the Treaty, entitled “Applicable Law”, provides as follows:

“1. Any tribunal established in accordance with this Section shall issue its ruling in the disputes submitted to it in accordance with the provisions of this Agreement and the applicable rules and principles of international law.

2. Any interpretation set forth by the Contracting Parties by mutual agreement concerning a provision of this Agreement shall be binding on any tribunal established pursuant thereto.”

216. Thus, in accordance with Article XV(1) of the Treaty, the Tribunal will apply the Treaty and applicable rules and principles of international law.

3. *Jura Novit Arbiter*

217. According to the principle of *jura novit curia*, when applying the law, the Tribunal may consider not only the arguments and sources invoked by the Parties, but also the law of its own motion, provided it seeks the Parties’ views if it intends to base its decision on a legal theory that was not addressed and that the Parties could not reasonably anticipate.¹⁴

C. THE RELEVANCE OF PRIOR AWARDS

218. Both Parties have relied on previous decisions or awards in other cases to support their positions, either to conclude that the same solution should be adopted in the present case, or in an effort to explain why this Tribunal should depart from that solution.

219. While not bound by previous decisions or awards in other cases, the Tribunal may give due consideration to earlier decisions of international tribunals. Specifically, it believes that, subject to compelling contrary grounds, it has a duty to adopt principles established in a series of consistent cases reflecting a sufficient consensus amongst international adjudicators. It further believes that, subject always to the specific text of

¹⁴ In the investment treaty context, see, *inter alia*, **Exh. CL-287**, *Deutsche Telekom v. India*, PCA Case No. 2014-10, Interim Award, 13 December 2017, para. 112; *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, para. 118; *Daimler Financial Services A.G. v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment, 7 January 2015, para. 295.

the Treaty, and with due regard to the circumstances of each particular case, it has a duty to contribute to the harmonious development of international investment law in furtherance of the certainty of the rule of law.

D. LANGUAGES OF THE TREATY

220. As a final preliminary matter, the Tribunal notes that the Treaty's official language is Spanish.¹⁵ The official Spanish language version of the Treaty and its unofficial English version were introduced into the record as Exh. RL-40 and Exh. C-1 respectively. There is no allegation by either Party that the English translation of the BIT is in any material respect different from the Spanish original or otherwise inaccurate.

221. Keeping in mind that the Award is issued in both Spanish and English,¹⁶ in the following discussion the Tribunal generally refers only to one version of the Treaty (the English version of the Treaty in the English version of the Award, and the Spanish version of the Treaty in the Spanish version), except where it finds it useful to refer to both texts to highlight a particular point or conclusion.

E. TRANSPARENCY AND OTHER TREATY PROVISIONS

222. In accordance with Article XVI, paragraph 4, of the Treaty, this award "shall be public". Pursuant to paragraph 39 of the TOA, prior to said publication, the Tribunal will consult the Parties on the passages of the award which they may seek to redact. In case of disagreements between the Parties as to the proposed redactions, the Tribunal will make a decision.

223. Furthermore, the Tribunal notes that Article XVI, paragraph 3, of the Treaty states as follows: "The award shall stipulate that it is made without prejudice to the rights that any person with a legal interest may have in the relief under applicable local legislation". In the official Spanish version, the same provision reads somewhat differently: "[e]l *laudo se dictará sin perjuicio de los derechos que cualquier persona con interés jurídico tenga sobre la reparación conforme a la legislación local aplicable*".

¹⁵ See **Exh. C-1**, Treaty, Article XXIV, para. 2 ("DONE at Mexico City on 10 October 2006 in two original copies in the Spanish language, both texts being equally authentic").

¹⁶ See TOA, para. 30; PO1, para. 3 d. See also the exchanges between the Tribunal and the Parties recounted *supra* at paras. 195-197.

224. Neither Party has relied or commented on this provision. The Tribunal thus need not make any finding in this respect but to emphasize the existence of this rule.

V. JURISDICTION AND ADMISSIBILITY

225. The Respondent contends that the Tribunal lacks jurisdiction and/or the claims are inadmissible on the following grounds:

- Spain has not consented to this arbitration, because the Claimants commenced this proceeding in disregard of the Treaty's waiver and fork-in-the-road clauses (A);
- The claims are based on the acts of EU authorities or private entities, which are not attributable to Spain (B);
- The Claimants did not make any investment protected by the Treaty (C);
- The claims fall outside the scope of the Tribunal's jurisdiction *ratione temporis* (D);
- The Tribunal lacks jurisdiction over eight Claimants who are dual Mexican and Spanish nationals (E);
- Some Claimants engaged in abusive, bad faith or unlawful conduct in connection with their alleged investment in Banco Popular (F).

226. The Claimants, for their part, argue that none of Spain's objections have any merit.

227. Spain's objections and the Claimants' responses are addressed in more detail in the following sections.

A. SPAIN'S CONSENT TO ARBITRATION: WAIVER AND FORK-IN-THE-ROAD CLAUSES

228. Spain first argues that the Tribunal lacks jurisdiction because the Claimants have not complied with the conditions to which Spain's consent to arbitrate under the Treaty is subject. Specifically, the Respondent contends that the Claimants commenced this

proceeding in breach of the waiver requirements set out in Article X(5) (1),¹⁷ and the fork-in-the-road provision contained in Article X(1) of the Treaty (2).¹⁸

229. For their part, the Claimants maintain that they have complied with the waiver and fork-in-the-road requirements of the Treaty and that, therefore, Spain's *ratione voluntatis* objection lacks merit.¹⁹

1. The waiver pursuant to Article X(5) of the Treaty

a. The Respondent's position

230. Spain contends that the Claimants have initiated this arbitration in disregard of Article X(5) of the Treaty, as they have submitted a waiver that does not meet the formal requirements of the Treaty (i),²⁰ and have commenced and continued parallel proceedings before the CJEU in connection with the measures challenged in this arbitration (the "CJEU Proceeding") (ii).²¹

i. Formal Requirements of Article X(5)

231. For Spain, the Treaty requires the Claimants to waive their right to challenge the contested measures in other fora. Relying on the decision in *Waste Management*, the Respondent makes two general observations on how Article X(5) of the Treaty operates. First, a waiver is a condition for the State's consent. As a result, if the Claimants' waiver does not comply with Article X(5), Spain's consent is lacking and the Tribunal has no jurisdiction. Second, a waiver seeks to avoid parallel proceedings related to the same measures. Thus, to comply with the Treaty, the Claimants' waiver must cover all measures challenged in this arbitration.²²

¹⁷ Request for Trifurcation, paras. 98-108; SoD, paras. 510-554; Rejoinder, paras. 597-637; R-PHB1, paras. 14-17; R-PHB2, para. 5.

¹⁸ Request for Trifurcation, paras. 87-97; SoD, paras. 555-560; Rejoinder, paras. 638-647.

¹⁹ Response to Trifurcation, paras. 34-50; Reply, paras. 358-404; C-PHB1, paras. 313-323; C-PHB2, paras. 198-200.

²⁰ SoD, paras. 513-537; Rejoinder, paras. 600-623.

²¹ SoD, paras. 538-554; Rejoinder, paras. 624-637. See also Respondent's letter to Tribunal, 11 July 2022, paras. 26-27.

²² SoD, paras. 518, 520 referring to **Exh. RL-0157**, *Waste Management v. Mexico*, ICSID Case ARB(AF)/98/2, Award, 2 June 2000, pp. 219-237. In support of its arguments, Spain also refers to the following decisions: **Exh. RL-0085**, *Detroit International Bridge Company v. Canada*, Award on Jurisdiction, 2 April 2015, paras. 291, 293; **Exh. RL-0086**, *Railroad*

232. Spain takes issue with the two documents submitted by the Claimants together with the Notice of Arbitration, i.e. the waiver contained in the body of the Notice (the “NOA Waiver”),²³ and the so-called Side Letters appended to the Notice (the “Side Letters”).²⁴ It argues that neither the NOA Waiver nor the Side Letters comply with Article X(5) of the Treaty, because these documents do not cover the measures adopted by the EU authorities which are discussed in this arbitration.²⁵ This carve-out enables the Claimants to challenge the same measures twice, once before this Tribunal and once before the CJEU, which goes against Article X(5) of the Treaty.²⁶

233. In response to the Claimants’ proposal to submit a revised waiver, Spain argues that a new waiver would not remedy the defect affecting an arbitration initiated in breach of Article X(5) of the Treaty.²⁷

ii. ***The Claimants’ pursuit of the CJEU Proceeding***

234. Spain also contends that the Tribunal lacks jurisdiction over the claims, because they arise out of measures already challenged in the CJEU Proceeding.²⁸ The only difference between this arbitration and the CJEU Proceeding is that in the latter the Claimants attribute the challenged measures to the EU, while in this arbitration they impute them to Spain.²⁹ The Respondent submits that the Claimants’ position in the

Development Corporation v. Guatemala, Decision on Objection to Jurisdiction, 17 November 2008, para. 48; **Exh. RL-0088**, *The Renco Group Inc. v. Peru I*, Partial Award on Jurisdiction, 15 July 2016, paras. 81-85, 119; **Exh. RL-0089**, *Commerce Group Corp. v. El Salvador*, Award, 14 March 2011, para. 115.

²³ Notice of Arbitration, para. 147, referring to Appendix **CRFA-C**.

²⁴ **Exh. CRFA-C-1**, Letter of consent and waiver of rights of Claimants pursuant to Article X(5) of the Treaty, 23 August 2018; **Exh. CRFA-C-2**, Letter of consent and waiver of rights of Claimants pursuant to Article X(5) of the Treaty, 23 August 2018.

²⁵ SoD, paras. 527-529; Rejoinder, paras. 614-623; R-PHB1, para. 15.

²⁶ SoD, para. 537; Rejoinder, para. 620; R-PHB1, paras. 16-17.

²⁷ SoD, paras. 533-534, referring to Claimants’ Response to Trifurcation Request, para. 49.

²⁸ SoD, para. 538-554; Rejoinder, para. 624-637; R-PHB1, para. 16; R-PHB2, para. 5.

²⁹ SoD, paras. 519, 538-551. The Claimants initiated proceedings before the CJEU on 4 August 2017, and one year later on 23 August 2018, they submitted their Notice of Arbitration. See **Exh. CL-107**, *Mr. Antonio del Valle Ruiz and Others v. the SRB, the European Commission*, lodged pursuant to Articles 263 and 277 of the Treaty on the Functioning of the European Union and Article 86 of Regulation (EU) No 806/2014 (Case T-510/17), p. 1; Notice of Arbitration, p. 1; **Exh. CL-107**, *Mr. Antonio del Valle Ruiz and Others v. the SRB, the European Commission*, lodged pursuant to Articles 263 and 277 of the Treaty on the Functioning of the European Union and Article 86 of Regulation (EU)

two proceedings is virtually identical and points to the following excerpts from the Claimants' pleadings to show such identity:

This Arbitration	CJEU Proceeding
<p><i>"[A]rbitrarily precipitated the very circumstances that it later used to justify the pre-arranged handover of Banco Popular to Santander via resolution".³⁰</i></p>	<p><i>"It is also self-evidently unfair and improper for the SRB to (at least in part) precipitate a liquidity problem within Banco Popular and then rely upon that same problem to deprive Applicants of their property rights when other solutions were readily available".³¹</i></p>
<p><i>"Upon receiving Santander's bid, Respondent immediately accepted Santander's offer to purchase Banco Popular for €1".³²</i></p>	<p><i>"[T]he SRB determined that the New Shares II were to be transferred to Banco Santander, in consideration of a purchase price of 'EUR 1'".³³</i></p>
<p><i>"Claimants were stunned to learn of the resolution on 7 June, with no prior notice or opportunity to be heard before the resolution was taken (. . .) Even after Respondent decided to sell Banco Popular to Santander in resolution, it provided no notice to Claimants or opportunity to be heard before wiping out their investments.</i></p>	<p><i>"[T]he Applicants were only advised of the cancellation of their respective shareholdings in Banco Popular, and the sale of Banco Popular to Banco Santander for 1 euro, on 7 June 2017; i.e. the date of the Contested Decisions. Indeed, the majority of the Applicants were only informed about the Contested Decisions through media</i></p>

No 806/2014 (Case T-510/17), Annex A. The 33 Claimants are: Antonio Del Valle Ruiz, Alejandra Pérez Mina, Alejandro Finkler Kudler, Alonso de Garay Gutiérrez, Arantzazu Del Valle Diharce, Arturo Grinberg Kreimerman, Carlos Ruíz Sacristán, Edmundo Del Valle Diharce, Elias Abadi Cherem, Enrique Rojas Blasquez, Eugenio Santiago Clariond Reyes, Fernando Ramos González de Castilla, Gerardo Madrazo Gómez, Germán Larrea Mota Velasco, Jacobo Troice Jalife, Jaime Abadi Cherem, Jorge Esteve Recolons, José Eduardo Del Valle Diharce, José Manuel Fierro Von Mohr, José María Casanueva y Llaguno, Juan Pablo Del Valle Perochena, Julio Andrés Maza Casas, Luís de Garay Russ, Luis Francisco Suinaga Aguilar, María de Guadalupe Del Valle Perochena, Rogelio Barrenechea Cuenca, Xochitl de Guadalupe Montero Motta (Xohitl Montero de De Garay), Inmobiliaria Asturval, GBM Capital Bursátil, S.A. de C.V., Fondo de Inversión de Renta Variable, GBM Fondo de Inversión Total, S.A. de C.V., Fondo de Renta Variable, GBM Global, S.A. de C.V., Fondo de Renta Variable and Hechos Con Amor, S.A. de C.V.; **Exh. CL-107**, *Mr. Antonio del Valle Ruiz and Others v. the SRB, the European Commission*, lodged pursuant to Articles 263 and 277 of the Treaty on the Functioning of the European Union and Article 86 of Regulation (EU) No 806/2014 (Case T-510/17), Annex A. The companies are: Bauhaus Partners Ltd, DGFAM Fund, LP, Eureka Global PTE LTD, Fideicomiso 70385-0 Bancomer, Fideicomiso Tanoak LTD, Grow Investments, LP, Miura LP, Simple Investments LP, and Terra Gamma Partners CV.

³⁰ SoD, para. 539.

³¹ SoD, para. 540.

³² SoD, para. 541.

³³ SoD, para. 542.

<p>Many Claimants learned from the media that their investments in Banco Popular had been completely wiped out”.³⁴</p>	<p>reports. As a result, the Applicants were deprived, among other things, of the opportunity to make representations regarding the availability of other private sector measures that could have restored Banco Popular to viability within a reasonable timeframe”.³⁵</p>
<p>“Respondent made unprecedented and alarming public announcements that further undermined public confidence in Banco Popular. Such conduct, which predictably harmed the bank and fostered greater instability in the Spanish banking sector, had no legitimate policy purpose. It also arbitrarily precipitated the very circumstances that it later used to justify the pre-arranged handover of Banco Popular to Santander via resolution”.³⁶</p>	<p>“[T]he statements made (on repeated occasions) by the SRB directly contributed to the liquidity issues Banco Popular faced. The SRB’s own role in precipitating the liquidity issues that Banco Popular faced was a key factor that ought to have been taken into account by the SRB in its assessment of the private sale process, and the availability of private sector measures more generally”.³⁷</p>
<p>“Respondent’s acts directly and indirectly expropriated Claimants’ interest in Banco Popular. First, Respondent engaged in acts and omissions that progressively harmed Banco Popular, significantly impairing the value of its assets by the date of the resolution. Then, on 6 June 2017, the expropriation crystallized when Respondent wiped out Claimants’ investment entirely, taking Claimants shares away without any compensation whatsoever and handing them over to Santander”.³⁸</p>	<p>“The Defendants have, by the Contested Decisions, interfered with the Applicants’ right not to be deprived of their possessions... and/or their right to peaceful enjoyment of their possessions... The write down of the nominal value of Banco Popular’s share capital, which resulted in the cancellation of 100% of Banco Popular’s share capital, is a paradigm case of deprivation. The same is true of the conversion of the bonds to shares, and the subsequent write down of those shares. As a consequence of the Contested Decisions, the Applicants’ shares and bonds have lost all appreciable economic value and the deprivation is permanent”.³⁹</p>
<p>Regarding their expropriation and loss of possession claims, on the one hand Claimants allege that it was Spain who “failed to provide any compensation”.⁴⁰</p>	<p>On the other hand, before the CJEU, Claimants assert that it was the SRB whose acts were “unjustifiable because of the absence of any compensation to the Applicants”.⁴¹</p>

³⁴ SoD, para. 543.

³⁵ SoD, para. 544.

³⁶ SoD, para. 545.

³⁷ SoD, para. 546.

³⁸ SoD, para. 547.

³⁹ SoD, para. 548.

⁴⁰ SoD, para. 549.

⁴¹ SoD, para. 549.

235. In Spain's view, such overlapping proceedings is the type of situation that Article X(5) seeks to avoid. More specifically, the CJEU Proceeding may render this arbitration moot, if the claim succeeds and the CJEU annuls the resolution of Banco Popular. Furthermore, there is a risk of double recovery and inconsistent decisions.⁴²

b. The Claimants' position

236. The Claimants contend that they have complied with Article X(5) of the Treaty, because the NOA Waiver and the Side Letters employed language consistent with the Treaty (i); and the CJEU Proceeding involves a different factual and legal matrix (ii).⁴³

i. Formal Requirements of Article X(5)

237. The Claimants deny having failed to meet the formal requirements of Article X(5).⁴⁴ They observe that the Treaty does not prescribe how a waiver must be expressed.⁴⁵ Accordingly, a waiver does not need to reproduce the treaty language *verbatim*⁴⁶ or be filed with the Notice of Arbitration. In support of this argument, the Claimants refer to several arbitral awards, where investment tribunals accepted waivers adopting wording different from that of the applicable BIT⁴⁷ or filed with submissions other than the Notice of Arbitration.⁴⁸

238. According to the Claimants, both the NOA Waiver and the Side Letters comply with the Treaty. First, the language of the NOA Waiver is almost identical to Article X(5)(b), the only distinction being the absence of the term "any proceedings" in the NOA Waiver. The Claimants explain that "[t]his was quite obviously a typographical error and no

⁴² SoD, paras. 552-554; Rejoinder, para. 634; R-PHB1, paras. 16-17.

⁴³ Response to Trifurcation, paras. 44-50; Reply, paras. 358-390; C-PHB1, paras. 313-323; C-PHB2, paras. 198-200.

⁴⁴ Reply, paras. 365-381; C-PHB1, paras. 313-319; C-PHB2, para. 198.

⁴⁵ Reply, para. 364.

⁴⁶ The Claimants note that this was confirmed by Spain. See C-PHB1, para. 318.

⁴⁷ Reply, paras. 364-378.

⁴⁸ Reply, para. 364, referring to **Exh. CL-113**, *Ethyl Corporation v. Government of Canada*, UNCITRAL, Award on Jurisdiction, 24 July 1998, para. 91; **Exh. RL-0039**, *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Award, 26 January 2006, para. 116.

meaning should be ascribed to it”.⁴⁹ Second, as regards the Side Letters, the deviations from the text of the Treaty⁵⁰ did not affect the scope of the waiver.⁵¹

239. In any event, the Claimants have offered to provide a revised waiver, if the Tribunal finds the NOA Waiver and the Side Letters defective.⁵²

ii. ***The CJEU Proceeding***

240. The Claimants maintain that they have not breached the Treaty by initiating the CJEU Proceeding and this arbitration.⁵³ In their interpretation, Article X(5) is similar to other clauses contained in investment treaties and only prohibits an investor from suing Spain in both international and domestic fora.⁵⁴ By contrast, Article X(5) does not prohibit pursuing claims against third parties, in courts outside of Spain or Mexico, for actions other than those challenged in this arbitration.⁵⁵ Accordingly, the Claimants did not

⁴⁹ Reply, para. 362.

⁵⁰ Reply, paras. 365-369.

⁵¹ For instance, the Side Letter mentions “the Kingdom of Spain” rather than the “Contracting Party”.

⁵² Response to Trifurcation, para. 49; Reply, paras. 361-364, 380.

⁵³ Reply, paras. 382-390; C-PHB1, paras. 320-323; C-PHB2, paras. 199-200.

⁵⁴ Reply, para. 367 referring to **Exh. CL-108**, Christoph Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, p. 11. See also **Exh. CL-109**, Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, 2013, p. 267; **Exh. CL-110**, *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013, p. 139; **Exh. CL-111**, *Yuri Bogdanov and Yulia Bogdanov v. Republic of Moldova*, SCC Case No. V091/2012, Final Award, 16 April 2013, paras. 171-74; Reply, paras. 370-378, referring to **Exh. RL-0039**, *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Award, 26 January 2006, paras. 116-18; **Exh. RL-0086**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction, 17 November 2008; **Exh. RL-0089**, *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, 14 March 2011; **Exh. RL-0085**, *Detroit International Bridge Company v. Government of Canada*, UNCITRAL, PCA Case No. 2012-25, Award on Jurisdiction, 2 April 2015; **Exh. RL-0088**, *The Renco Group, Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, 15 July 2016. See also C-PHB1, paras. 320-321; C-PHB2, paras. 199-200.

⁵⁵ Reply, para. 367, referring to **Exh. CL-112**, Executive Summary of the Mexico-Spain Treaty, p. 31.

violate Article X(5) by challenging the measures adopted by EU authorities in relation to Banco Popular before the CJEU.⁵⁶

241. Moreover, the Claimants dispute any overlap between this arbitration and the CJEU Proceeding, as the claims involve different facts, parties and issues, arise under different legal instruments and are governed by different laws.⁵⁷

c. Analysis

242. The Tribunal begins by setting out the provisions of the Treaty in connection with the waiver in both Spanish and English, as at least in one respect (as discussed below at paras. 248 and 257) it may be useful to have regard to both language versions of the Treaty to examine the validity of the NOA Waiver.

243. In its Spanish original Article X(5) of the Treaty reads as follows:

“5. Un inversor contendiente podrá someter una reclamación a arbitraje únicamente si: [...]

b) el inversor renuncia a su derecho de iniciar o continuar cualquier procedimiento ante un tribunal administrativo o judicial de conformidad con la legislación de una Parte Contratante u otros procedimientos de solución de controversias con respecto a la medida de la Parte Contratante contendiente que constituya un supuesto incumplimiento de una obligación de este Acuerdo, salvo los procedimientos en los que se solicite la aplicación de medidas precautorias de carácter suspensivo, declarativo o extraordinario, que no impliquen daños, ante un tribunal administrativo o judicial, de conformidad con la legislación de la Parte Contratante contendiente. [...]

244. Article X(7) which is also pertinent to this objection, provides that:

“7. El consentimiento y la renuncia requeridos por este Artículo deberán manifestarse por escrito, ser entregados a la Parte Contratante contendiente e incluidos en el sometimiento de la reclamación a arbitraje.”

245. In their English version, these provisions read as follows:

“5. A disputing investor may submit a claim to arbitration only if: [...] (b) the investor waives his right to initiate or continue any proceedings before an administrative or judicial tribunal in accordance with the legislation of one Contracting Party or other dispute settlement procedures in respect of the measure by the disputing Contracting Party that constitutes an alleged failure to comply with an obligation under this Agreement, with the exception of procedures requesting the application of declarative or extraordinary precautionary measures having a suspensive effect, which do not involve the

⁵⁶ Reply, para. 385.

⁵⁷ Reply, para. 386.

payment of damages, before an administrative or judicial tribunal in accordance with the legislation of the disputing Contracting Party. [...]

7. The consent and the waiver required by this article shall be expressed in writing, transmitted to the disputing Contracting Party and included in the submission of the claim to arbitration.”

246. The Treaty must be interpreted in accordance with the rules on treaty interpretation that are enshrined in the Vienna Convention on the Law of Treaties (“VCLT”). According to Article 31 of the VCLT, a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. The starting point of the interpretation is the “ordinary meaning” of the text. The latter must be ascertained in the light of the context and the treaty’s object and purpose, any subsequent agreement or practice of the Contracting Parties related to the interpretation of the treaty, and any other relevant rules of international law applicable in the relations between the Contracting Parties.⁵⁸
247. Starting with the text of Article X(5), the *chapeau* makes it clear that submitting a waiver is a mandatory requirement (“A disputing investor may submit a claim to arbitration *only if*”, emphasis added). The content of the waiver is then described in letter (b) of Article X(5). Specifically, an investor must waive its right to initiate and continue proceedings of two types: (i) proceedings “before an administrative or judicial tribunal in accordance with the legislation of one Contracting Party”, which clearly refer to domestic court proceedings, and (ii) “other dispute settlement procedures”, which are not restricted to those “in accordance with the legislation of one Contracting Party” and thus may include non-domestic proceedings (for instance, international arbitration proceedings). Importantly, both (i) and (ii) are qualified by the requirement that they be “in respect of the measure *by the disputing Contracting Party* that constitutes an alleged failure to comply with an obligation under this Agreement” (emphasis added). This is only logical as the waiver provision seeks to prevent parallel proceedings against a respondent in relation to the same measure *by that respondent* brought in different fora (for instance, before an international arbitral tribunal and the respondent’s domestic courts, or in two different international arbitration mechanisms which the Treaty offers as options).
248. Article X(5)(b) then provides an exception for provisional measures before domestic courts. Although the English translation is arguably less clear on this point, the Spanish original leaves no room for doubts as it refers to “los procedimientos *en los que se solicite la aplicación de medidas precautorias* de carácter suspensivo, declarativo o

⁵⁸ Article 31 of the VCLT.

extraordinario [...]” (emphasis added). This exception, which is typically provided in waiver clauses in IIAs, gives the investor access to possibly urgently needed protection, without entailing the risks common to multiple proceedings about the same measures, such as inconsistent decisions, multiple recovery and waste of resources.

249. In terms of form, Article X(7) requires that the waiver be (i) “expressed in writing”, (ii) “transmitted to the disputing Contracting Party” and “included in the submission of the claim to arbitration”. Other than those requirements, the Treaty does not prescribe any particular form. For instance, it does not require that the waiver contain the words used in Article X(5) of the Treaty. Absent such indication, the Tribunal considers that a waiver complies with Article X(5) if, irrespective of the words used or omitted, it substantively conforms to each of the elements of Article X(5) set out above and does not seek to limit the scope of the waiver provided by the Treaty, through exceptions or carve-outs. In other words, substance prevails over form as long as the waiver complies with each of the requirements enumerated by the Treaty.
250. With these principles in mind, the Tribunal now turns to the two questions before it, i.e., first, whether the Claimants’ NOA Waiver and/or Side Letters complied with Article X(5) and, second, whether by initiating the CJEU Proceeding the Claimants violated the Treaty.
251. Starting with the first question, the Tribunal notes that the Notice of Arbitration included waivers both in the text of the Notice (referred to above as the “NOA Waiver”) and as appendices (the so-called “Side Letters”). Both the NOA Waiver and the Side Letters were “expressed in writing”, “transmitted to the disputing Contracting Party”, and “included in the submission of the claim to arbitration”, i.e. the Notice of Arbitration. Article X(7) is thus complied with. The question is whether the text of such waivers complies with the content requirements set out in Article X(5).
252. The NOA Waiver reads as follow:

“Claimants also satisfy the conditions precedent to the submission of a claim under the Treaty. Pursuant to Article X(5)(a) of the Treaty, Claimants consent to arbitration in accordance with the procedures set out in the Treaty. Claimants also waive their right to initiate or continue before any administrative or judicial tribunal in accordance with the legislation of a Party or other dispute settlement procedures in respect of the measures by Respondent that constitutes an alleged failure to comply with the Treaty, with the exception of procedures requesting the application of declarative or extraordinary or precautionary measures having a suspensive effect, which do not involve the payment of damages. The written consent and waiver

required by Article X(5)(b) is included with this Notice of Arbitration as Appendix CRFA-C and shall be delivered to Respondent.⁷²

⁷² Letter of consent and waiver of rights of Claimants pursuant to Article X(5) of the Treaty is attached hereto as **Appendix CRFA-C.**"

253. For their part, the two Side Letters, issued in connection with each of the UNCITRAL and ICSID proceedings (which were subsequently consolidated), contain the following wording:

"In accordance with Article X(5)(b), the [Banco Popular] Investors hereby waive their rights to initiate or continue any proceeding before an administrative or judicial tribunal or other dispute settlement mechanism under the laws of the Kingdom of Spain, with the exception of procedures requesting the application of declarative or extraordinary precautionary measures having a suspensive effect, which do not involve the payment of damages."

254. Neither the NOA Waiver nor the Side Letters mirror *exactly* the wording of Article X(5). Yet, as observed above, there is no requirement in the Treaty that the text of Article X(5) be replicated *verbatim*. In application of the principles set out above, the Tribunal finds that none of the deviations from the Treaty text that are found in the NOA Waiver and Side Letters have any meaningful consequence on the validity of the waiver, and hence on the Tribunal's jurisdiction or the admissibility of the claims.

255. First, in the Notice of Arbitration, the Claimants "waive[d] their right to initiate or continue before any administrative or judicial tribunal in accordance with the legislation of a Party or other dispute settlement procedures in respect of the measures by Respondent that constitutes an alleged failure to comply with the Treaty". The Tribunal notes that the words "any proceedings" is missing between "continue" and "before". This appears to be a typographical error as opposed to a deliberate omission, as grammatically the sentence does not make sense without the object. This is confirmed by the text of the Side Letters, which *do* refer to "any proceeding". The omission of the word "any proceedings" in the NOA Waiver is thus inconsequential, as one cannot see what else an investor could waive initiating or continuing "before any administrative or judicial tribunal". The other textual differences in the NOA Waiver are equally insubstantial. For instance, the references in the NOA Waiver to "any administrative or judicial tribunal in accordance with the legislation of a Party" (rather than to "*an* administrative or judicial tribunal in accordance with the legislation of one *Contracting* Party") or to "other dispute settlement procedures in respect of the measures by Respondent that constitutes *an alleged failure to comply with the Treaty*" (rather than "[...] an alleged failure to comply with *an obligation* under this Agreement") are merely stylistic variations without any effect in terms of meaning.

256. In the Tribunal's view, through the NOA Waiver, either read alone or in combination with the Side Letters, the Claimants provided the waiver required under Article X(5) of the Treaty if they wished to start arbitration, as they gave up their right to initiate or continue domestic and other proceedings in respect of the Respondent's measures that are alleged to constitute a Treaty breach. Contrary to other cases in which arbitral tribunals have found the wording of waivers to be non-compliant with the terms of the applicable treaty,⁵⁹ the Claimants did not seek to qualify or limit the waiver through carve-outs or reservation of rights which would be incompatible with the Treaty's terms as interpreted in good faith in accordance with their ordinary meaning in their context and in light of their object and purpose.
257. This being said, one issue remains to be addressed in respect of the NOA Waiver and the Side Letters. As recalled above, the waiver provision in the Treaty makes an exception for provisional measures before domestic courts. The NOA Waiver and the Side Letters do mention the exception, however omitting that such provisional relief is to be requested "before an administrative or judicial tribunal in accordance with the legislation of the disputing Contracting Party", as required by the Treaty. The effect of this omission may be to broaden the scope of the exception beyond domestic remedies to encompass *any* "procedures requesting the application of declarative or extraordinary precautionary measures having a suspensive effect, which do not involve the payment of damages", which is the wording used by the Claimants which in this case replicates the English unofficial translation of the Treaty. While the Tribunal finds the lack of reference to domestic courts in the relevant part of the NOA Waiver or Side Letters regrettable, on balance it considers that, regardless of such omissions, the Claimants could not have intended to refer to any "precautionary" (i.e., provisional or interim) relief other than the one that may be requested before domestic courts. This being so, the Tribunal considers that this omission is not fatal to the Claimants' compliance with the terms of Article X(5).

⁵⁹ For instance, in *Renco v. Peru*, the claimants submitted a waiver, containing a carve-out enabling them to pursue claims in another forum *in the event the tribunal had declined to hear its claims on jurisdictional or admissibility grounds*. See **Exh. RL-0088**, *The Renco Group v. Republic of Peru*, Partial Award on Jurisdiction, 15 July 2016, paras. 79-81. In *Waste Management v. Mexico*, the claimant made additional statements to the waiver to invoke failure to comply with duties imposed by other sources of law, including the municipal law of the respondent. See **Exh. RL-0157**, *Waste Management v. Mexico*, ICSID Case ARB(AF)/98/2, Award, 2 June 2000, paras. 27, 31.

258. In sum, the NOA Waiver, whether read in isolation or in combination with the Side Letters, complied with the requirements of the Treaty.
259. The second question is whether by actually initiating and continuing proceedings before the CJEU the Claimants breached Article X(5) of the Treaty. It is undisputed that the factual background that gave rise to this dispute, as will be further described in the subsequent sections of this Award (in particular those relating to liability), involved the conduct of both the EU and Spanish authorities. The delimitation of the responsibilities between the Respondent and the EU authorities is a question that will be addressed later in this Award. For present purposes, it is sufficient to observe that Article X(5) only requires a disputing investor to waive its right to initiate or continue proceedings before “other dispute settlement procedures in respect of the measure *by the disputing Contracting Party* that constitutes an alleged failure to comply with an obligation under this Agreement” (emphasis added).
260. In other words, for the waiver to operate in respect of “other dispute settlement procedures” (which in the abstract could encompass proceedings before the CJEU), the impugned measure in both the arbitration and the “other dispute settlement procedure” must be a measure taken *by the Respondent*. In this arbitration, the Claimants challenge the *Respondent’s* measures as being contrary to Spain’s obligations under the Treaty and do not seek to impugn the EU authorities’ conduct under EU law. Conversely, before the CJEU, the only respondents are the European Commission and the SRB, not the Kingdom of Spain, and those authorities were sought to be held liable under EU law for their own conduct.⁶⁰ It suffices to review the Claimants’ application before the CJEU to conclude that the Claimants’ “pleas” (as they are called in that submission) in the CJEU Proceeding are directed solely against the EU in connection with acts of EU institutions. Specifically, in the CJEU Proceeding, the Claimants submitted pleas in connection with the alleged unlawfulness of the SRM Regulation adopted by the EU Parliament and the Council (pleas nos. 1 and 9 in the

⁶⁰ See **Exh. CL-107**, *Mr. Antonio del Valle Ruiz and Others v. the SRB, the European Commission*, Application lodged pursuant to Articles 263 and 277 of the Treaty on the Functioning of the European Union and Article 86 of Regulation (EU) No 806/2014 (Case T-510/17). See also **Exh. RL-0423**, *Decision by the General Court of the CJEU in case Antonio del Valle Ruiz and others v. European Commission and SRB* (Case T-510/17), 1 June 2022 (the “CJEU Decision”).

Claimants' Application before the CJEU).⁶¹ They also filed numerous pleas according to which the SRB and the *European Commission*, through their decision or conduct, "infringed Articles 41, 47 and 48 of the EU Charter", "infringed, without justification or proportion, the Applicants' right to property", "infringed Article 20 of the SRM Regulation by failing to undertake a proper and independent valuation prior to taking the Contested Decisions", "infringed Article 18(1) of the SRM Regulation in determining that the conditions precedent set out under Articles 18(1)(a) and (b) were satisfied", "infringed Article 21(1) of the SRM Regulation in determining that the conditions for the exercise of the power to write down or convert relevant capital instruments were satisfied", "breached an essential procedural requirement by failing to provide an adequate statement of reasons for the Contested Decisions", "failed to comply with (a) the principle of proportionality; and (b) the legitimate expectations of the Applicants by departing from the resolution plan without justification".⁶²

261. On 1 June 2022, the CJEU rendered its decision in the CJEU Proceeding, dismissing the applicants' claims (the "CJEU Decision").⁶³ The CJEU Decision confirms that in the CJEU Proceeding, the Claimants did not seek to impugn the Respondent's conduct before the CJEU. Indeed, the Court summarized the applicants' claim in the following terms:

"The applicants claim that the Court should:

- annul the resolution scheme and Decision 2017/1246 (together, 'the contested decisions');
- order the SRB and the Commission to pay the costs."⁶⁴

⁶¹ **Exh. CL-107**, *Mr. Antonio del Valle Ruiz and Others v. the SRB, the European Commission*, Application lodged pursuant to Articles 263 and 277 of the Treaty on the Functioning of the European Union and Article 86 of Regulation (EU) No 806/2014 (Case T-510/17), pleas nos. 1 and 9.

⁶² **Exh. CL-107**, *Mr. Antonio del Valle Ruiz and Others v. the SRB, the European Commission*, Application lodged pursuant to Articles 263 and 277 of the Treaty on the Functioning of the European Union and Article 86 of Regulation (EU) No 806/2014 (Case T-510/17), pleas nos. 2 to 8.

⁶³ See **Exh. RL-0423**, Decision by the General Court of the CJEU in case *Antonio del Valle Ruiz and others v. European Commission and SRB* (Case T-510/17), 1 June 2022. The Parties were given an opportunity to comment on the CJEU Decision. See Respondent's letter, 11 July 2022; Claimants' letter, 29 July 2022.

⁶⁴ **Exh. RL-0423**, CJEU Decision, para. 99.

262. The “resolution scheme” and Decision 2017/1246 referred to by the Court as the “contested decisions” are, respectively, Decision SRB/EES/2017/08 *adopted by the Executive Session of the SRB on 7 June 2017*⁶⁵ and Decision 2017/1246 *adopted by the European Commission on the same date*.⁶⁶ The Court examined the applicants’ “pleas” directed against the EU in connection with acts of EU institutions under EU law and did not scrutinize any acts or omissions of Spanish authorities in connection with Banco Popular’s resolution. The CJEU Decision thus provides further confirmation that the CJEU Proceeding does not fall within the purview of Article X(5).
263. In summary, in the CJEU Proceeding, the Claimants did not seek to impugn the Respondent’s conduct or, in other words, the CJEU Proceeding is not a dispute settlement procedure in respect of measures *taken by Spain* that are alleged to have breached an obligation under the Treaty.
264. Therefore, the pursuit of the CJEU Proceeding does not fall within the purview of Article X(5) and has thus no consequence on the Tribunal’s jurisdiction over this dispute or the admissibility of the claims.
265. In conclusion, the Respondent’s objections in connection to Article X(5) of the Treaty are denied.

2. Fork-in-the-Road

a. *The Respondent’s position*

266. Spain contends that Article X(1) of the Treaty (the “fork-in-the-road provision”) prohibits foreign investors from raising claims in different fora, if the fundamental basis of such claims is identical.⁶⁷ The Claimants thus allegedly violated this provision by challenging

⁶⁵ **Exh. RL-0423**, CJEU Decision, para. 68 (“[o]n 7 June 2017, the Executive Session of the SRB adopted Decision SRB/EES/2017/08 concerning a resolution scheme in respect of Banco Popular (‘the resolution scheme’) on the basis of Regulation No 806/2014”).

⁶⁶ **Exh. RL-0423**, CJEU Decision, para. 78.

⁶⁷ Rejoinder, paras. 641-642, referring to **Exh. RL-0018**, *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award 30 July 2009, para. 61; **Exh. RL-0020**, *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt*, ICSID No. ARB/09/15, Award 6 May 2014, paras. 368-369; **Exh. RL-0304**, *Supervisión y Control S.A v. Costa Rica*, ICSID Case No. ARB/12/4, Final Award, 18 January 2017, paras. 308, 309 and 330. See also Respondent’s Request for Trifurcation, paras. 87-97; SoD, paras. 555-560.

the measures related to the resolution of Banco Popular both before the CJEU and this Tribunal.⁶⁸ Despite acknowledging that the applicable laws and the *petita* are different in the two proceedings, Spain is of the view that the claims are fundamentally identical.⁶⁹ Specifically, Spain argues that the Claimants requested the CJEU to declare that they had suffered a deprivation of their property, which would be identical to the expropriation claim raised in this arbitration.⁷⁰

267. Moreover, although the Claimants do not claim damages before the CJEU, such possibility is not precluded, as they expressly reserved such right. This might create a risk of double recovery.⁷¹ Finally, Spain suggests that the Claimants' initiation of two proceedings about the same measures to seek to compensate the same damage is an abuse of process.⁷²

b. *The Claimants' position*

268. The Claimants dispute having breached Article X(1) of the Treaty.⁷³

269. First, in the Claimants' submission, Article X(1) does not apply here. This provision only comes into play when two conditions are met: (i) an investor sues a State in different fora; and (ii) the claims in the different fora involve the State's failure to comply with the Treaty. These requirements are not fulfilled here, because in this arbitration the Claimants are suing Spain for alleged breaches of the Treaty, while in the CJEU Proceeding they are seeking to hold the European Commission and the SRB accountable for breaches of EU law.⁷⁴

270. Second, Article X(1) does not preclude the CJEU Proceeding and this arbitration from running in parallel. The Claimants advocate for the application of the triple identity test, meaning that the fork-in-the-road provision only prohibits claims involving the same parties, the same legal basis and the same relief. They observe that this test has found

⁶⁸ Request for Trifurcation, paras. 87-97; SoD, paras. 555-560; Rejoinder, paras. 638-647.

⁶⁹ SoD, paras. 555-560; Rejoinder, para. 641.

⁷⁰ SoD, para. 557.

⁷¹ SoD, para. 559.

⁷² Rejoinder, para. 645.

⁷³ Response to the Trifurcation Request, paras. 34-43; Reply, paras. 391-404; C-PHB1, paras. 321-322; C-PHB2, para. 200.

⁷⁴ Reply, para. 393.

broader application⁷⁵ than the fundamental basis test proposed by Spain.⁷⁶ In the Claimants' view, this arbitration and the CJEU Proceeding do not satisfy the triple identity test, because they involve different parties, causes of action and relief.⁷⁷

271. For the Claimants, the Respondent's position implies that an investor cannot "be made whole for their losses where multiple actors (i.e. a Respondent State and the EU authorities) carried out different acts that independently caused harm to an investor",⁷⁸ which would not make sense and be patently unfair.

c. Analysis

272. The fork-in-the-road clause embodied in Article X(1) reads as follows:

"An investor who alleges before a judicial or administrative tribunal that the Contracting Party has failed to comply with an obligation under this Agreement may not submit a claim in accordance with this Section. Nor may an investor submit a claim in accordance with this Section on behalf of an enterprise if that enterprise alleges before a judicial or administrative tribunal that the Contracting Party has failed to comply with an obligation under this Agreement."

273. The ordinary meaning of this clause is straightforward. For it to apply so that an investor "may not submit a claim" under the Treaty, the investor must have (i) started proceedings "before a judicial or administrative tribunal" and (ii) alleged in those

⁷⁵ Reply, para. 396, referring to **Exh. CL-235**, *Eudoro Armando Olguín v. Republic of Paraguay*, ICSID Case No. ARB/98/5, Decision on Jurisdiction, 8 August 2000, para. 30; **Exh. CL-236**, *Compañía de Aguas del Aconquija, S.A., Compagnie Générale des Eaux v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 21 November 2000, paras. 53-55; **Exh. RL-0160**, *Alex Genin, Eastern Credit Limited, Inc., and A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, paras. 156-166; **Exh. CL-70**, *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, paras. 70-73; **Exh. CL-234**, *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award on Jurisdiction, 8 December 2003, paras. 37-41, 86-92; **Exh. RL-0072**, *Enron Corporation Ponderosa Assets L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, paras. 95-98; **Exh. CL-43**, *Occidental Exploration and Production Co v. Republic of Ecuador*, LCIA No. UN-3467, Final Award No. UN-3467, paras. 37-63; **Exh. RL-0065**, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, paras. 442-443.

⁷⁶ Reply, para. 397, referring to **Exh. RL-0018**, *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, CIADI Case N. ARB/07/21, Award, 30 July 2009, para. 67.

⁷⁷ Reply, paras. 399-401.

⁷⁸ Reply, para. 388.

proceedings that “the *Contracting Party* has failed to comply with *an obligation under this Agreement*”. Accordingly, Article X(1) mandates that the submission in the other proceedings involve an allegation that one of the Contracting Parties to the Treaty has breached an obligation set out in the Treaty. The rule manifestly does not apply when the investor alleges before a judicial or administrative court that other entities or institutions have breached different types of obligations.

274. With that in mind, the Tribunal may be relatively brief as the analysis is not materially different from the one carried out in connection with the waiver. Indeed, as explained above by reference to the complaints launched before the CJEU, in the CJEU Proceeding the Claimants did not allege that *the Respondent* failed to comply with *an obligation under the Treaty*. Rather, their complaints were solely directed at the European authorities (in particular the SRB and the European Commission) for alleged violations of EU law, as confirmed also by the CJEU Decision (see *supra* paras. 261-262). This being so, the Claimants’ prior initiation of the CJEU Proceeding has clearly not triggered the fork-in-the-road provision in Article X(1) of the Treaty.
275. As a result of these conclusions, the Tribunal can dispense with entering into the Parties’ further arguments on the applicability of the triple identity test in the context of fork-in-the-road provisions or on the fundamental basis of the claim test. This being so, it emphasizes that it reaches its conclusion based on the text of the Treaty’s fork-in-the-road clause. Consequently, it does not purport to make findings on fork-in-the-road clauses in other investment treaties nor on the application of the so-called “triple identity” or “fundamental basis” tests.
276. In conclusion, the Tribunal finds that Article X(1) of the Treaty has not been triggered and, therefore, its jurisdiction or the admissibility of the claims have not been affected by the Claimants’ initiation of the CJEU Proceeding. The Respondent’s fork-in-the-road objection is accordingly rejected.
277. Finally, the Tribunal notes that in two short paragraphs of the Rejoinder, the Respondent argued that the Claimants’ initiation of multiple proceedings also amounted to an abuse of process. The threshold for a finding of an abuse of process is high.⁷⁹ The Tribunal considers that the Respondent has not sufficiently substantiated, let alone

⁷⁹ See, e.g., **Exh. RL-0002**, *Philip Morris Asia Limited v. Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, para. 539 (“[a]s a preliminary matter, it is clear, and recognised by all earlier decisions that the threshold for finding an abusive initiation of an investment claim is high”).

proven, that the Claimants' pursuit of the CJEU Proceeding and this arbitration constituted an abuse under that high threshold. The Respondent's abuse of process objection is thus equally denied.

B. WHETHER THE MEASURES CHALLENGED BY THE CLAIMANTS FALL WITHIN THE SCOPE OF THE TREATY

1. The Respondent's position

278. The Respondent notes that Mexico and Spain are the only Contracting Parties to the Treaty. Consequently, the Tribunal's jurisdiction is limited to acts performed by these States and does not extend to acts carried out by third parties, specifically acts of the EU institutions (a) and Spanish public entities (b).⁸⁰

a. Acts of EU authorities

279. Spain argues that the Claimants incorrectly attribute to it measures adopted by the EU, for instance (i) the prudential supervision and the resolution of Banco Popular; (ii) Dr. Elke König's statement of 31 May 2017; and (iii) the failure to make public statements supporting Banco Popular.⁸¹ In support, Spain gives the following explanations:

- The ECB was exclusively responsible for supervising Banco Popular. Consequently, the resolution of Banco Popular is not attributable to Spain;⁸²
- Dr. Elke König is an official of the EU, with the result that her statements and their effect on the Claimants' alleged investment cannot be imputed to Spain;
- The ECB is solely responsible for making public statements of support in relation to the banks it supervises. Accordingly, the alleged failure to publicly support Banco Popular must be imputed to the ECB rather than to Spain.

280. Spain contests the Claimants' analogy with cases in which tribunals analyzed whether an EU Member State breached an investment treaty by acting in accordance with EU

⁸⁰ Request for Trifurcation, paras. 50-76; SoD, paras. 561-596; Rejoinder, paras. 648-669; R-PHB1, paras. 18-19; R-PHB2, paras. 6-8.

⁸¹ SoD, paras. 569-570; Rejoinder, paras. 652-656; R-PHB1, paras. 18-19; R-PHB2, para. 7.

⁸² SoD, paras. 568-577, 579, referring to Application for Leave to Intervene as a Non-Disputing Party submitted by the European Commission, 10 October 2019, para. 12; RER-1, para. 53; CER-2, para. 1.4. See also Rejoinder, paras. 654-663.

law. Here, the principal question is whether Spain can be liable for the acts of EU authorities.⁸³

281. In conclusion, Spain “requests the Tribunal to declare that it lacks jurisdiction in respect of all acts of the European Union which are outside the scope of the Treaty’s application and on which Claimants base their claims”.⁸⁴

b. Acts of Public Entities

282. The Respondent argues that the acts of Spanish public entities, specifically the bank deposit withdrawals in 2015-2017, are not attributable to Spain because they are commercial in nature and were not taken in the exercise of sovereign authority. Spain disputes being obliged to prevent such withdrawals or having coordinated them.⁸⁵ The conduct of the public sector entities in the management and subsequent withdrawal of deposits “amounts therefore to *iur[e] gestionis* acts that cannot, by their nature, represent a breach of the Treaty in the manner [i]n which [the Claimants] [h]ave built their claim”.⁸⁶ These acts must thus “be excluded from this dispute”.⁸⁷

2. The Claimants’ position

283. The Claimants assert that they do not seek to hold Spain liable for acts of EU officials.⁸⁸ They challenge the acts that were taken on Spain’s own initiative without direction from EU authorities, such as the failure to support Banco Popular and the withdrawal of public deposits.⁸⁹ The EU background of the claims does not deprive the Tribunal of its

⁸³ Rejoinder, paras. 663-664, referring to Reply, paras. 454-455. See **Exh. CL-255**, *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Award, para. 346; **Exh. CL-260**, *Republic of Hungary v. EDF Int’l S.A.*, Swiss Federal Tribunal Case 4A_34/2015, Judgment, 6 October 2015, para. 5.2; **Exh. CL-168**, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 5.26; **Exh. CL-37**, *Ioan Micula, et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, para. 864. See also R-PHB2, para. 7.

⁸⁴ SoD, para. 583.

⁸⁵ SoD, paras. 585-596; Rejoinder, paras. 668-669; R-PHB1, para. 20; R-PHB2, para. 8.

⁸⁶ SoD, para. 595.

⁸⁷ SoD, para. 596.

⁸⁸ Reply, paras. 448-453; C-PHB1, paras. 324-327; C-PHB2, paras. 201-202.

⁸⁹ Reply, paras. 457-469; C-PHB1, paras. 324-327; C-PHB2, paras. 201-202.

jurisdiction, because it is possible to separate the acts of EU authorities from those of Spain, as various investment tribunals have done under similar circumstances.⁹⁰

284. The Claimants further claim that the withdrawals by public entities are attributable to Spain.⁹¹ They distinguish two types of deposit withdrawals: (i) those by the Fund for the Orderly Restructuring of Banks (“FROB”), the National Securities Market Commission (“CNMV”), and the National Commission on Markets and Competition (“CNMC”)⁹²; and (ii) those by other public entities. In respect of the first, the Claimants contend that they are attributable to Spain under Article 4 of the ILC Articles on State Responsibility, as FROB and CNMC form part of the Spanish Government.⁹³ As to the second category of withdrawals, the Claimants do not attribute them to the Respondent. Rather they accuse Spain, specifically the Government, the Minister of Economy and Bank of Spain,⁹⁴ of failing “to do anything to stop its own entities from withdrawing billions of euros in deposits which it knew would severely impact the bank”.⁹⁵

3. Analysis

285. It is Spain’s contention that (i) the acts of EU authorities and (ii) the deposit withdrawals by the so-called public entities fall outside the scope of the Treaty as they are not acts of the Respondent or conduct that can be attributed to it. The Tribunal takes the two prongs of Spain’s objection in turn.

⁹⁰ Reply, paras. 454-455, referring to **Exh. CL-255**, *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Award, para. 346; **Exh. CL-260**, *Republic of Hungary v. EDF Int’l S.A.*, Swiss Federal Tribunal, Case 4A_34/2015, Judgment, 6 October, 2015, para. 5.2; **Exh. CL-168**, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 5.26; **Exh. CL-37**, *Ioan Micula, et al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, para. 864.

⁹¹ Reply, para. 457-468; C-PHB1, paras. 324-327; C-PHB2, paras. 201-202.

⁹² See Reply, para. 460 referring to **Exh. CL-200**, Ley del Mercado de Valores for the CNMV and **Exh. CL-264**, Spanish Law 3/2013 for the creation of the CNMC.

⁹³ Reply, paras. 460-461, referring to **Exh. CL-265**, *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, paras. 77-78.

⁹⁴ Reply, paras. 462-468, referring to **Exh. RL-0037**, *Gustav Hamester v. Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, para. 174; **Exh. RL-0093**, *Bayindir Insaat v. Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, paras. 119-120.

⁹⁵ Reply, para. 462.

286. With respect to the acts of the EU authorities, there can be no doubt that the Treaty only binds the two State Contracting Parties. Hence, the Tribunal has jurisdiction only with respect to acts of *Spain* (provided of course they are relevant to this dispute). As the EU is not a Party to the Treaty, the Tribunal obviously has no jurisdiction over acts of EU authorities. As already noted above in connection with the waiver and fork-in-the-road objections, in this arbitration the Claimants have advanced their claims against Spain, not the EU. While it is true that the Claimants' pleadings contain references to a number of acts of the EU authorities, this is not surprising as EU Member States and the EU share competences in the European Banking System. The acts of EU authorities thus form part of the factual background which the Tribunal may consider when assessing whether *the Respondent* breached the Treaty. The allocation of competences between Spain and the EU in areas pertinent to this dispute are thus matters that are relevant to the merits and will be further assessed in that context. However, by examining facts which involve the acts of EU institutions, the Tribunal is in no way asserting jurisdiction over EU authorities or their conduct.

287. In respect of the deposit withdrawals by entities to which the Claimants refer as "public entities", the issues are somewhat different. As specified in the Reply, the claims regarding the withdrawals of deposit have two dimensions:⁹⁶

- First, the Claimants complain of the very acts of withdrawal by "numerous agencies of the Spanish government"⁹⁷ or "Spanish public entities"⁹⁸ (among which the Claimants expressly identify the Entidad Pública Empresarial Red Española,⁹⁹ Adif Alta Velocidad,¹⁰⁰ Comunidad Autónoma de Canarias,¹⁰¹ the FROB,¹⁰² the CNMV,¹⁰³ Sareb,¹⁰⁴ Tesorería General Seguridad Social (TGSS),

⁹⁶ See Reply, paras. 115-120.

⁹⁷ Reply, para. 116.

⁹⁸ Reply, para. 118.

⁹⁹ Reply, paras. 118-119.

¹⁰⁰ Reply, paras. 118-119.

¹⁰¹ Reply, paras. 118-119.

¹⁰² Reply, paras. 118-119.

¹⁰³ Reply, para. 119.

¹⁰⁴ Reply, para. 119.

Sociedad Estatal de Loterías y Apuestas del Estado (SELAE),¹⁰⁵ and Fondo Nacional de Eficiencia Energética);¹⁰⁶

- Second, the Claimants contend that the Respondent's organs who had the "obligation to maintain the financial stability of the system" (including 'the central government, the Minister of Economy, and the [Bank of Spain]') failed "to do anything to stop its own entities from withdrawing billions of euros in deposits which it knew would severely impact the bank".¹⁰⁷

288. Specifically, the Claimants claim that the Respondent breached the fair and equitable treatment ("FET"), expropriation, and non-discrimination standards by (i) withdrawing "billions of Euros from Banco Popular"¹⁰⁸ and by (ii) failing to resort to what the Claimants consider were regulatory tools at the Respondent's disposal that could have stopped the deposit withdrawals¹⁰⁹ (e.g., failure "to order the suspension of deposit

¹⁰⁵ Reply, para. 119.

¹⁰⁶ Reply, para. 119.

¹⁰⁷ Reply, para. 462.

¹⁰⁸ See SoC, paras. 26 (arguing that the Respondent breached FET by its "continuous and unprecedented withdrawal of billions of Euros from Banco Popular"), 28 ("Respondent expropriated Claimants' investments in Banco Popular by destroying the value of those investments" through conduct that included "withdrawal of billions of Euros in deposits"), 343 (contending that the Respondent took discriminatory conduct by, *inter alia*, "continuing to withdraw government deposits from Banco Popular despite the knowledge that such withdrawals were worsening Banco Popular's liquidity crisis", while it adopted different conduct with regard to other banks); Reply, paras. 680 h. ("Respondent's acts and omissions, described above, fundamentally breached the FET standard on so many levels: [...] Respondent's continued massive deposit withdrawals in 2017 despite the knowledge of [Banco Popular]'s solvency and its weakening liquidity position"), 754 ff. (arguing that "[t]he deposit withdrawals [...] constituted part of the creeping expropriation"), 772; C-PHB1, para. 213 ("Respondent's creeping expropriation began with massive government withdrawals [...]); para. 64 ("Respondent's deposit withdrawals violate Claimants' legitimate expectations that Respondent would "do no harm" to their investment"); C-PHB2, para. 24.

¹⁰⁹ See SoC, para. 125 ("Respondent did nothing to stop the outflow of deposits, principally driven by its own entities"); Reply, para. 575 ("The [Bank of Spain] should have alerted Spanish authorities about the excessive withdrawals from public authorities and then considered all possible means to strengthen [Banco Popular]'s deposit holdings").

withdrawals in order to safeguard the stability of the banking system”,¹¹⁰ to make public statements,¹¹¹ and to issue a short sale ban).¹¹²

289. In its jurisdictional objection, the Respondent predominantly insists on the first facet of the claim,¹¹³ and contends that because “the Tribunal’s jurisdiction is limited to breaches of the BIT, the Tribunal lacks jurisdiction over conduct that cannot *prima facie* amount to breaches of the BIT”.¹¹⁴ In Spain’s view, the public deposit withdrawals cannot be attributable to Spain and therefore cannot constitute treaty breaches.
290. The Tribunal’s jurisdiction is limited to “[a]ny dispute which may arise between one of the Contracting Parties and an investor of the other Contracting Party *due to alleged non-compliance with an obligation under this Agreement*”.¹¹⁵ The dispute settlement clause thus focuses on the second element for State responsibility, i.e. the existence of a breach of an international obligation as opposed to attribution, which is the first element.¹¹⁶ Accordingly, it limits the Tribunal’s jurisdiction to disputes in connection with alleged breaches of a Treaty obligation. As a result, at the jurisdictional level, the

¹¹⁰ Reply, para. 561.

¹¹¹ Reply, paras. 134 (“Respondent never made a single public statement telling [Banco Popular]’s depositors that there was no need to withdraw their deposits, that their deposits were safe and that there was no need [for] any depositor concern, which Mr. Manso Olivar points out could have been done”), 811 (“In the present case, Respondent failed to make strong statements of support for [Banco Popular], standing by and watching as the bank’s deposits were withdrawn in a panic, including massive withdrawals by the government itself”).

¹¹² Reply, para. 138 (“a short sale ban is one of the numerous supervisory tools that Respondent had at its disposal to stop the manic drop in share price and deposit withdrawals in [Banco Popular] during the weeks and months leading to its resolution”).

¹¹³ In respect of the second facet, the Respondent argues that the “Claimants’ attempt to invoke ‘*Respondent’s failure to do anything to stop its own entities from withdrawing billions of euros in deposits*’ fails to establish that the Kingdom of Spain had the power to do so, let alone that such an obligation existed in the first place”. See Rejoinder, para. 669.

¹¹⁴ Rejoinder, para. 668.

¹¹⁵ See **Exh. C-1**, Treaty, Article IX (emphasis added), dealing with the obligation to notify the dispute, and Article XI, entitled “Referral to Arbitration”, which cross-references the same notification (“[p]rovided that six months have elapsed since the notification referred to in article IX, the disputing investor may submit the claim to arbitration in accordance with [...]”).

¹¹⁶ See **Exh. CL-50**, ILC Articles on State Responsibility, Article 2, which lists the “[e]lements of an internationally wrongful act of a State” and provides that “[t]here is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) *constitutes a breach of an international obligation of the State*” (emphasis added).

Tribunal must satisfy itself that the conduct that is alleged is *prima facie* capable of constituting a breach of the Treaty. Therefore, at this stage the relevant question is whether the impugned acts, i.e. the deposit withdrawals, can potentially trigger a breach of a *primary rule*, not whether such acts are attributable to the State (which, if the acts in question pass the jurisdictional hurdle, is a matter best addressed at the merits).

291. The primary rules which serve as the source of the obligation at issue here (the FET, expropriation and non-discrimination standards alleged to be violated) require that the acts of a Contracting Party be carried out in the exercise of sovereign powers in order to trigger a potential Treaty breach.¹¹⁷ Indeed, as a general rule, the substantive standards of investment treaties are intended to protect investors from sovereign risks, not commercial risks.¹¹⁸
292. With this clarification in mind, the Tribunal examines the two prongs of the claims regarding the deposit withdrawals. Starting with the first, i.e. the allegation that the very acts of the Spanish public entities withdrawing deposits were unlawful, the Tribunal is of the view that these withdrawals were plainly acts which the entities in question took in the exercise of their rights under their private law deposit contracts with Banco Popular, like any bank client acting in a commercial capacity. These are manifestly *not*

¹¹⁷ See *Carlos Rios and Francisco Rios v. Republic of Chile*, ICSID Case No. ARB/17/16, Award, 11 January 2021, paras. 259 (“[d]ado el texto del Tratado y tomando en cuenta la jurisprudencia internacional en materia de naturaleza del acto del Estado, el Tribunal entiende que la medida debe ser soberana, y no meramente contractual. Este requisito habría sido aplicable aun si el Tratado no lo hubiese dicho expresamente. En efecto, está bien establecido que, excepto en casos de aplicación de ciertas cláusulas conocidas como ‘paraguas,’ para comprometer la responsabilidad internacional del Estado por la violación de un tratado de inversión el Estado debe haber actuado en ejercicio de prerrogativas soberanas, y no como parte en una relación contractual. La razón es que, como regla general, los estándares sustantivos de los tratados de inversión tienen por objeto proteger a los inversionistas de riesgos soberanos y no riesgos comerciales. Así, sólo pueden considerarse como expropiatorias aquellas medidas estatales que frustren un contrato en que el Estado sea parte y que constituyan el ejercicio de potestades exorbitantes del Estado. Debe por lo tanto tratarse de medidas que sólo el Estado podría haber tomado y no podrían haber sido replicadas por cualquier contraparte contractual ordinaria”, internal footnotes omitted) and 627 (“[e]e igual forma que bajo el estándar de expropiación, la responsabilidad del Estado bajo los estándares de TJE, TNMF y PSP requieren que la medida violatoria sea el producto de la conducta soberana del Estado. La situación podría ser distinta en caso de que una cláusula paraguas fuese aplicable, pero ese no es el caso aquí”, internal footnote omitted).

¹¹⁸ Ibid.

acts that involve the exercise of sovereign powers. In this respect, the Tribunal considers that the Claimants have not established, not even on a *prima facie* basis for purposes of jurisdiction, how the act of withdrawing one's own money deposited in a bank under a private law contract could constitute a breach of the Treaty. Those acts are thus not capable of constituting Treaty breaches and therefore disputes arising out of such acts are outside of the Tribunal's *ratione materiae* jurisdiction.

293. In the context of the second prong of the claim regarding the deposit withdrawals, the Claimants allege that the Respondent breached the Treaty standards by not exercising its regulatory powers for the protection of financial stability in such a manner as to prevent those withdrawals. If it were established that the Respondent was required to prevent the withdrawals, then the failure to do so could potentially constitute a Treaty breach, with the result that such alleged breach falls within the Tribunal's jurisdiction. Said otherwise, the Tribunal has jurisdiction to consider whether the Respondent failed to exercise its regulatory powers in matters of financial stability, which are sovereign powers, in breach of the Treaty standards. Whether the Respondent actually breached the Treaty is a matter for the merits and will be addressed in that context.

294. In summary, and subject to the limitations regarding the Tribunal's jurisdiction *ratione materiae* and *temporis* discussed below, the Tribunal has jurisdiction over claims about the deposit withdrawals to the extent that they concern acts or omissions taken by the Respondent in the exercise of sovereign powers.

C. JURISDICTION *RATIONE MATERIAE*

1. The Respondent's position

295. Spain argues that the Tribunal lacks jurisdiction *ratione materiae* and has advanced numerous arguments why the Claimants' alleged investments are not protected under the Treaty. These arguments are summarized in this section.

296. It is Spain's position that the Treaty does not protect indirect investments.¹¹⁹ The Respondent observes that such investments are not expressly included in the scope of the Treaty.¹²⁰ The mere inclusion of shares in Article I(4) does not mean that all types

¹¹⁹ SoD, paras. 597-625; Rejoinder, paras. 692-751; R-PHB1, paras. 21-25; R-PHB2, paras. 9-13.

¹²⁰ SoD, paras. 598-601; Rejoinder, 692-705; R-PHB1, paras. 21-25; R-PHB2, paras. 9-13.

of indirect investments are protected.¹²¹ On the contrary, the Treaty requires a *direct* link between an investor and his or her investment.¹²² Spain acknowledges that the Treaty does grant protection to indirect investments under Articles X(2)-(3), but that protection is limited and the Claimants cannot benefit from it, as they have no control over Banco Popular.¹²³

297. Spain argues that its position is reinforced by other provisions of the Treaty, specifically those related to the substantive protection of foreign investments,¹²⁴ as they apply only to “investments of investors”.¹²⁵
298. Moreover, if Spain and Mexico had intended to protect indirect investments, they would have opted for wording similar to Spain’s BIT with Kuwait or Jordan. These treaties define investment as any asset owned or controlled directly or indirectly by an investor.¹²⁶
299. Further, Spain submits that the Claimants’ alleged investments lack any territorial nexus with the host country.¹²⁷ The Claimants held their shares in Banco Popular passively through various intermediary companies and trusts and, consequently, lacked ownership or control over their shares.¹²⁸ In Spain’s view, the Claimants’ argument that they were required to hold shares through intermediaries under Mexican law is irrelevant for determining the type of investment protected under the Treaty.¹²⁹

¹²¹ Rejoinder, para. 700.

¹²² SoD, para. 602; Rejoinder, para. 705.

¹²³ Rejoinder, paras. 695-699.

¹²⁴ SoD, paras. 677-684. Spain refers to the following provisions: (i) Article II(I) (promotion and admission of investments); (ii) Article III (national treatment); (iii) Article III (MFN treatment); (iv) Article IV (minimum standard of treatment); and (v) Article IX (freedom of transfers).

¹²⁵ SoD, para. 614.

¹²⁶ SoD, para. 603, referring to **Exh. RL-0239**, Agreement between the Kingdom of Spain and the State of Kuwait for the Promotion and Reciprocal Protection of Investments, 8 September 2005, Article 1(1); **Exh. RL-0240**, Agreement between the Kingdom of Spain and the Hashemite Kingdom of Jordan for the Promotion and Reciprocal Protection of Investments, 20 October 1999, Article 1(2).

¹²⁷ SoD, paras. 602, 614; Rejoinder, para. 690; R-PHB1, para. 22.

¹²⁸ SoD, paras. 615-625; Rejoinder, paras. 718-734; R-PHB1, paras. 21-24; R-PHB2, para. 12. Spain’s objections in relation to each Claimant are described in detail in (i) Annex A to the Rejoinder; and (ii) Annex I to R-PHB2.

¹²⁹ Rejoinder, para. 703. See also R-PHB2, para. 11.

300. In any event, so Spain contends, reflective loss claims are prohibited under international law, so the Claimants cannot claim damages for the harm suffered by Banco Popular.¹³⁰
301. Finally, Spain maintains that the Claimants' shareholding in Banco Popular was not protected by the Treaty, because it lacked the inherent characteristics of an investment, i.e. contribution, duration, and risk.¹³¹ First, the Claimants did not make any "active contribution", by simply owning shares.¹³² Still in respect of contribution, the Respondent maintains that the documentation submitted by the Claimants does not "indicate a disbursement of funds by each of the Claimants to acquire Banco Popular's shares and bonds, particularly to the extent that those assets were acquired by the offshore vehicles, or other legal entities".¹³³ Second, in respect of duration, Spain takes issue with the Claimants' "speculative" and "aggressive" "investment strategy" of selling and re-purchasing shares on short term.¹³⁴ In particular, the Respondent underscores that "[m]any Claimants purchased large amounts of shares and bonds in Banco Popular only in June 2016, late 2016, or May 2017, immediately prior to the bank's 2017 resolution".¹³⁵ Third, Spain contends that investment treaties do not protect from "simple commercial risk" or "the risk of doing business in general".¹³⁶ In this case, the

¹³⁰ SoD, para. 613, referring to **Exh. RL-0106**, *Georges Pinson (France) v. United Mexican States*, Award, 19 October 1928, V Reports of International Arbitral Awards 327 (1952), p. 422;

Exh. RL-0105, Gabriel Bottini, *Indirect Claims Under the ICSID Convention*, 29(3) University of Pennsylvania Journal of International Law 563 (2008), p. 573; Rejoinder, paras. 735-751, referring to **Exh. RL-0049**, *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, International Court of Justice, Decision, 5 February 1970, ICJ Reports 3 (1970), para. 41; **Exh. RL-0075**, Zachary Douglas, *The International Law of Investment Claims*, Cambridge University Press 2009, paras. 578, 580; **Exh. RL-0113**, Surya P. Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart Publishing 2008), pp. 58-60; **Exh. RL-0111**, Paul Peters, *Some Serendipitous Findings in BITs: The Barcelona Traction Case and the Reach of Bilateral Investment Treaties*, in Erik Denters & Nico Schrijver (eds.), *Reflections on International Law from the Low Countries: in honour of Paul de Waart* 27 (Kluwer Law International 1998), pp. 33-34; R-PHB1, para. 25; R-PHB2, para. 13.

¹³¹ SoD, paras. 626-634; Rejoinder, paras. 670-691.

¹³² SoD, para. 632; Rejoinder, para. 677.

¹³³ Rejoinder, para. 677.

¹³⁴ Rejoinder, paras. 680-682.

¹³⁵ Rejoinder, para. 680 (internal footnote omitted).

¹³⁶ Rejoinder, para. 683, discussing **Exh. RL-0396**, *A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG v. Czech Republic*, PCA Case No. 2017-15, Final Award, 11 May 2020,

Claimants assumed no risk because they “knew exactly that their economic exposure through minimal holdings held by way of various layers of corporate vehicles was limited to the amounts that these structures had allegedly spent to acquire the shares and bonds of Banco Popular. The risk was therefore not borne by the Claimants themselves and, in any event, was confined to the potential loss of those initial amounts, which is the ordinary commercial or business risk borne by all those who trade in shares and securities of publicly listed companies at the secondary market”.¹³⁷

302. For all these reasons, Spain concludes that the Tribunal lacks jurisdiction *ratione materiae*.

2. The Claimants’ position

303. The Claimants consider that none of the arguments advanced by Spain on *ratione materiae* jurisdiction have any merit.

304. First, the Claimants take the view that the Treaty protects indirect investments.¹³⁸ For them, it is well-established that indirect investments are covered by a treaty as long as they are not expressly excluded.¹³⁹ As Article I(4) of the BIT does not exclude indirect investments, such investments are protected. Although both Mexico and Spain entered into treaties with third states that expressly include indirect investments, these treaties are without relevance here.¹⁴⁰

305. Second, the Claimants underscore that Article I(4) contains a broad definition of investment, which includes such indirect financial instruments as shares, partnership

para. 472; and **Exh. RL-0074**, *Romak v. Republic of Uzbekistan*, UNCITRAL Case PCA N AA280, Award, 26 November 2009, para. 229.

¹³⁷ Rejoinder, para. 684.

¹³⁸ Reply, paras. 335-357; C-PHB1, paras. 328-348; C-PHB 2, paras. 203-207.

¹³⁹ Reply, para. 303, referring to **Exh. CL-203**, *Indian Metals & Ferro Alloys Ltd. v. Republic of Indonesia*, PCA Case No. 2015-40, Award, 29 March 2019, para. 179; **Exh. CL-204**, *Venezuela Holdings, B.V. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, para. 162.

¹⁴⁰ Reply, para. 306, referring to **Exh. RL-0239**, Agreement between the Kingdom of Spain and the State of Kuwait for the Promotion and Reciprocal Protection of Investments dated 8 September 2005, Article 1(1); **Exh. RL-0240**, Agreement between the Kingdom of Spain and the Hashemite Kingdom of Jordan for the Promotion and Reciprocal Protection of Investments, 20 October 1999, Article 1(2). See also C-PHB1, para. 340; C-PHB2, para. 206.

interest, debt instruments and loans.¹⁴¹ The broad coverage of investments was confirmed *inter alia* in the 2008 Decree promulgating the Treaty.¹⁴²

306. Third, the Treaty contains a number of provisions, which would make no sense should the Treaty not cover indirect investments,¹⁴³ specifically (i) Article X(3), which allows a foreign investor to submit a claim to arbitration on behalf of an enterprise owned by him or her or under his other direct or indirect control; (ii) Article XIV concerning the consolidation of proceedings; and (iii) Article X(2), which prohibits local enterprises from initiating proceedings against their home State. By contrast, in the Claimants' submission, the "other provisions of the treaty" (MFN, national treatment and FET) that on Spain's case limit protection to direct investments are irrelevant, as they set out the standards of treatment, as opposed to the types of investors to which such standards apply.¹⁴⁴

307. Fourth, the Claimants' interpretation of Article I(4) is in line with Mexican law, because shares and financial instruments listed on international exchanges may only be marketed through authorized broker dealers and banks.¹⁴⁵ Moreover, the Claimants posit that, contrary to Spain's allegations, their investment complies with the requirements of Article I(4):

- investment has a territorial connection with the host state as it was made in Spain.¹⁴⁶ The Claimants' shareholding in Banco Popular is no different from intangible property and IP rights, which are mentioned in Article I(4) and, consequently, satisfy the territorial requirement;¹⁴⁷

¹⁴¹ Reply, para. 275.

¹⁴² Reply, para. 277, referring to **Exh. CL-112**, Executive Summary of the Mexico-Spain Treaty, p. 50.

¹⁴³ Reply, paras. 286; C-PHB1, paras. 341-342.

¹⁴⁴ Reply, para. 301.

¹⁴⁵ Reply, para. 287, referring to **Exh. CL-200**, *Ley del Mercado de Valores*, Articles 9, 262 (free translation).

¹⁴⁶ Reply, paras. 315-334.

¹⁴⁷ Reply, paras. 295-300. In support of their arguments, the Claimants refer to **Exh. CL-201**, *Fedax N.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, para. 41; **Exh. RL-0127**, *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, paras. 497-499; **Exh. CL-202**, *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010,

- it is established that the Claimants own and control their shares in Banco Popular, as explained in detail in (i) Annex A to the Statement of Claim; (ii) Annex I to the Reply; and (iii) Annex I to the C-PHB1. The intermediate corporate structures through which they hold their shares do not affect their rights of ownership and control, because these intermediaries can only act upon the Claimants' instructions. In any event, the fact of ownership is sufficient to satisfy the Treaty requirements;¹⁴⁸
- the Respondent's reflective loss argument was raised belatedly and in any event, the Claimants do not claim compensation for reflective loss. They seek damages for harm caused to them directly. In any event, the claim for reflective loss is permissible under the Treaty;¹⁴⁹
- an investment does not need to meet requirements other than those provided by the applicable treaty.¹⁵⁰ The Claimants refer to decisions of investment

para. 279; **Exh. CL- 199**, *British Caribbean Bank Limited v. Government of Belize*, PCA Case No. 2010-18, Award, 19 December 2014, para. 206; **Exh. CL-54**, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012, paras. 291.

¹⁴⁸ Reply, paras. 315-334; C-PHB1, paras. 366-370; C-PHB2, paras. 205-207.

¹⁴⁹ Reply, para. 313; C-PHB1, paras. 349-354; C-PHB2, para. 208.

¹⁵⁰ Reply, paras. 335-345, referring to **Exh. CL-207**, *Inmaris Perestroika Sailing Maritim Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, paras. 129-30; **Exh. CL-212**, *Philip Morris Brands Sàrl, Philip Morris Products S.A. & Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction, 2 July 2013, para. 206; **Exh. CL-213**, *Hassan Awdi, Enterprise Business Consultants, Inc. & Alfa El Corp. v. Romania*, ICSID Case No. ARB/10/13, Award, 2 March 2015, para. 197; **Exh. RL-0181**: *White Industries Australia Limited v. Republic of India*, UNCITRAL, Final Award, 30 November 2011, para. 7.4.8; **Exh. CL-216**, *Guaracachi America, Inc. & Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, Award, 31 January 2014, para. 364; **Exh. CL-217**, *J. Oostergetel & T. Laurentius v. The Slovak Republic*, UNCITRAL, Decision on Jurisdiction, 30 April 2010, para. 159; **Exh. CL-218**, *Mytilineos Holdings SA v. The State Union of Serbia & Montenegro & Republic of Serbia*, UNCITRAL, Partial Award on Jurisdiction, 8 September 2006, paras. 117-118; **Exh. RL-0011**: *Flemingo Duty Free Shop Private Limited (India) v. Republic of Poland*, UNCITRAL, Award, 12 August 2016, para. 298; **Exh. CL-219**, *Anglia Auto Accessories Ltd v. The Czech Republic*, SCC Case No. V 2014/181, Final Award, 10 March 2017, para. 150.

tribunals that refused to apply the so-called “inherent definition of investment” or *Salini* test in non-ICSID arbitration.¹⁵¹

308. In any event, the investments all have the hallmarks of an investment.¹⁵² The Claimants made a monetary contribution by purchasing shares in Banco Popular.¹⁵³ Holding shares in Banco Popular involved substantial investment risk, because Banco Popular was not controlled by the Claimants and its success depended on market conditions.¹⁵⁴ The investment was made to benefit from Banco Popular’s long-term growth and rising brand recognition.¹⁵⁵

3. Analysis

309. The Tribunal will address the different aspects of Spain’s objection to *ratione materiae* jurisdiction in the following order: (a) whether the BIT protects “indirect” investments; (b) whether the Claimants have shown that each of them owned or controlled their investments; (c) whether the assets allegedly forming part of their investments have the inherent characteristics of an investment; and (d) whether they would be entitled to claim for “reflective losses”.

a. Indirect investments

310. First, Spain contends that the Treaty does not cover “indirect” investments. Since the Claimants held their shares and bonds in Banco Popular through various intermediaries, such as offshore companies and trusts, they cannot benefit from the protection of the Treaty according to the Respondent.

311. Article I(4) of the Treaty reads as follows:

“4. The term “investment” shall mean, in particular, the following assets owned or controlled by investors of one of the Contracting Parties and established in the territory of the other Contracting Party in accordance with the legislation of the latter:

(a) an enterprise;

¹⁵¹ Reply, para. 348, referring to **Exh. CL-220**, *G. Garvilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 25 July 2018, para. 192.

¹⁵² See also C-PHB1, paras. 331-337.

¹⁵³ Reply, paras. 336, 357.

¹⁵⁴ Reply, para. 350.

¹⁵⁵ Reply, para. 350.

(b) shares, partnership interests and other forms of participation in the capital of an enterprise;

(c) debt instruments of an enterprise:

(i) when the enterprise is a subsidiary of the investor, or

(ii) when the debt instrument has an original maturity of at least three years, but does not include an obligation of a Contracting Party or a State enterprise, irrespective of the original maturity;

(d) a loan to an enterprise:

(i) when the enterprise is a subsidiary of the investor, or

(ii) when the loan has an original maturity of at least three years, but does not include a loan to a Contracting Party or to a State enterprise, irrespective of the original maturity;

(e) movable or immovable property, as well as mortgages, pledges, usufructs or other tangible or intangible property, including all intellectual and industrial property rights, acquired or used for economic activities or other business purposes;

(f) rights resulting from the contribution of capital or other resources in the territory of one Contracting Party for the development of an economic activity in the territory of the other Contracting Party, including those derived from a contract or concession;

This definition shall not include any monetary claims arising exclusively from:

(i) Commercial contracts for the sale of property or services by a national or an enterprise in the territory of one Contracting Party to an enterprise in the territory of the other Contracting Party; or

(ii) The granting of credit in relation to a commercial transaction, such as the financing of trade, with the exception of a loan covered by subparagraph (d)."

312. Article I(4) contains a non-exhaustive ("in particular") list of "assets" that are considered as protected investments under the Treaty. To the extent relevant here, such list includes the following assets:

- "shares, partnership interests and other forms of participation in the capital of an enterprise" (Article I(4)(b));
- "debt instruments of an enterprise: (i) when the enterprise is a subsidiary of the investor, or (ii) when the debt instrument has an original maturity of at least three years, but does not include an obligation of a Contracting Party or a State enterprise, irrespective of the original maturity and a loan to an enterprise" (Article I(4)(c));

- “a loan to an enterprise: (i) when the enterprise is a subsidiary of the investor, or (ii) when the loan has an original maturity of at least three years, but does not include a loan to a Contracting Party or to a State enterprise, irrespective of the original maturity” (Article I(4)(d)).
313. It is thus clear that both shares and bonds are captured by the list in Article I(4). The question is whether the Treaty requires an investor to own or control these assets directly, i.e. without the involvement of an intermediate holder.
314. Starting with the ordinary meaning of the Treaty terms according to Article 31(1) of the VCLT, the Tribunal notes that there is no requirement of direct ownership or control in the language of Article I(4). The provision merely requires that the relevant asset be “owned or controlled”.
315. Investments are often made indirectly. It is indeed not unusual for investors to structure their foreign investments through several corporations for a variety of legal and regulatory reasons. Therefore, the ordinary meaning of the terms “investment” or “invested” is not restricted to assets which an investor owns or controls directly.¹⁵⁶
316. Turning then to the context, the Respondent cites several provisions in the Treaty that allegedly support its interpretation that the BIT does not protect indirect investments. For example, the obligations of promotion and admission of investments, national treatment, most-favored nation treatment, minimum standard of treatment and freedom of transfers only apply with respect to “investments *of* investors”. In the Tribunal’s view, none of these provisions imply that investments should be held directly. While the term “of” implies an ownership link between investors and investments, such ownership need not necessarily be direct.
317. Spain also argues that the definition of *investor* in Article I(5) of the Treaty “adds an additional limitation, as it defines the term ‘investor’ in a restrictive manner by requiring that investors ‘ha[ve] made an investment in the territory of the other Contracting Party’”. Spain further specifies that “[...] the ordinary interpretation of such instrument must be that it is only applicable to ‘investors’ who have directly made an ‘investment’ in the territory of the Kingdom of Spain”.¹⁵⁷

¹⁵⁶ See **Exh. CL-287**, *Deutsche Telekom v. India*, PCA Case No. 2014-10, Interim Award, 13 December 2017, para. 142.

¹⁵⁷ SoD, paras. 601-602.

318. Article I(5) of the Treaty reads as follows:

“5. The term “investors” shall mean:

(a) Physical persons who are nationals of one of the Contracting Parties in accordance with its laws; or

(b) Any enterprise, meaning any legal entity — including companies, associations of companies, trading corporate entities, branch offices and other organizations — which is established or, in any case, properly organized in accordance with the law of one of the Contracting Parties and has its head office in the territory of that Contracting Party;

which has made an investment in the territory of the other Contracting Party.”

319. In accordance with Article I(5) *in fine*, in order for a physical person or enterprise to be considered an investor it, first, must have “made” an investment and, second, such investment must be “in the territory of the [host State]”.

320. Nothing in the first part of that formulation requires that the investment be “made” directly. In its ordinary meaning, the word “made” does not imply that the investment be structured without intermediate companies. As noted above, in practice, investments are often “made” indirectly. The second part of Article 1(5) last sentence requires the investment to be “in the territory” of the host state. That requirement does not restrict the way in which the investment can be made. It suffices that the result of the investment activity, *i.e.* the relevant assets, be in the territory of the host state. For the sake of completeness, it is noted that the same requirement is contained in Article I(4) of the Treaty requiring the assets to be “established in the territory of the [host State]”. That provision does not imply a direct investment either.

321. Investment tribunals have consistently refused to read the reference to the territory of the host state as a requirement for direct ownership of the assets constituting the investment. For instance, the *CEMEX v. Venezuela* tribunal stated:

“[W]hen the BIT mentions investments made ‘in’ the territory of a Contracting Party, all it requires is that the investment itself be situated in that territory. It does not imply that those investments must be ‘directly’ made in such territory.”¹⁵⁸

¹⁵⁸ *CEMEX Caracas Investments B.V and CEMEX Caracas II Investments B.V v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010 para. 157, cited in **Exh. CL-287**, *Deutsche Telekom v. India*, PCA Case No. 2014-10, Interim Award, 13 December 2017, para. 152; **Exh. CL-216**, *Guaracachi America, Inc. & Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, Award, 31 January 2014, para. 356.

322. Therefore, it is sufficient that the assets invested be situated in Spain. That condition is undoubtedly met as it is common ground that Banco Popular was a company incorporated and existing in Spain.
323. Moreover, the object and the purpose of the Treaty impose no limitation to directly invested assets. The preamble of the BIT provides that the Contracting Parties wish to “intensify economic cooperation for the mutual benefit of both countries”, “create favourable conditions for investments made by either Contracting Party in the territory of the other”, “stimulate initiatives in this field”. Such objectives can be achieved irrespective of whether an investor carries out his or her economic activities directly or indirectly.
324. This interpretation is corroborated by consistent decisions of a number of investment tribunals.¹⁵⁹ In *Guaracachi v. Bolivia*, for instance, the tribunal construed an unqualified definition of “investment” contained in the UK-Bolivia BIT to “naturally include ‘indirect investments’ through the acquisition of shares in a company”.¹⁶⁰ Similarly, in *Siemens v. Argentina*, the tribunal held that “a literal reading” of the unqualified definition of “investment” in the Argentina-Germany BIT “does not support the allegation that the definition of investment excludes indirect investments”.¹⁶¹
325. The tribunal in *Indian Metals v. Indonesia* recently summarized the broad consensus in the jurisprudence on this topic in the following terms:

“There is a consistent jurisprudence which supports the conclusion that investment treaties, including this BIT, that define investments broadly, protect indirect investments as well. This is true regardless of whether there is an explicit reference to direct or indirect investments in the treaty [...]”¹⁶²

¹⁵⁹ **Exh. CL-201**, *Fedax N.V. v. Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, 11 July 1997, paras. 34-35; *ConocoPhillips Petrozuata B.V. and others v. Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits, 3 September 2013, paras. 282-285.

¹⁶⁰ **Exh. CL-216**, *Guaracachi America, Inc. & Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, Award, 31 January 2014, para. 352.

¹⁶¹ **Exh. CL-206**, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/08, Decision on Jurisdiction, 3 August 2004, para. 137.

¹⁶² **Exh. CL-203**, *Indian Metals & Ferro Alloys Ltd. v. Republic of Indonesia*, PCA Case No. 2015-40, Award, 29 March 2019, para. 179, referring to *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, August 3, 2004, para. 137; *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, July 6, 2007, paras 123-124; *Venezuela Holdings B.V. and others (Case formerly known*

326. The Respondent further invokes differences in language used in other investment treaties concluded by Spain. It suggests that the lack of an express specification in the Treaty means that the BIT only covers direct investments. The Tribunal cannot follow this argumentation. As it is clear from the authorities cited by Spain, comparative treaty practice can only serve as supplementary means of treaty interpretation under Article 32 VCLT.¹⁶³ Here, the application of the primary means of interpretation shows that indirect investments qualify for treaty protection. It is thus unnecessary to resort to comparative treaty practice.
327. In any event, the fact that Spain and Mexico did not elaborate on the directness of investments in the Treaty does not mean that they intended to rule out indirect investments. As noted in *ConocoPhillips v. Venezuela* in relation to comparative treaty practice, “there is no single way of drafting definitions”.¹⁶⁴ Some treaties are more detailed than others and there is no indication here that the Treaty’s silence on this point should be interpreted as an exclusion.
328. The Tribunal therefore concludes that the Treaty definition of “investment” does not require that assets be owned or controlled directly by the national of the home state in order for them to qualify as protected investments. Spain’s objection in relation to the indirect nature of the investment is accordingly denied.

b. Proof of Ownership and Control

329. The Tribunal now moves to Spain’s objection that the Claimants have not proffered sufficient evidence of their actual ownership or control of the shares and bonds in Banco Popular.

as Mobil Corporation and others) v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07 127, Decision on Jurisdiction, 10 June 2010, para. 165; *Cemex Caracas Investments BV and Cemex Caracas II Investments BV v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, December 30, 2010, paras 151-153; *Guaracachi & Rurelec v. Bolivia*, PCA Case No. 2011-17, Award, paras 352-356; *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, para. III).

¹⁶³ **Exh. RLA-101**, Aust, *Modern Treaty Law and Practice* (3rd ed., Cambridge University Press 2013), p. 220.

¹⁶⁴ *ConocoPhillips Petrozuata B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07, Decision on Jurisdiction and Merits, 3 September 2013, para. 284.

330. To recall, Article I(4) requires the “assets” constituting investments to be “owned or controlled by investors” of the home State. Ownership and control are clearly alternative requirements. Consequently, the Claimants must show that they either (i) owned the shares/bonds in Banco Popular, or (ii) controlled them. In connection with control, the Tribunal considers that the notion referred to in Article I(4) of the Treaty is broad and does not require a specific form for its exercise.

331. As noted in *Abengoa v. Mexico* in connection with the same Article I(4) of the Treaty:

“El artículo 1.4 del APPRI 2006 no define el concepto de control. El Tribunal Arbitral observa que este requisito es alternativo a la condición de propiedad y se aplica de manera amplia a todos los activos enumerados. Por tanto, el APPRI 2006 claramente ha entendido amparar sujetos que, aunque no resulten propietarios de los activos, ejerzan un control sobre los mismos. El APPRI 2006 tampoco contiene restricción alguna en cuanto a la naturaleza o las modalidades de dicho control.”

332. The relevant question is whether the Claimants have proven that they “owned or controlled” their shares and bonds in accordance with Article I(4) of the Treaty. It is not in dispute that the Claimants held their shares in Banco Popular through various intermediaries, i.e. companies (some of which offshore) and trusts. However, this does not mean that they did not control the shares under various types of arrangements with the companies and trusts.

333. The Tribunal has reviewed the voluminous documentation provided by the Claimants in support of their allegations. Although the exercise was not always simple and the explanations provided by the Claimants on certain corporate structures or trusts was sometimes relatively brief, the Tribunal considers that the Claimants have established that all of them, except for four (as explained below), owned or controlled the relevant shares in Banco Popular. The following sections review in some details the Tribunal’s findings in respect of each Claimant’s shareholding. The numbering for each of the Claimants follows the numbering in paragraph 2 above.

334. First, 35 out of 54 Claimants invested in Banco Popular through brokerage accounts. Specifically:

- Claimant 1 (through brokerage accounts with [REDACTED]);
- Claimant 3 (through brokerage account with [REDACTED]);
- Claimant 4 (through brokerage account with [REDACTED]);

- Claimant 6 (through brokerage account with [REDACTED]);
- Claimant 9 (through brokerage account with [REDACTED]);
- Claimant 10 (through brokerage account with [REDACTED]);
- Claimant 12 (through brokerage account with [REDACTED]);
- Claimant 14 (through brokerage account with [REDACTED]);
- Claimant 16 (through brokerage account with [REDACTED]);
- Claimant 17 (through brokerage account with [REDACTED]);
- Claimant 18 (through brokerage account with [REDACTED]);
- Claimant 19 (through brokerage account with [REDACTED]);
- Claimant 20 (through brokerage account with [REDACTED]);
- Claimant 22 (through brokerage account with [REDACTED]);
- Claimant 23 (through brokerage account with [REDACTED]);
- Claimant 24 (through brokerage account with [REDACTED]);
- Claimant 25 (through brokerage account with [REDACTED]);
- Claimant 27 (through brokerage account with [REDACTED]);
- Claimant 28 (through brokerage account with [REDACTED]);
- Claimant 31 (through brokerage account with [REDACTED]);
- Claimant 32 (through brokerage account with [REDACTED]);
- Claimant 34 (through brokerage account with [REDACTED]);
- Claimant 35 (through brokerage account with [REDACTED]);
- Claimant 36 (through brokerage account with [REDACTED]);

- Claimant 37 (through brokerage account with [REDACTED]);
- Claimant 39 (through brokerage accounts with [REDACTED]);
- Claimant 40¹⁶⁵ (through brokerage account with [REDACTED]);
- Claimant 41 (through brokerage account with [REDACTED]);
- Claimant 42 (through brokerage account with [REDACTED]);
- Claimant 43 (through brokerage account with [REDACTED]);
- Claimant 44 (through brokerage account with [REDACTED]);
- Claimant 45 (through brokerage account with [REDACTED]);
- Claimant 47 (through brokerage account with [REDACTED]);
- Claimant 51 (through brokerage account with [REDACTED]);
- Claimant 54 (through brokerage account with [REDACTED]).

335. Having reviewed the evidence on record,¹⁶⁶ the Tribunal is satisfied that the brokerage accounts through which Banco Popular's shares were bought belonged to the Claimants and were operated to their benefit, rather than to the intermediaries' benefit. The aforementioned Claimants thus controlled the shares in Banco Popular.

336. Second, the following Claimants invested in Banco Popular through [REDACTED], a limited partnership established in [REDACTED] in [REDACTED]:

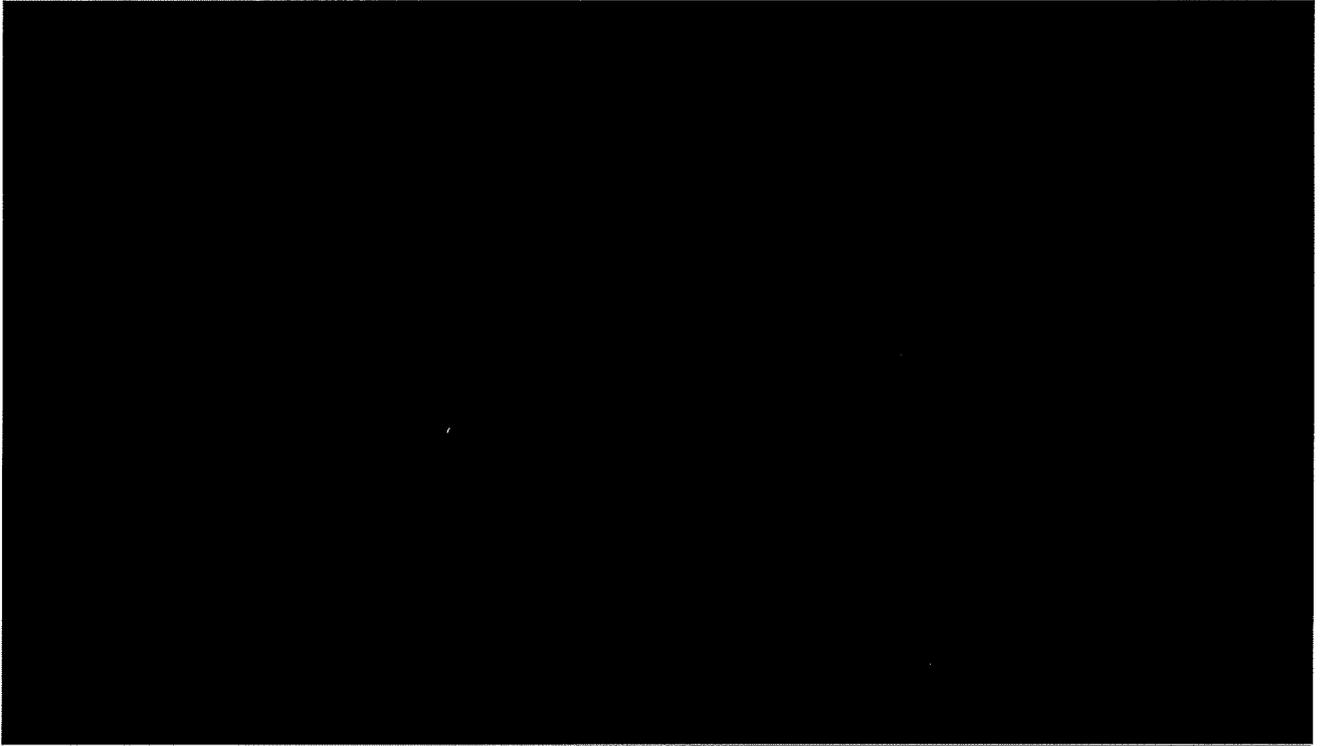
- Claimant 8;
- Claimant 13;
- Claimant 21;
- Claimant 42;

¹⁶⁵ As discussed *infra* at paras. 393-394, the Claimants "dropped" Mr. Casanueva y Llaguno from the arbitration in the course of the proceedings.

¹⁶⁶ See Appendix D to the Reply.

- Claimant 46;
- Claimant 47.

337. The corporate structure of [REDACTED] is as follows:¹⁶⁷



338. The Respondent does not contest [REDACTED]'s title to Banco Popular's shares.

339. The Tribunal considers that the Claimants have established through the various documentation submitted into the record¹⁶⁸ that the afore-mentioned six Claimants were the shareholders and thus beneficiaries of [REDACTED], which held Banco Popular's shares through a brokerage account with [REDACTED]. There is nothing in the constituting documents of [REDACTED] that would contradict the fact that Claimants 8, 13, 21, 42, 46 and 47 had control over Banco Popular's shares held by that intermediary.

¹⁶⁷ This and the following diagrams are excerpted from the Claimants' submissions.

¹⁶⁸ Reply, **Appendix C-001**, [REDACTED] Agreement and Appointment of [REDACTED]; **Appendix C-002**, [REDACTED] Certificación de Estructura de Accionistas; **CRFA-A-36**, Identity Documents of [REDACTED]; **Appendix C-044**, Correction to [REDACTED] General Partner Certificate, 23 July 2019.

340. Third, the following individuals invested in Banco Popular through [REDACTED] [REDACTED], a limited partnership created in the [REDACTED] in [REDACTED]:

- Claimant 2;
- Claimant 14;
- Claimant 34.

341. The corporate structure of [REDACTED] is as follows:



342. The Respondent does not contest [REDACTED]' title to Banco Popular's shares.

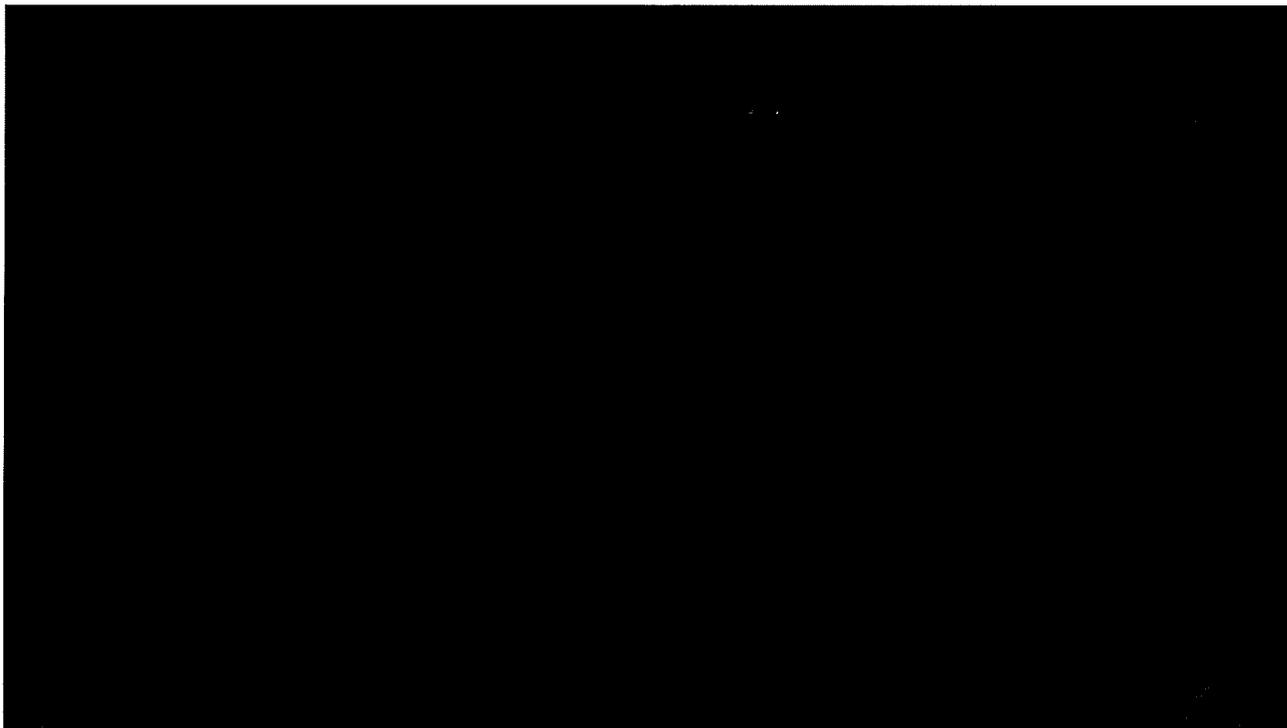
343. The Tribunal considers that the Claimants have established by reference to the relevant documentation¹⁶⁹ that the afore-mentioned three Claimants were the shareholders and beneficiaries of [REDACTED], which held Banco Popular's shares through a brokerage account with [REDACTED]. Furthermore, there is nothing in the constituting documents of [REDACTED] that would suggest that Claimants 2, 14 and 34 did not control Banco Popular's shares held by the intermediary.

¹⁶⁹ Reply, **Appendix C-003**, LPA of [REDACTED] Reply, Annex A, pp. 1, 5 and 34.

344. Fourth, two Claimants held Banco Popular's shares through [REDACTED] incorporated in the [REDACTED] in [REDACTED]:

- Claimant 14; and
- Claimant 17.

345. The corporate structure of [REDACTED] is as follows:



346. The Respondent does not dispute [REDACTED]'s title to Banco Popular's shares.

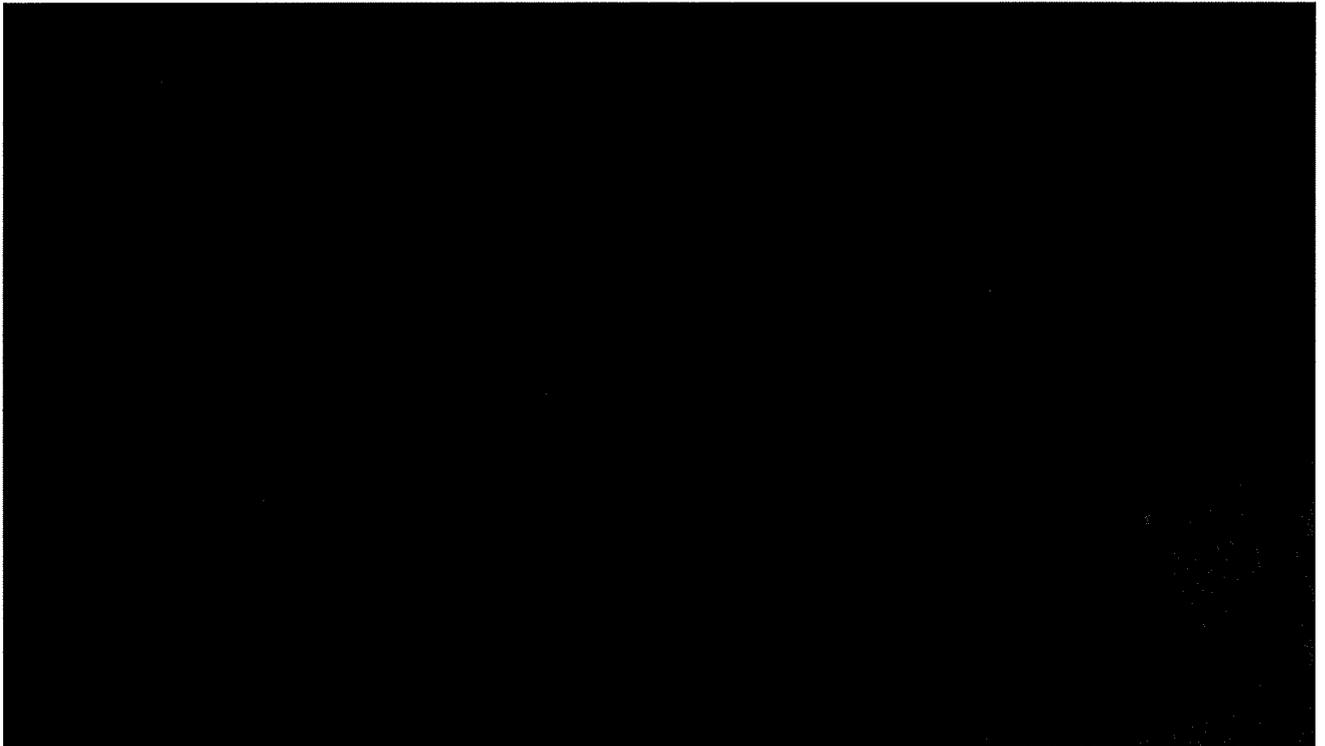
347. The Tribunal considers that the Claimants have established by reference to the relevant documentation submitted into the record¹⁷⁰ that Claimants 14 and 17 were the shareholders and beneficiaries of [REDACTED], which held Banco Popular's shares through a brokerage account. The constituting documents of [REDACTED] do not contain any provision limiting Claimant 14's and 17's control over Banco Popular's shares held by the intermediary.

¹⁷⁰ Reply, **Appendix C-004**, [REDACTED] Memorandum of Association and Articles of Association, 25 September 2013; **Appendix C-005**, [REDACTED] Certificate of Incumbency.

348. Fifth, several Claimants held Banco Popular's shares through [REDACTED], a limited partnership registered in [REDACTED]:

- Claimant 6;
- Claimant 26;
- Claimant 50;
- Claimant 52;
- Claimant 53;
- Claimant 54.

349. The corporate structure of [REDACTED] is as follows:



350. Spain does not challenge [REDACTED]'s title to Banco Popular's shares.

351. The Tribunal considers that the Claimants have established by reference to the relevant documentation¹⁷¹ that the afore-mentioned six Claimants were the shareholders and

¹⁷¹ Reply, **Appendix C-006**, [REDACTED], Limited Partnership Agreement, 18 May 2016; **Appendix C-007**, [REDACTED], Subscription Agreement Fideicomiso 100-1,

ultimate beneficiaries of [REDACTED]. Nothing in the constituting documents of [REDACTED] limit Claimants 6, 26, 50, 52, 53 and 54's control over Banco Popular's shares held by the intermediary.

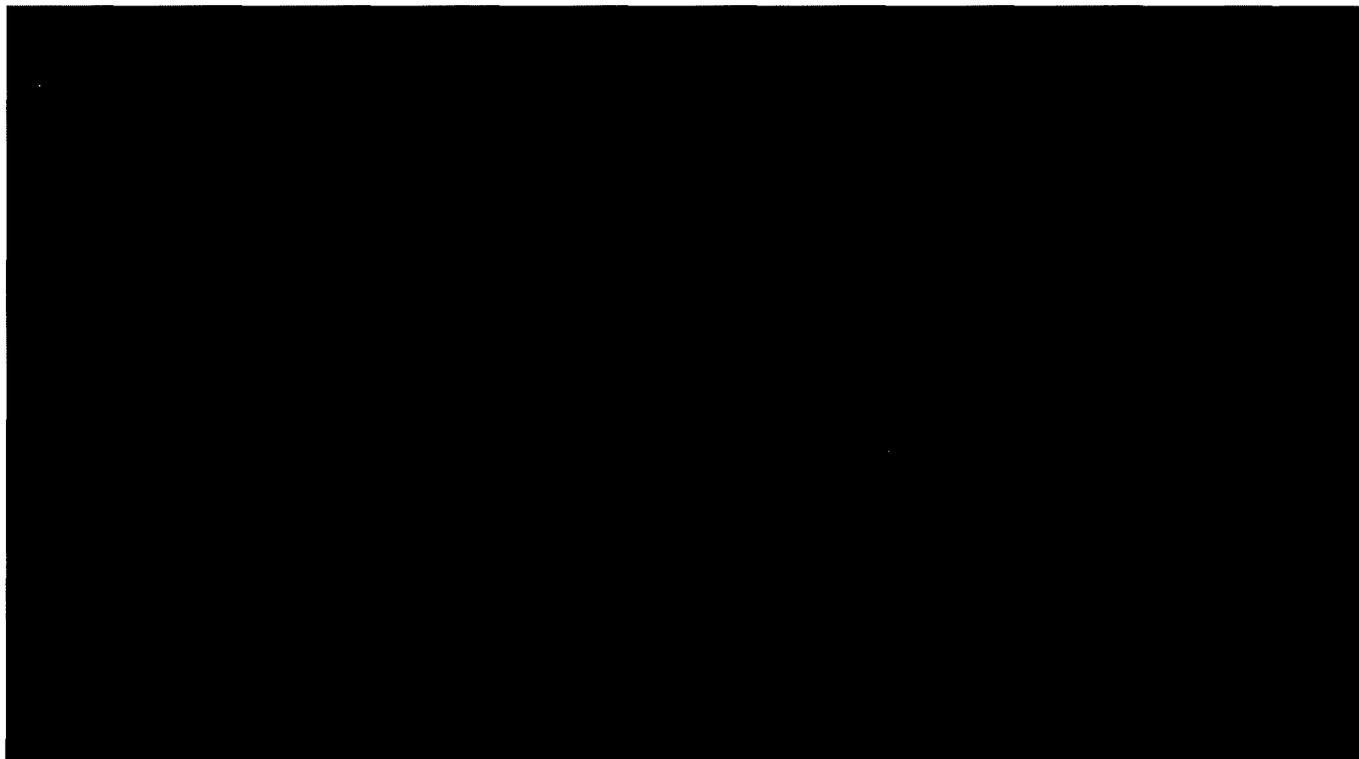
352. Spain takes issue with the fact that Claimant 26 brought its claim as trustee of [REDACTED]. The Tribunal considers that, having a legal title to [REDACTED]'s shares, Claimant 26 falls within the scope of the Treaty protection.

353. Sixth, the following Claimants invested in Banco Popular through [REDACTED], a [REDACTED] limited partnership formed in [REDACTED]:

- Claimant 5;
- Claimant 26;
- Claimant 29;
- Claimant 30;
- Claimant 33;
- Claimant 38;
- Claimant 48;
- Claimant 49.

18 May 2016; **Appendix C-008**, [REDACTED], Subscription Agreement Fideicomiso 100-2, 14 June 2016; **Appendix C-009**, [REDACTED] Subscription Agreement Fideicomiso 100-3, 17 June 2016; **Appendix C-010**, Certificación [REDACTED], 15 May 2020; **Appendix C-011**, [REDACTED], Subscription Agreement [REDACTED], 4 August 2016; **Appendix C-012**, [REDACTED], Subscription Agreement [REDACTED], 4 August 2016; **Appendix C-046**, [REDACTED], Certificate of Capital Structure, 1 December 2017.

354. The corporate structure of [REDACTED] is as follows:



355. Spain does not dispute [REDACTED]'s title to Banco Popular's shares.

356. The Tribunal considers that the Claimants have established that Claimants 26, 30, 38 and 48 owned [REDACTED].¹⁷² Nothing in the constituting documents of [REDACTED] deprived Claimants 26, 30, 38 and 48 of their control over and benefit from Banco Popular's shares held by the intermediary.

357. By contrast, it appears from the documentation submitted into the record that Claimants [REDACTED], [REDACTED], [REDACTED] and [REDACTED] were neither beneficial nor legal owners of [REDACTED].

358. Rather, they are beneficiaries of [REDACTED], which, according to the constituting documents,¹⁷³ would acquire rights in connection with [REDACTED] only in

¹⁷² Reply, **CRFA-A-30**, Identity documents of [REDACTED]; **Appendix C-017**, [REDACTED], Limited Partnership Agreement, 22 September 2008.

¹⁷³ Reply, **Appendix C-032**, Segundo Convenio Modificadorio al Contrato de [REDACTED], 18 January 2017; **Appendix C-022**, Quinto Convenio Modificadorio al Contrato de [REDACTED], 18 January 2017; **Appendix C-018**, Certificación [REDACTED], 15 May 2020.

case of death, absence or legal incapacity of [REDACTED] and [REDACTED]. The Tribunal notes that Spain raised specific objections in relation to these Claimants in its Annex A to the Rejoinder. The Claimants have not specifically addressed these objections. Actually, a comparison between the Annex 1 to the SoC and the Annex I to the Claimants' first post-hearing brief, which replaced the former, shows that Annex 1 to the SoC lists Claimants [REDACTED], [REDACTED], [REDACTED] and [REDACTED] as beneficiaries in connection with [REDACTED]:

[REDACTED]

359. By contrast, in the subsequent Annex I to the first PHB, these four individuals are no longer listed as beneficiaries and have been replaced by Claimants [REDACTED]:

[REDACTED]

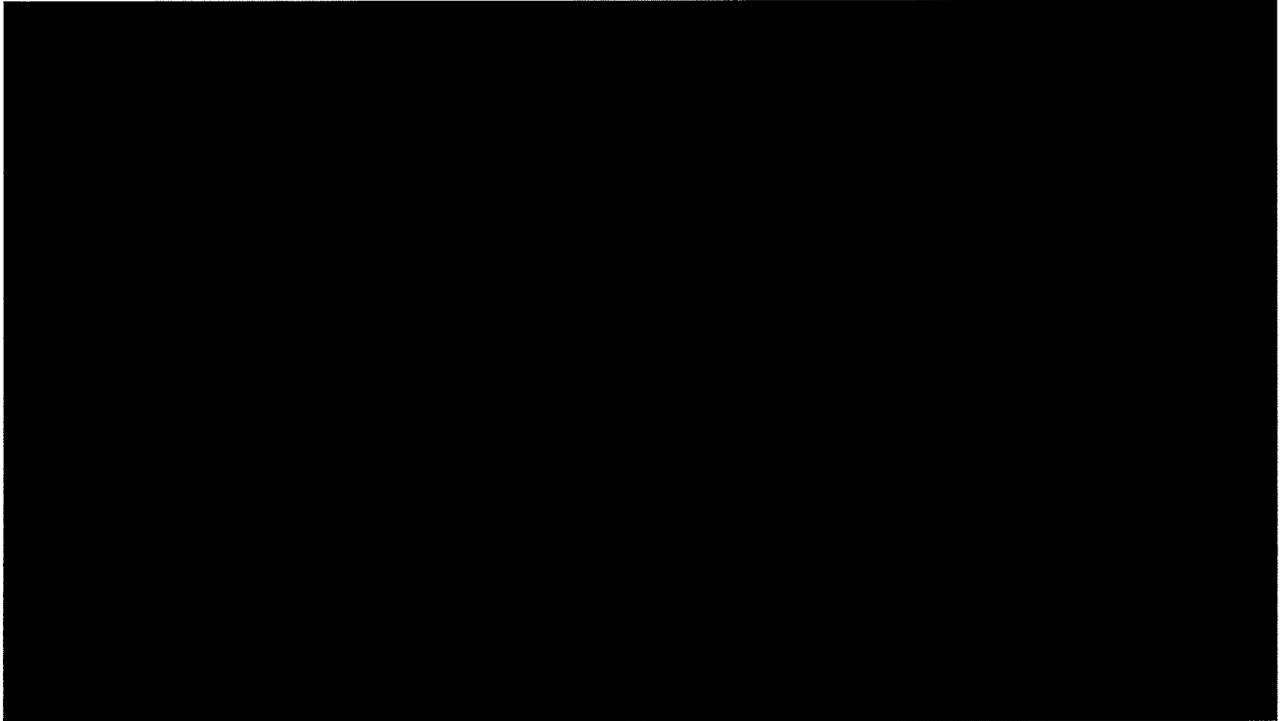
360. The Tribunal thus understands that the Claimants have conceded that these four Claimants have no vested rights to the relevant shares that would entitle them to bring claims in this arbitration. Taking into account all these considerations, the Tribunal concludes that the Claimants have not sufficiently shown that Claimants 5, 29, 33, and 49 owned or controlled shares in Banco Popular.

361. Seventh, the following Claimants held shares through [REDACTED], a [REDACTED] limited partnership created in [REDACTED]:

- Claimant 6;
- Claimant 54;
- Claimant 52;

- Claimant 50.

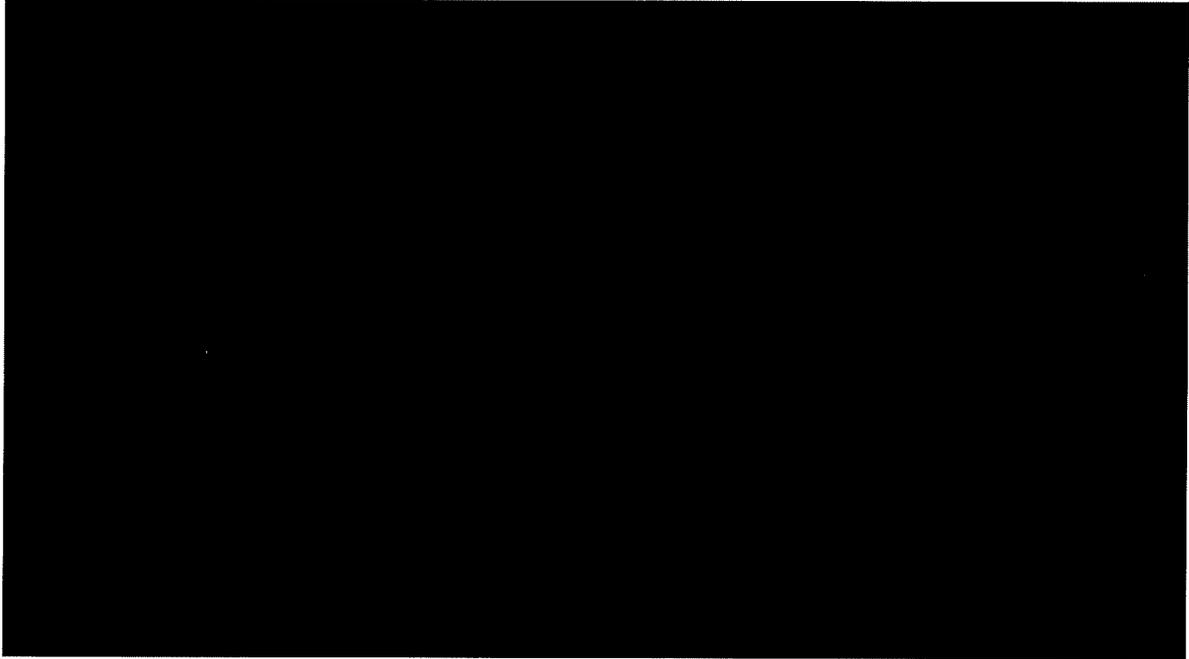
362. The corporate structure of [REDACTED] is as follows:



363. The Tribunal considers that the Claimants have established by reference to the relevant documents¹⁷⁴ that Claimants 6, 50, 52 and 54 were the owners or ultimate beneficiaries of [REDACTED] and Banco Popular's shares that the intermediary held. The constituting documents of [REDACTED] do not limit Claimants 6, 50, 52 and 54's control over Banco Popular's shares held by the intermediary.

¹⁷⁴ Reply, **Appendix C-034**, [REDACTED], Ownership Certification, 1 December 2017; **Appendix C-033**, Second Amended and Restated [REDACTED] Agreement, 12 June 2012; **CRFA-A-52**, Identity documents of [REDACTED].

364. Eighth, Claimant 19 invested in Banco Popular through [REDACTED], incorporated in the [REDACTED] in [REDACTED]. The corporate structure of [REDACTED] is as follows:



365. The Tribunal considers that the Claimants have established that Claimant 19 was the ultimate beneficiary of [REDACTED] and of the Banco Popular shares that the intermediary held.¹⁷⁵ Nothing in the constituting documents of [REDACTED] deprived Claimant 19 of his control over the Banco Popular shares held by the intermediary.

366. Ninth, Claimant 15 invested in Banco Popular through [REDACTED], a company incorporated in [REDACTED] in [REDACTED]. [REDACTED] is partially owned by [REDACTED], which acts in the best interest and on behalf of the [REDACTED] of the [REDACTED], of which [REDACTED].

¹⁷⁵ Reply, **Appendix C-038**, [REDACTED] Shareholder Certification, 12 February 2016; **Appendix C-035**, [REDACTED], [REDACTED], at Section 1(b), Third Schedule (A) (noting that "[REDACTED]"); **Appendix C-036**, [REDACTED], 26 June 2007.

367. The corporate structure of [REDACTED] is as follows:



368. The Tribunal considers that the Claimants have established that Claimant 15 was the ultimate beneficiary of [REDACTED] and of Banco Popular shares held by the intermediary.¹⁷⁶ Nothing in the constituting documents of [REDACTED] deprived Claimant 15 of his control over and benefit from the Banco Popular shares held by the intermediary.

369. Finally, Claimant 7 invested in the bank through [REDACTED]
[REDACTED]. Claimant 11 is a legal owner of the bank's shares, which it holds as [REDACTED]
[REDACTED]. Nothing in the constituting documents of [REDACTED] deprived [REDACTED] of his control over and benefit from the bank's shares held by [REDACTED]. The Tribunal considers that the Claimants have proven that [REDACTED] were the legal and beneficial owners of the shares

¹⁷⁶ Reply, **Appendix C-040**, [REDACTED], Memorandum and Articles of Association; **Appendix C-041**, Nominee Agreement between [REDACTED] and [REDACTED]; **Appendix C-039**, Amendment and Restatement of the [REDACTED], at 6; **Appendix C-043**, Deed of Distribution, Indemnity, and Termination relating to the [REDACTED], at 2-3.

in Banco Popular.¹⁷⁷ In respect of Spain's objection that the Claimants have "double-counted" the shares of [REDACTED] as they are allegedly listed twice (once for [REDACTED] personally, and once for [REDACTED]),¹⁷⁸ the Tribunal has taken note of the Claimants' representation that they are not claiming damages for the same shareholding twice.¹⁷⁹ Issues of this sort will be reviewed at the quantum stage, if the Tribunal reaches that stage. For present purposes, the Tribunal is satisfied that it has jurisdiction in respect of the investments of both Claimants.

* * *

370. In conclusion, the Claimants have established that all of them, except for Claimants 5, 29, 33 and 49, owned and/or controlled shares in Banco Popular. Therefore, the Tribunal lacks jurisdiction over disputes between Claimants 5, 29, 33 and 49 and Spain for lack of ownership or control over a qualifying investment.

c. "Inherent" characteristics of an investment

371. Spain argues that the Claimants have not demonstrated that their alleged investments have the "inherent characteristics" of an investment, including contribution, duration and risk.¹⁸⁰

372. In line with other arbitral tribunals, this Tribunal considers that the terms "investment" in Article I(4) of the Treaty has an objective meaning which requires the presence of the elements of contribution, or commitment of resources, duration and risk.¹⁸¹

373. With regard to contribution, the Tribunal is of the view that each Claimant must show that it has made a commitment of resources. Contrary to Spain's position, this does,

¹⁷⁷ **Annex 0001** submitted with Claimants' Statement of Claim, at 1; Reply, **CRFA-A-11**, Identity documents of [REDACTED] and **Appendix B-5**, [REDACTED] – Bank Statements.

¹⁷⁸ Rejoinder, Annex A, pp. 12, 17–18.

¹⁷⁹ C-PHB1, paras. 366-367.

¹⁸⁰ SoD, paras. 626-634; Rejoinder, paras. 673-675.

¹⁸¹ See, e.g., **Exh. RL-0074**, *Romak v. Republic of Uzbekistan*, UNCITRAL Case PCA N AA280. Award, 26 November 2009, para. 207 ("The Arbitral Tribunal therefore considers that the term 'investments' under the BIT has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk"); **Exh. RL-0396**, *A.M.F. Aircraftleasing v. Czech Republic*, PCA, Final Award, 11 May 2020, para. 472.

however, not mean that there is any purported requirement for “active” contribution or management of the investment.¹⁸² To the contrary, it is sufficient for the Claimants to show that they have purchased their shares and/or bonds for a price. In this respect, the Respondent takes issue with the fact that the Claimants did not provide sufficient information as to how and at what price they purchased their shares or bonds. The Tribunal disagrees. The abundant documentation, including bank records, filed by the Claimants include specific information regarding their purchases of Banco Popular shares and bonds. Hence, by purchasing shares and/or bonds the Claimants made a commitment of resources.

374. In respect of duration, Spain takes issue with the fact that certain Claimants purchased large amounts of shares and bonds in Banco Popular in late 2016 a few months prior to Banco Popular's 2017 resolution. It is true that the duration of those investments ended up being short. However, there is no indication that the Claimants did not intend to hold their shares for a long time had the resolution not occurred. In addition, the Claimants held the majority of their shares and bonds for a number of years. Accordingly, this requirement appears met as well.
375. Finally, in connection with risk, by buying shares in Banco Popular, the Claimants assumed investment risk, i.e. the risk that the value of the shares could increase, decrease, or even be lost entirely. They also bore investment risk in relation to the bonds, although to a lesser extent than with respect to shares.
376. In conclusion, the Claimants' investments satisfy the conditions of contribution, duration and risk to be protected under the Treaty.

d. Reflective Loss

377. Spain raised its reflective loss objection for the first time in its Rejoinder. In accordance with Article 23(2) of the UNCITRAL Rules, “[a] plea that the arbitral tribunal does not

¹⁸² See also **Exh. CL-226**, *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016, paras. 230-231; **Exh. CL-227**, *South American Silver Ltd. (Bermuda) v. The Plurinational State of Bolivia*, PCA Case No. 2013-15, Award, 22 November 2018, paras. 233, 331; **Exh. CL-228**, *Vladislav Kim & Others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017, paras. 306, 310-12; **Exh. CL-229**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, paras. 225-26, 230, 256, 260, 261, 272.

have jurisdiction shall be raised no later than in the statement of defence [...]”. On this basis, the Tribunal considers that this objection is belated and must thus be denied. Spain’s explanation that it put forward such objection in response to the Claimants’ Reply is unconvincing, as in that submission the Claimants only mentioned “reflective losses” once and *en passant*.¹⁸³ There is thus no reason to consider the delay justified in accordance with Article 23(2), last sentence, of the UNCITRAL Rules.

D. JURISDICTION *RATIONE TEMPORIS*

1. The Respondent’s position

378. Spain contends that “some of the acts that Claimants allege to be breaches of the Treaty occurred before a large portion of Claimants’ investments were made”.¹⁸⁴

379. According to Spain, since the Claimants brought this arbitration as a group, they can only challenge acts that occurred after the last of their investments was made.¹⁸⁵ Any distinction among claims would breach the Joinder Agreement.¹⁸⁶

380. The last investment was made on 12 May 2017 by Mr. José María Casanueva y Llaguno. Hence, any acts that occurred prior to 12 May 2017 fall outside the scope of the Tribunal’s jurisdiction. Spain submits this objection primarily related to the complaints about the public deposit withdrawals in 2015 and 2016.

2. The Claimants’ position

381. The Claimants argue that all of them, except for Mr. José Casanueva y Llaguno, had made their investments by December 2016.¹⁸⁷ Consequently, the Tribunal has jurisdiction over the claims arising from events that occurred in 2017. The Claimants have summarized the “temporal terms” of each of the impugned actions and omissions in the following table:¹⁸⁸

¹⁸³ See Respondent’s letter, 27 December 2021, para. 7.

¹⁸⁴ SoD, para. 635.

¹⁸⁵ Request for Trifurcation, paras. 127-154; SoD, paras. 635-666; Rejoinder, paras. 752-795; R-PHB1, paras. 26-31; R-PHB2, paras. 14-15.

¹⁸⁶ SoD, para. 664, referring to Joinder Agreement.

¹⁸⁷ C-PHB1, paras. 356-365; C-PHB2, paras. 209-213. The Claimants accept that the Tribunal can render one award, in which it grants relief to all but Mr. José Casanueva y Llaguno.

¹⁸⁸ Response to the Request for Trifurcation, paras. 64-71; Reply, paras. 405-407; C-PHB1, paras. 356-365; C-PHB2, paras. 209-213.

Actions and omissions imputed by the claimants	Temporary terms
Withdrawal of deposits ¹²⁶	From October 2016 until May 2017
Non-suspension of operations at short ¹²⁷	Undetermined date
Public statements	10th of April – 18th of May 2017
Contracting of valuers by SRB ¹²⁸	23th of May 2017
Extended session of SRB on BPE followup	24th of May 2017
Procuring an Investment Bank through FROB	30th of May 2017
BPE sends guidelines for the selling process	3rd of June 2017
Signing of confidentiality agreements	4th of June 2017
Provision of ELA ¹²⁹	5-6th of June 2017
FOLTF Statement	6th of June 2017
Resolution statement and sale to Banco Santander	6-8th of June 2017

382. The Claimants consider that all these events fall within the Tribunal's *ratione temporis* jurisdiction. They specify that they do not impugn the withdrawals that occurred in 2015 on their own, but together with the withdrawals effected in 2016-2017.¹⁸⁹

3. Analysis

383. The Parties' positions in respect of this objection have evolved throughout the case. Initially, Spain argued that the Claimants had not provided sufficient details on the timing of their share and bond acquisitions in Banco Popular and, accordingly, had not proven ownership of their alleged investments at the relevant times.¹⁹⁰ In response to Spain's argument, the Claimants summarized the information regarding the timing of their investments first in Annex A to their Reply and subsequently in Annex I to their first PHB,¹⁹¹ while at the same time acknowledging certain jurisdictional shortcomings in respect of one individual Claimant, as further described below. As a result of this evolution of the Parties' position and the additional documents supplied by the Claimants, Spain has finally articulated its defense on the following two main arguments. First, Spain contends that some of the acts of which the Claimants complain

¹⁸⁹ Reply, paras. 408, 418. See also C-PHB1, paras. 357-358; C-PHB2, para. 211.

¹⁹⁰ SoD, paras. 637-639.

¹⁹¹ Annex I to the C-PHB1 is said to be a "[r]eplacement of Annex 1 in SoC", which was entitled "Claimants' holdings as of June 6, 2017".

took place before the Claimants made their investments. Second, it maintains that because the “Claimants elected to bring their claims collectively and litigate them as a group, their claims are limited to establishing Spain’s liability on the basis of acts or omissions that occurred after the *latest-in-time investment* was made by *any* of the Claimants”.¹⁹²

384. The Tribunal starts with the second argument according to which the relevant date to establish the Tribunal’s temporal jurisdiction is the last date on which *any* of the individual Claimants purchased shares or bonds in Banco Popular. In essence, Spain argues that the Joinder Agreement requires the Claimants to present a “homogenous claim”. Consequently, because Mr. Casanueva invested as late as May 2017, jurisdiction *ratione temporis* should be assessed for all Claimants as of that date. In support, Spain contends that “the expectations that any of the Claimants could have had in 2013 are different from the expectations that Claimants had when acquiring shares in 2016 or 2017 and therefore cannot form the basis of a single and homogenous claim for all Claimants”.¹⁹³

385. In this arbitration, each individual Claimant raises claims in his or her own name. Even though all the individual Claimants chose to act together in one single proceeding, the Tribunal must ensure that it has jurisdiction over each individual claim. Indeed, as noted by the tribunal in *PV Investors v. Spain*, in an aggregate proceeding with multiple claimants, “the Tribunal must satisfy itself that the jurisdictional requirements are satisfied in relation to each claimant”.¹⁹⁴ If the inquiry were to show that a given Claimant or investment falls outside of the scope of the Treaty, such conclusion would not automatically affect all the other Claimants. The Respondent has not advanced any convincing reason why a jurisdictional flaw that only affects certain of the Claimants would automatically extend to the entire group and nothing in the Joinder Agreement suggests such an outcome. Spain’s further argument regarding legitimate expectations is equally to no avail in this context, as it conflates matters of jurisdiction and liability. Indeed, a tribunal could well have jurisdiction over a number of claimants who made

¹⁹² Rejoinder, para. 758 (emphasis added).

¹⁹³ R-PHB1, para. 28.

¹⁹⁴ *PV Investors v. Spain*, PCA Case. 2012-14, Preliminary Award, 13 October 2014, para. 99.

their investments at different times on the basis of different expectations and whether they were frustrated would then be a matter for the merits, not jurisdiction.¹⁹⁵

386. Consequently, regardless of the fact that the Claimants have started this arbitration as a group, the Tribunal must examine whether the *ratione temporis* jurisdictional requirements are satisfied in relation to each Claimant.

387. As already noted, the Treaty limits the Tribunal's jurisdiction to "[a]ny dispute which may arise between one of the Contracting Parties and an investor of the other Contracting Party due to alleged non-compliance with an obligation under this Agreement" ("*Toda controversia [...] derivada de un presunto incumplimiento de una obligación establecida en este Acuerdo*").¹⁹⁶ Because the Treaty provides for dispute resolution only with respect to the substantive standards set forth in the Treaty, the non-retroactivity principle (Article 28 VCLT) limits the disputes over which the Tribunal has jurisdiction.¹⁹⁷ More specifically, and as far as relevant here,¹⁹⁸ a Contracting Party's obligations to any given investor of the other Contracting Party only arise after the date of the investment by the qualifying investor, at which point in time the Treaty obligations become applicable to such qualifying investor. For that reason, tribunals have

¹⁹⁵ See also *PV Investors v. Spain*, PCA Case. 2012-14, Preliminary Award, 13 October 2014, para. 99 ("What matters is that disputes between one of the Contracting Parties and an investor be adjudged in their individual dimension, i.e., in the same way as they would be in [a treaty] arbitration with a single claimant. This means in particular that, at the present jurisdictional stage, the Tribunal must satisfy itself that the jurisdictional requirements are satisfied in relation to each claimant. *Insofar as there may be differences between the Claimants, in terms for instance of alleged legitimate expectations or losses, these differences will be examined at the merits stage of the procedure*", emphasis added).

¹⁹⁶ See **Exh. C-1**, Treaty, Article IX, dealing with the obligation to notify the dispute, and Article XI, entitled "Referral to Arbitration", which cross-references the same notification ("[p]rovided that six months have elapsed since the *notification referred to in article IX*, the disputing investor may submit the claim to arbitration in accordance with [...]"). (emphasis added).

¹⁹⁷ See **Exh. RL-0002**, *Philip Morris v. Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, para. 528 (finding that the theoretical distinction between jurisdiction *ratione temporis* and the temporal application of the substantive standards "is unnecessary when the cause of action is founded upon a treaty breach").

¹⁹⁸ In addition to the requirements discussed in the text, the Treaty must be into force when the alleged breach occurs. In this case, it is not disputed that the Treaty entered into force before any of the challenged acts occurred and any of the Claimants made their investments.

consistently held that an investor bringing a claim based on a treaty obligation must have owned or controlled the investment when that obligation was allegedly breached.

388. As explained by the tribunal in *Renée Rose Levy and Gremcitel v. Peru*:

"146. [...] where the claim is founded upon an alleged breach of the Treaty's substantive standards, a tribunal's jurisdiction is limited to a dispute between the host state and a national or company which has acquired its protected investment *before the alleged breach occurred*. In other words, the Treaty must be in force and the national or company must have already made its investment when the alleged breach occurs, for the Tribunal to have jurisdiction over a breach of that Treaty's substantive standards affecting that investment.

147. *This conclusion follows from the principle of non-retroactivity of treaties*, which entails that the substantive protections of the BIT apply to the state conduct that occurred *after these protections became applicable to the eligible investment*. Because the BIT is at the same time the instrument that creates the substantive obligation forming the basis of the claim before the Tribunal and the instrument that confers jurisdiction upon the Tribunal, a claimant bringing a claim based on a Treaty obligation must have owned or controlled the investment when that obligation was allegedly breached."¹⁹⁹

389. The Tribunal must thus determine the dates of (1) the alleged breach(es) and (2) the relevant investment(s).²⁰⁰ If (1) has occurred before (2), the Tribunal lacks jurisdiction *ratione temporis* over disputes derived from such alleged breaches.

390. In this case, because (1) the Claimants complain of a variety of measures and (2) they have made their investments at different times, the analysis must necessarily address both of these aspects and their combination.

391. With regard to the contested measures, the Tribunal notes that, with the exception of the so-called early deposit withdrawals of 2015-2016 (to which the Tribunal will revert), all of the impugned measures date from 2017 onwards.²⁰¹ Initially Spain objected to the Tribunal's jurisdiction *ratione temporis* over the claims concerning Spain's alleged failure to suspend short sales (for which the Claimants' table reproduced above at para. 381 indicated an "undetermined date"). However, in their Response to the Trifurcation Request, the Claimants clarified that although in the SoC they "did not assign a specific date to Respondent's failure to suspend short sales, they explained that Banco

¹⁹⁹ **Exh. CL-0119**, *Renée Rose Levy de Levi and Gremcitel S.A v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, 9 January 2015, paras. 146-147.

²⁰⁰ As mentioned *supra* in footnote 198, it is not disputed that the Treaty entered into force before the challenged acts occurred and the Claimants made their investments.

²⁰¹ See chart reproduced above at para. 381.

Popular's financial position became critical in January 2017. [...] *That is when a short-sale ban would have been appropriate, so the short-sale omission falls into the 2017 timeframe [...]*".²⁰² The Tribunal thus understands that the Claimants are raising claims in respect of Spain's alleged failure to suspend short sales only from 2017 onwards. As a result, all of the measures of which the Claimants complain, with the exception of the early deposit withdrawals, were taken after January 2017.

392. With regard to the dates of the relevant investments, the Tribunal has reviewed the evidence filed by the Claimants on their acquisition of shares and bonds in Banco Popular and is satisfied that, subject to the qualifications in the following paragraphs, all of them had acquired their investments by the end of 2016, i.e., before the 2017 date of the earliest impugned measure.
393. The first qualification concerns Mr. José Casanueva y Llaguno (i.e., Claimant 40), who purchased his shares in Banco Popular on 12 May 2017.²⁰³ In their first PHB, the Claimants conceded that "the only Claimant that did not invest prior to December 2016 is Mr. José Casanueva y Llaguno" and maintained that "[t]he most obvious means to address this issue is to omit [Mr. Casanueva y Llaguno] from the final Award", which "the Consolidation Agreement does not prevent the Tribunal from doing [...]".²⁰⁴ In their second PHB, they referred back to that submission and confirmed that they had "agreed to drop that investor and his investments from the arbitration".²⁰⁵
394. The Tribunal has taken note that the Claimants have "dropped" Mr. Casanueva y Llaguno from the arbitration and thus confirms that he may not claim in these proceedings.
395. The second qualification concerns disputes arising out of the so-called early public deposit withdrawals that occurred in 2015-2016, i.e. before the end of 2016 (at which point all of the Claimants, save for Mr. Casanueva, had made their investments). The

²⁰² Response to Trifurcation Request, para. 68 (emphasis added).

²⁰³ See Reply, **Appendix B-34**, José María Casanueva y Llaguno - Bank Statement Extracts, p. 3.

²⁰⁴ C-PHB1, para. 361.

²⁰⁵ C-PHB2, para. 210 ("With respect to the single individual who did not purchase shares or bonds until 2017, Mr. José Casanueva y Llaguno, Claimants agreed to drop that investor and his investments from the arbitration"), citing to C-PHB1, para. 361.

question here is whether the Tribunal has jurisdiction over disputes arising out of these withdrawals.

396. The Tribunal starts by noting that the Claimants do not allege that the 2015-2016 deposits constitute breaches of the Treaty in and of themselves. Rather, they contend that “[e]ven though Respondent’s deposit withdrawals took place prior to that date [December 2016], those acts are properly before this Tribunal *because of their continuing nature* and their connection to Respondent’s later challenged acts that also led to the destruction of Claimants’ investment”.²⁰⁶
397. As a result of this argumentation, it is important to clarify certain distinctions linked to the duration of a wrongful act. The ILC Articles on State Responsibility distinguish between (i) instantaneous (or simple, or one-time, or non-continuing) (Article 14(1)), (ii) continuing (Articles 14(2) and (3)), and (iii) composite wrongful acts (Article 15).
398. An instantaneous wrongful act entails that the act and its consequence are fixed at a particular point in time.²⁰⁷ This is the case for instance of a nationalization decree which is performed on the date of that decree.²⁰⁸ The notion of instantaneous act is reflected in Article 14(1) ILC Articles as follows:

“1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.”

399. A wrongful act with a continuing character, by contrast, is an act of the same nature as an instantaneous act, but extends over a period of time, a classic example being a State’s wrongful detention of an individual, which continues throughout the period of detention. As formulated in ILC Articles 14(2) and (3):

²⁰⁶ C-PHB1, para. 359.

²⁰⁷ In James Crawford’s words, “the wrongful act itself can be narrowed down to a single date – virtually a single moment in time – and anything that continues afterwards represents the effects of the breach, rather than a continuation of the act itself”. James Crawford, *State Responsibility: The General Part* (CUP, 2013), p. 255.

²⁰⁸ **Exh. CL-193**, *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections, 1 June 2012, para. 2.67; **Exh. CL-50**, ILC Articles, Commentary *ad Art. 14*, para. 4; James Crawford, *State Responsibility: The General Part* (CUP, 2013), p. 254; **Exh. RL-0416**, *Infinito Gold v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021, paras. 231-233.

“2. The breach of an international obligation by an act of a State *having a continuing character* extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.”

400. Finally, a composite act is composed of a series of different acts that extend over that period. In other words, a composite act results from an aggregation of other acts and has acquired a different legal characterization than those other acts. The relevant provision is Article 15 of the ILC Articles which reads as follows:

“1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.”

401. The Claimants’ submissions dealing with the characterization of the deposit withdrawals are unclear. In their Reply, the Claimants contended that they “are not alleging that any one of the 2015 withdrawals constitutes a violation of the Treaty on its own”, adding that “Claimants’ position is that it is the *totality* of the withdrawals and their *cumulative* effect on their investments that amount to a breach of the Treaty”.²⁰⁹ The mention of the “totality” of the withdrawals and their “cumulative effect” could have been understood as a reference to a composite act, i.e. a “series of actions or omissions *defined in aggregate as wrongful*” according to Article 15(1) of the ILC Articles quoted above. However, a few paragraphs later, the Claimants noted that “[t]he relevant article of the ILC Articles on State Responsibility for Internationally Wrongful Acts is actually Article 14, and in particular, Commentary 12 thereto”,²¹⁰ and specified that the “Respondent’s behavior constitutes a *continuing* breach of the Treaty and should be treated as such”.²¹¹ Notwithstanding this specification, at the May Hearing they referred

²⁰⁹ Reply, para. 408 (emphasis added). They also stated that “[w]hile the later deposit withdrawals would not have had the same effect without the earlier withdrawals, it is not the case that the early withdrawals, in and of themselves, constitute the “breach” in this case. Rather, it was Respondent’s decision to force [Banco Popular]’s sale via resolution, when the bank was already gasping for air in the midst of its run on deposits, that constituted the breach. This breach occurred in 2017”. Ibid., para. 409.

²¹⁰ Reply, para. 413.

²¹¹ Reply, para. 413 (emphasis added).

to Article 15 of the ILC Articles.²¹² Further, in their first PHB, while insisting on their characterization of a “continuing breach”,²¹³ they cited both Articles 14 and 15.²¹⁴ Finally, in their second PHB, the Claimants argued more generally that “the deposit withdrawals are covered by the ILC Articles, which provides that a continuing act receives protection as long as the later acts benefit from treaty protection”.²¹⁵

402. Be this as it may, the early deposit withdrawals of which the Claimants complain cannot be characterized as continuing wrongful acts. As explained by the ILC, “[a]n act does not have a continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which continues”.²¹⁶ The examples of continuing wrongful acts given by the ILC include “the maintenance in effect of legislative provisions incompatible with treaty obligations of the enacting State, unlawful detention of a foreign official or unlawful occupation of embassy premises, maintenance by force of colonial domination, unlawful occupation of part of the territory of another State or stationing armed forces in another State without its consent”.²¹⁷ By comparison to those illustrations, the deposit withdrawals appear like instantaneous or one-time simple acts. The Claimants have made no serious effort to show how they could be “continuing” in nature. Being instantaneous acts, they fall outside of the Tribunal’s temporal jurisdiction, because they were committed before the relevant cut-off dates of the Claimants’ investments.

403. At most, the contested acts could constitute composite acts within the meaning of Article 15 of the ILC Articles. As noted above at para. 402, even if the Claimants made some references to Article 15 of the ILC Articles in their pleadings, their submissions taken as a whole suggest that the early deposit withdrawals should be characterized as continuing acts within Article 14 of the ILC Articles (a view which the Tribunal has dismissed in the preceding paragraph). Even if the Tribunal had misunderstood the Claimants’ submissions and they *did* characterize the early deposit withdrawals as composite acts, they have not sufficiently substantiated their argument on the effect of a composite breach on the Tribunal’s temporal jurisdiction. Therefore, the Tribunal’s

²¹² Claimant’s Opening Statement, slide 90, referring to “ILC Draft Articles on State Responsibility, Art. 15 and Art. 15, Commentary 11”.

²¹³ C-PHB1, para. 358.

²¹⁴ C-PHB1, fn. 712.

²¹⁵ C-PHB2, para. 211.

²¹⁶ **Exh. CL-50**, ILC Articles, Commentary, *ad* Art. 14, para. 6.

²¹⁷ **Exh. CL-50**, ILC Articles, Commentary, *ad* Art. 14, para. 3.

analysis could stop here. However, for the sake of completeness the Tribunal will examine whether it has jurisdiction *ratione temporis* over such composite acts.

404. The starting point in the Tribunal's analysis is the temporal rule enshrined in Article 13 of the ILC Articles, whereby "[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs".

405. With regard to the potential intertemporal issues raised by composite acts, the ILC Commentary to Article 15 clarifies that:

"In accordance with [the intertemporal principle set out in article 13], the State must be bound by the international obligation for the period during which the series of acts making up the breach is committed. *In cases where the relevant obligation did not exist at the beginning of the course of conduct but came into being thereafter*, the "first" of the actions or omissions of the series for the purposes of State responsibility will be *the first occurring after the obligation came into existence*."²¹⁸

406. This is only logical because, as explained by Pauwelyn, if a court or tribunal "took into account acts *prior* to the date of entry into force of the obligation and found that a practice [i.e. a composite act] has been established, it would automatically act contrary to the principle of non-retroactivity since the breach would then start on a date at which the obligation was not yet in force".²¹⁹

407. Thus, acts that have occurred before the Treaty obligations came into existence or became applicable cannot serve as a potential basis of liability.²²⁰ However, "[t]his need not prevent a court taking into account earlier actions or omissions for other purposes

²¹⁸ **Exh. CL-50**, ILC Articles, Commentary, *ad* Art. 15, para. 11 (emphasis added).

²¹⁹ J. Pauwelyn, *The Concept of a "Continuing Violation" of an International Obligation: Selected Problems* (1995) 66 BYBIL 415, 447, cited in Z. Douglas, *The International Law of Investment Claims*, Cambridge University Press (2009), p. 335, fn. 52.

²²⁰ See also Z. Douglas, *The International Law of Investment Claims*, Cambridge University Press (2009), p. 335, noting that "if the first acts of the series are alleged to have occurred before the treaty enters into force", "the intertemporal principle once again trumps all other considerations. The host state cannot be liable to pay damages for the prejudice caused to an investment by the first acts of the series [of an alleged composite act] if at the time of those first acts the obligation in question was not in force in the host state".

(e.g. in order to establish a factual basis for the later breaches or to provide evidence of intent)".²²¹

408. In the present dispute, no obligation of Spain was applicable to any of the Claimants before the relevant cut-off dates of their investments. Hence, the first of the actions or omissions of the series for purposes of liability are those occurring *after* the date of each of the Claimants' investments. Accordingly, only those acts, and not the earlier ones, could give rise to an "alleged non-compliance with an obligation under this Agreement" over which the Tribunal would have jurisdiction in accordance with the Treaty's dispute resolution clause. In other words, to the extent that the Claimants are alleging that the early deposit withdrawals are part of a composite act which started before they made their investments and which was "accomplished" after the critical date, the Tribunal has no jurisdiction *ratione temporis* over those deposit withdrawals.

409. In conclusion, and subject to the limitations regarding the private/regulatory acts discussed in section VI.B.3 above, the Tribunal has no jurisdiction over disputes arising out of the public deposit withdrawals that occurred in 2015 and 2016 to the extent that such withdrawals predated the Claimants' investments.

E. JURISDICTION OVER THE DUAL SPANISH-MEXICAN CLAIMANTS

1. The Respondent's position

410. Spain argues that the Tribunal lacks jurisdiction *ratione personae* over eight of the Claimants who are dual Spanish-Mexican nationals.²²² The Respondent has advanced a number of arguments why Article XII(2) of the Treaty bars claims by dual nationals.

411. First, it contends that Article XII(2) imposes on qualifying investors "the requirements of Chapter II of the ICSID Convention", specifically Article 25(2)(a) of the ICSID

²²¹ **Exh. CL-50**, ILC Articles, Commentary, *ad* Art. 15, para. 11. As also noted by the tribunal in *MCI v. Ecuador* in the context of its discussion on jurisdiction over composite acts, "[p]rior events may only be considered by the Tribunal for purposes of understanding the background, the causes, or scope of violations of the BIT that occurred after its entry into force". *MCI v. Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, para. 93.

²²² Request for Trifurcation, paras. 111-126; SoD, paras. 667-700; Rejoinder paras. 796-832; R-PHB1, paras. 32-33; R-PHB2, para. 17. The eight dual Mexican-Spanish Claimants are: Antonio del Valle Ruiz, Antonio Cosío Arió, Carlos Ruiz Sacristán, Jaime Ruiz Sacristán, Jorge Esteve Recolons, José Manuel Fierro Von Mohr, Luis de Garay Russ, and Rogelio Barrenechea Cuenca. See SoD, fn. 1006.

Convention which prohibits dual nationals from bringing an ICSID claim against their State of nationality.²²³

412. Second, relying on the practice of investment tribunals, the Respondent argues that the prohibition on claims by dual nationals also applies to UNCITRAL proceedings.²²⁴ In the Respondent's view, the notion of "investor" under the BIT cannot have two different meanings depending on the forum in which a claim is submitted.²²⁵ Thus, regardless of the arbitration rules which a claimant chooses, the Treaty must be interpreted as "if these proceedings took place under the ICSID Convention".²²⁶
413. Third, in the Respondent's submission, the Treaty protects only investments made by investors of one Contracting Party in the territory of the *other* Contracting Party, which thus excludes investments by dual nationals from its scope of protection.²²⁷ Spain notes that numerous BIT provisions refer to investors "of the other Contracting party", in particular Articles I(4), I(5), II(1), III, IV and IX.²²⁸ Furthermore, in the Respondent's view, a teleological interpretation also leads to excluding dual nationals from the protection of the Treaty. For Spain, the object and purpose of the Treaty, as reflected in its preamble, is to intensify Mexico's and Spain's economic cooperation for their reciprocal benefit and create favourable conditions for investments made by investors of one Contracting Party in the territory of the other.²²⁹ Thus, the Treaty makes it clear that it does not protect "investments made in the territory of a Contracting Party by those who hold the nationality of said Contracting Party".²³⁰
414. Fourth, contrary to the Claimants' assertions about Spain's treaty practice, the latter has expressly excluded dual nationals from the protection of its BITs only when the other contracting party so requested. The Respondent underscores that, out of its 88

²²³ SoD, paras. 670-672; Rejoinder, para. 803. See also Trifurcation Request, paras. 116-118.

²²⁴ SoD, paras. 674 ff. referring to **Exh. RL-0092**, *Enrique and Jorge Heemsen v. the Bolivarian Republic of Venezuela*, PCA Case No. 2017-18, UNCITRAL, Award on Jurisdiction, 29 October 2019, para. 419; **Exh. RL-0091**, *Manuel García Armas and others v. the Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Award on Jurisdiction, 13 December 2019, para. 715.

²²⁵ SoD, para. 673.

²²⁶ SoD, paras. 676.

²²⁷ SoD, paras. 678-679.

²²⁸ SoD, paras. 680-683.

²²⁹ SoD, para. 677.

²³⁰ SoD, para. 680.

investment treaties, only two BITs, the Spain-Uruguay BIT and Spain-Colombia BIT, expressly exclude dual nationals from the scope of the treaty. In the Respondent's contention, this shows that Spain "did not deem such a clause as necessary".²³¹

415. Moreover, the Respondent maintains that customary international law and the principle of non-responsibility codified in the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, as applied by investment tribunals,²³² bar dual nationals from bringing claims against their States of nationality.²³³ For the Respondent, investment arbitration would be "completely distorted" if investors were allowed to sue their State of nationality.²³⁴
416. Finally, while Spain does not appear to take an express position on the "dominant and effective" nationality criterion, it contends that "if [the Tribunal] deems it appropriate to take into account the effective and dominant nationality",²³⁵ it should conclude that the Claimants have not offered any evidence to support their arguments that the dual national Claimants are predominantly Mexican. By contrast, Spain has shown that these individuals make "effective and habitual use" of their Spanish nationality by, for instance, frequently travelling with their Spanish passport.²³⁶
417. In light of these arguments, Spain concludes that the Tribunal lacks jurisdiction over the eight Claimants who hold dual Mexican-Spanish nationality.²³⁷

²³¹ SoD, paras. 692. See **Exh. CL-115**, Spain-Uruguay Agreement on the reciprocal promotion and protection of investments, Art. I(3)(c); **Exh. CL-242**, Spain-Colombia BIT, Art. 11(5).

²³² SoD, paras. 695-700, referring to **Exh. RL-0091**, *Manuel García Armas and others v. the Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Award on Jurisdiction, 13 December 2019, para. 662.

²³³ SoD, para. 696; Rejoinder, para. 825 ff.

²³⁴ SoD, paras. 695.

²³⁵ Rejoinder, para. 828 (emphasis added).

²³⁶ Rejoinder, paras. 830-831.

²³⁷ SoD, paras. 667-668. Rejoinder, para. 796 ff.

2. The Claimants' position

418. The Claimants argue that the Tribunal has jurisdiction to hear the claims of the Claimants who are dual nationals.²³⁸ For the Claimants, Spain's dual nationality objection has no basis in the Treaty.²³⁹
419. First, according to the Claimants, the definition of "investor" in Article I(5)(a) of the Treaty includes *any* physical person who is a national of a Contracting Party and has made an investment in the territory of the other Contracting Party, without any further requirements or limitations.²⁴⁰ Relying on a number of decisions by investment tribunals, the Claimants argue that the absence of a specific exclusion means that the Treaty protects dual nationals.²⁴¹ The Claimants maintain that, contrary to the Respondent's submission, the goal of the Treaty, in particular the promotion of "intensive economic cooperation for the mutual benefit of both countries" as reflected in the preamble, is fulfilled through "cross-investment regardless of dual nationality".²⁴² If the Respondent intended to exclude dual nationals from the protection of the Treaty, so say the Claimants, it would have done so expressly as it did in its BITs with Uruguay and Colombia.²⁴³
420. Second, in the Claimants' interpretation, Article XII of the Treaty does not transpose the requirements of the ICSID Convention to an UNCITRAL arbitration. It simply requires the Parties to provide their unconditional consent to ICSID arbitration in writing.²⁴⁴

²³⁸ Reply, paras. 428-447; C-PHB1, paras. 371-374; C-PHB2, paras. 214-215.

²³⁹ Reply, para. 428 ff.

²⁴⁰ Reply, para. 430.

²⁴¹ Reply, paras. 435-438, referring to **Exh. CL-114**, *Serafín García Armas and Karina García Gruber v. Bolivarian Republic of Venezuela*, PCA Case No. 2013-3, Decision on Jurisdiction, 15 December 2014, paras. 192-93; **CL-117**, *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008, para. 415; **CL-241**, *Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt*, PCA Case No. 2012-07, Decision on Jurisdiction, 30 November 2017.

²⁴² Reply, para. 430.

²⁴³ Reply, para. 431, referring to **Exh. CL-115**, Spain-Uruguay BIT, Agreement on the reciprocal promotion and protection of investments Art. I(3)(c); **Exh. CL-242**, Spain-Colombia BIT, Art. 11(5).

²⁴⁴ Reply, paras. 432-433.

421. Third, it is the Claimants' position that the Treaty prevails as *lex specialis* over general principles of international law or customary international law.²⁴⁵ Therefore, as the Treaty contains a broad definition of investor, it protects dual nationals.²⁴⁶
422. If, contrary to their primary position, customary international law were applicable, the Claimants contend that the Tribunal should apply the "dominant and effective" nationality test adopted by the ICJ in *Nottebohm* in the context of diplomatic protection. In application of such criterion, they argue that the "dominant and effective" nationality of the eight Claimants at issue is Mexican.²⁴⁷ They explain that these individuals (i) reside in Mexico; (ii) have their centre of business and professional interests in Mexico; (iii) have Mexican children, parents, and spouses, who also and reside in Mexico; (iv) pay taxes in Mexico; and (v) conduct their public lives in Mexico. The Claimants assert that the Claimants holding dual nationality use their Spanish passports only as a "convenience item".²⁴⁸ Therefore, they cannot be considered Spanish nationals for the purposes of these proceedings.²⁴⁹
423. In summary, the Claimants conclude that the Respondent's objection to jurisdiction should be dismissed.

3. Analysis

a. *Introductory remarks*

424. In the preceding sections, the Tribunal has already referred to the rules of treaty interpretation set out in the VCLT (see, e.g., *supra* paras. 246 ff.). For the purposes of this objection, it is helpful to look at them in some more detail.
425. Article 31 VCLT, entitled "General rule of interpretation", reads as follows:

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

²⁴⁵ Reply, para. 444.

²⁴⁶ Reply, paras. 444-445.

²⁴⁷ Reply, para. 446, referring to **Exh. CL-252**, *Nottebohm* case (*Liechtenstein v. Guatemala*), 2nd phase, Judgment of 6 April 1995, 1995 ICJ Reports, p. 23.

²⁴⁸ Reply, para. 447.

²⁴⁹ Reply, para. 447.

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

[...]"

426. Article 31 of the VCLT contains "the general rule" of treaty interpretation. The singular mode emphasizes that the provision contains one single rule.²⁵⁰ Its first paragraph refers to wording, context and object and purpose, which, together with the guiding principle of good faith, constitute integral parts of that rule and must be applied in a single combined operation. Paragraph 2 sets out certain elements of the context, whereas paragraph 3 lists additional interpretative means to be used along with the context. As noted by one commentator, it transpires from the formulations used in the first three paragraphs of Article 31 "that the various means mentioned in Article 31 are all of equal value; none are of an inferior character" and "all means will be considered in one and the same, single process of application".²⁵¹

427. The Tribunal will apply the various elements referred in Article 31(1) in turn.²⁵²

b. *The Treaty terms in their ordinary meaning, context and in light of the object and purpose (Article 31(1))*

428. The jurisdiction of this Tribunal derives from Articles IX *et seq.* of the Treaty. Specifically, Article IX(1) requires a prospective claimant to notify in writing "[a]ny dispute which may arise between one of the Contracting Parties and an investor of the

²⁵⁰ See O. Dörr, *Vienna Convention on the Law of Treaties: A Commentary*, Springer (2nd ed., 2018), p. 561.

²⁵¹ M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Nijhoff (2009), p. 435.

²⁵² As the ICJ stated in *Libya v. Chad*, "[i]nterpretation must be based above all upon the text of the treaty" (**Exh.- CL-239**, Territorial Dispute (*Libyan Arab Jamahiriya v. Chad*), Judgment, ICJ Reports 1994, para. 41).

other Contracting Party due to alleged non-compliance with an obligation under this Agreement". Under Article IX(3), if "the dispute" thus notified cannot be settled within six months, "it shall be submitted to the dispute settlement mechanism stipulated in this Section", including the international arbitration options provided under Article XI. Article XI, in turn, cross-references the notification requirement under Article IX. Hence, the jurisdiction of this Tribunal is limited to "[a]ny dispute which may arise between one of the Contracting Parties and an *investor* of the *other* Contracting Party" (emphasis added).

429. The term "investors" is defined in Article I(5)(a) as "[p]hysical persons who are nationals of one of the Contracting Parties in accordance with its laws [...] which has made an investment in the territory of the *other* Contracting Party" (emphasis added). Therefore, jurisdiction extends to a dispute between a "national of one of the Contracting Parties" and the "other" Contracting Party. It is beyond dispute that, according to the ordinary meaning of the word, the term "other" employed in both Articles I(5)(a) and IX requires diversity of nationality between a putative claimant and the respondent State.²⁵³
430. The context of Articles I(5)(a) and IX *et seq.* and the objectives of the BIT support this interpretation. Under the general rule of interpretation laid down in Article 31(1), "the terms of a treaty have to be interpreted 'in their context', which means that the interpreter of any phrase in a treaty has to look at the treaty as a whole and, as Art 31 paras 2 and 3 demonstrate, even beyond that".²⁵⁴ In this exercise, "[t]he entire text of the treaty is to be taken into account as 'context', including title, preamble and annexes".²⁵⁵ Looking at the treaty as a whole, it is clear that the BIT is premised on the grant of substantive and procedural protection to investors of one Contracting Party vis-à-vis the *other* Contracting Party. First, the term "investment", which is referred to in the definition of "investors" at Article I(5)(a) *in fine*, requires assets to be "owned or controlled by investors of one of the Contracting parties and established in the territory

²⁵³ See, e.g., the definition of "other" in the Cambridge Dictionary: "*different* from the thing or person already mentioned". See <https://dictionary.cambridge.org/dictionary/english/other> (emphasis added). Similarly, according to the Oxford dictionary, the term "other" denotes "a person or thing that is *different* or distinct from one already mentioned or known about" (emphasis added). See <https://www.lexico.com/definition/other>.

²⁵⁴ O. Dörr, *Vienna Convention on the Law of Treaties: A Commentary*, Springer (2nd ed., 2018), p. 582.

²⁵⁵ *Ibid.*

of the *other* Contracting Party”.²⁵⁶ Second, nearly all of the BIT’s substantive provisions concern the manner in which one Contracting Party ought to treat investors of the *other* Contracting Party.²⁵⁷ In addition, several of the non-discrimination provisions contained in the Treaty (see, e.g. Articles III(1), III(2), VI) require a Contracting Party to grant investors of the other Contracting Party the same treatment it grants “to its own investors”. These provisions only make sense if one moves from the premise that, from the viewpoint of a Contracting Party, protected investors are only those having the nationality of the *other* Contracting Party. The investor-State dispute settlement provision, for its part, is included in a section that is entitled “Disputes Between One Contracting Party And Investors Of The *Other* Contracting Party”.²⁵⁸ Finally, the preamble of the BIT, which can “be of both contextual and teleological significance”,²⁵⁹ recalls the Contracting Parties’ wish “to intensify economic cooperation for the mutual benefit of both countries” and their intention “to create favourable conditions for investments made by either Contracting Party in the territory of the *other*” (emphasis added).

431. In sum, the BIT does not establish an investment framework for domestic investors, but rather aims at protecting investors having a different nationality from the one of the host State. As noted by one investor-State tribunal, diversity of nationality is the rule under the overwhelming majority of investment treaties, where nationals of the host state are

²⁵⁶ **Exh. C-1**, Treaty, Art. 1(4).

²⁵⁷ See **Exh. C-1**, Treaty, Articles II (“(1) Each Contracting Party shall accept investments by investors of the *other* Contracting Party in accordance with its legislation. (2) In order to promote *reciprocal* investment flows, the Contracting Parties shall [...]”); III (“(1) Each Contracting Party shall give in its territory to the investments of investors of the *other* Contracting Party treatment that [...]; (2) Each Contracting Party shall give to the investors of the *other* Contracting Party [...] (3) The treatment granted under paragraphs 1 and 2 above shall not be interpreted as an obligation on either of the Contracting Parties to extend to the investors of the *other* Contracting Party and to their investments the benefits of [...]”); IV (“(1) Each Contracting Party shall give to the investments of investors of the *other* Contracting Party treatment [...]”); VI (“Investors of one Contracting Party whose investments in the territory of the *other* Contracting Party suffer losses owing to war, other armed conflicts, a state of national emergency, a rebellion or mutiny, or other similar circumstances, shall be accorded [...]”); VII (“1. Each Contracting Party shall guarantee that all transfers relating to an investment of an investor of the *other* Contracting Party are made freely and without delay”). All emphases added.

²⁵⁸ **Exh. C-1**, Treaty, Chapter III, Section One (emphasis added).

²⁵⁹ O. Dörr, *Vienna Convention on the Law of Treaties: A Commentary*, Springer (2nd ed., 2018), p. 583.

normally not allowed to bring investment treaty claims against their home state.²⁶⁰ This rule is consistent with the well-established principle of international law that an individual or entity may not bring an international claim against its own State. In this sense, the investment treaty system is still based on traditional notions of nationality and reciprocity and can be contrasted with the evolution undergone in the field of human rights, where individuals are able to bring claims against the State regardless of their nationality. Indeed, under human rights law, even nationals of the respondent State and stateless individuals are able to bring claims against a State.

432. In consequence, the requirement for diversity of nationality is the starting point of the Tribunal's inquiry into jurisdiction *ratione personae*.
433. The situation where an investor of a Party possesses the nationality of the home State *and* the nationality of the respondent/host State, to which the Tribunal will refer as the "dual national" situation,²⁶¹ is not expressly addressed in the Treaty. The Tribunal cannot agree with either of the Parties' primary positions that dual nationals are included or respectively excluded by the Treaty text.
434. For the Claimants, in the absence of any express indication to the contrary, claims by dual nationals must necessarily be deemed permitted. However, the Tribunal sees nothing in the Treaty's wording supporting this conclusion. The only indication in the Treaty is that an investor may not bring a claim against its own State Party. If anything, the word "one" in Article I(5)(a) could imply that individuals holding the nationalities of more than one of the Contracting Parties would not qualify as "investors" under the Treaty. However, the Tribunal is unconvinced by such a reading of the clause as the term "one" in this context is simply synonymous to the determiner "a" (as is also clear in the authentic Spanish language version: "*nacionalidad de una Parte Contratante*").
435. On the other hand, the Tribunal sees no reason to adopt Spain's position according to which the text of the Treaty leads to an automatic exclusion of dual nationals, without

²⁶⁰ *PV Investors v. Spain*, PCA Case. 2012-14, Preliminary Award, 13 October 2014, para. 257.

²⁶¹ A dual national situation could also arise if the investor has the nationality of the home State and of a third State (but not that of the respondent State). This is not the situation in this dispute. Hence, as stated in the text, the term "dual national" will be used solely to refer to the situation in which an investor of a Party possesses, at the same time, the nationality of the home State and the nationality of the respondent/host State.

any further inquiry. Nothing in the text supports this inference and, as just mentioned, the use of the word “one” in Article I(5)(a) is insufficient to justify such an interpretation.

436. In other words, the Treaty *neither* says that investors must possess “at least one” nationality to have standing to claim *nor* does it state that they shall possess “only one” nationality, and the Tribunal is not willing to read terms into the Treaty that are not there. Rather, the Treaty text requires that an investor have the nationality of “one” Contracting Party (“*la nacionalidad de una Parte Contratante*”) and is silent on dual nationality.

437. The Respondent’s other arguments to exclude dual nationals from the Treaty protection are equally unconvincing. In particular, Spain invites the Tribunal to “import” the ICSID requirements on nationality within the Treaty even where, as here, the arbitration is not conducted under the ICSID Convention.

438. It is not in dispute that the ICSID Convention, which is one of the options listed in Article XI(1) of the Treaty, expressly bars dual nationals from bringing claims before the Centre. Article 25(2)(a) of the ICSID Convention defines “national of another Contracting Party” to the ICSID Convention in relevant part as follows:

“any natural person who had the nationality of a Contracting State other than the State party to the dispute [on the relevant dates], *but does not include any person who on either date also had the nationality of the Contracting State party to the dispute [...]*” (emphasis added).

439. While Spain does not dispute that the UNCITRAL Rules, which apply to this arbitration, do not contain a similar exclusion, it argues that the ICSID requirement also applies in the present UNCITRAL context by virtue of Article XII. This provision reads as follows:

“Article XII. Consent

1. Each Contracting Party shall give its unconditional consent to the submission of a dispute to international arbitration in accordance with the procedures laid down in this Section.

2. The consent referred to in paragraph 1 above and the submission of a claim to arbitration by a disputing investor shall meet the requirements set out in:

(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules, which require the consent in writing of the parties; and

(b) Article II of the New York Convention, which requires an agreement in writing.”

440. In the Tribunal’s view, Article XII, entitled “consent”, seeks to make it clear that each Contracting Party has given “unconditional consent” to investment arbitration in one of

the options provided under Article XI (Article XII(1)). Specifically, Article XII of the Treaty is the characteristic “agreement in writing” clause included in a number of bilateral investment treaties, which is intended to dispel any doubts that an offer-acceptance “without privity” (i.e., a State’s offer which an investor may accept by filing a claim) fulfils the “consent in writing” / “agreement in writing” requirements under the ICSID and New York Conventions respectively. Contrary to Spain’s argument, Article XII cannot serve to import the jurisdictional *ratione personae* requirements of an ICSID arbitration into an UNCITRAL arbitration. To the contrary, each of the arbitration options provided under the Treaty is governed by its own rules.

441. This is explicitly confirmed in Article XI(2) of the Treaty which states that “[t]he ICSID Convention or the rules mentioned shall govern the arbitration, except as modified by this Section” (emphasis added). The word “or” confirms that the ICSID Convention only governs if ICSID arbitration was chosen. In other words, Article XI(2) rules out the application in a non-ICSID arbitration of the ICSID *ratione personae* requirements, among which the prohibition of claims by dual nationals.
442. For the same reason, the Tribunal does not consider that the Treaty’s notion of investor must always be the same whether a claimant opts for arbitration under the ICSID Convention or under any of the other available fora. This Treaty (like many others) gives a claimant, who meets the definition of “investor” set out in Article 1(5)(a), a choice between several arbitration mechanisms. These mechanisms vary in many respects. For example, they are not subject to the same legal framework. Unlike the others, the ICSID Convention system is not subject to a national *lex arbitri* nor to the supervision of national courts and has its own award annulment and enforcement regime. In contrast, an investment arbitration conducted under the other mechanisms (ICSID Additional Facility, UNCITRAL Rules and the “other arbitration rules [...] agreed by the disputing parties”) is akin to a commercial arbitration with regard to its legal regime, i.e., it is subject to the international arbitration law of the seat and to the jurisdiction of the courts at the seat in aid and control of the arbitration (including annulment of awards), and the recognition and enforcement of awards is governed by the New York Convention.
443. The four arbitration options enumerated in Article XI are also different in terms of jurisdictional requirements. For instance, the ICSID Convention and ICSID Additional Facility Rules require respectively that either both or one of the investor’s home state or the respondent state be party to the ICSID Convention. In addition, the ICSID

Convention requires that there be a “legal dispute arising directly out of an investment” (Article 25(1) of the ICSID Convention); it also provides for particular rules on jurisdiction *ratione personae*, including rules requiring that certain critical dates be met for a claimant to qualify as national of an ICSID Contracting State (see Article 25(2) of the ICSID Convention). The other arbitration rules offered in Article XI contain no similar requirements.

444. By selecting one of the dispute settlement options available under the Treaty, a claimant opts into a particular legal framework. In this case, the Claimants have opted for the legal framework that arises from the combination of the Treaty requirements with the UNCITRAL Arbitration Rules, which do not include any rule analogous to Article 25(2)(a) of the ICSID Convention.
445. Furthermore, the Tribunal would find it rather extraordinary that the two Contracting Parties would have intended the ICSID Convention requirements to apply to all the arbitration options included in the Treaty, when at the time of the conclusion of the Treaty in 2006, Mexico had neither signed nor ratified the ICSID Convention (which it did twelve years later).²⁶²
446. In sum, a textual and contextual analysis of the Treaty in accordance with Article 31(1) of the VCLT leads to the conclusion that the Treaty is silent on the question of dual nationals. Consequently, neither Party’s primary positions on this issue can be accepted.

c. *Means of interpretation under Articles 31(2) and 31(3)(a) and (b)*

447. Moving to the other means of interpretation referred to in Article 31, the Tribunal notes that it has not been provided with any elements under Article 31(2) of the VCLT, i.e. “any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty” or “any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty”. Neither has it been presented with “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” or “any subsequent practice in the application of the

²⁶² See ICSID/3, List Of Contracting States And Other Signatories Of The Convention (as of September 3, 2021), available at https://icsid.worldbank.org/sites/default/files/documents/2021_Sep.ICSID.ENG.pdf (stating that Mexico signed and ratified the ICSID Convention in 2018).

treaty which establishes the agreement of the parties regarding its interpretation” pursuant to Article 31(3)(a) and (b) of the VCLT. It thus turns to the means of interpretation provided in Article 31(3)(c).

d. Article 31(3)(c) and the principle of systemic integration

448. Under Article 31(3)(c), the VCLT directs the interpreter to “take into account, together with the context” “any relevant rules of international law applicable in the relations between the parties”. Hence, in its interpretive process, the Tribunal must (“shall”) take into account “other relevant rules of international law”. As McLachlan emphasizes, the rule set out in Article 31(3)(c) forms “a *mandatory* part of the interpretation process”, whereby it is “not (as contrasted with the provisions of Article 32 on *travaux préparatoires*), only to be referred to where confirmation is required or the meaning is ambiguous, obscure or manifestly absurd or unreasonable”.²⁶³ Article 31(3)(c) is said to express the principle of “systemic integration” in treaty interpretation;²⁶⁴ it postulates that treaties are a creation of the international legal system and must thus be interpreted against the background of broader international law rules. In this vein, it has been suggested that the principle of systemic integration may be articulated as a presumption with both positive and negative aspects, meaning that (a) positively the parties are to be taken “to refer to general principles of international law for all questions which [the treaty] does not itself resolve in express terms or in a different way”; and (b) negatively, in entering into treaty obligations, the parties intend not to act inconsistently with generally recognized principles of international law or with previous treaty obligations towards third states.²⁶⁵

²⁶³ **Exh. RL-0242**, McLachlan, Campbell, *The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention*, *The International and Comparative Law Quarterly* 54, no. 2 (2005): 279–319, para. 7.87.

²⁶⁴ ILC Fragmentation of International Law Report, A/CN.4/L.682 and add.1, 2016, para. 413.

²⁶⁵ See **Exh. RL-0242**, McLachlan, Campbell, *The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention*, *The International and Comparative Law Quarterly* 54, no. 2 (2005): 279–319, para. 7.95. This view was adopted by the ILC in its fragmentation report. See ILC Fragmentation of International Law Report, A/CN.4/L.682 and add.1, 2016, para. 465.

449. As clarified by the ICJ,²⁶⁶ the “relevant rules of international law applicable in the relations between the parties” include customary international law rules, which, as stated by the Iran-US Claims Tribunal in *Amoco*:

“[...] may be useful in order to fill in possible lacunae of the Treaty to ascertain the meaning of undefined terms in its text or, more generally to aid interpretation and implementation of its provisions.”²⁶⁷

450. Of course, if the wording of the treaty provides a solution which is different from the one otherwise applicable in general international law, that solution must prevail based on Article 31(1) (subject to *jus cogens*). However, when the treaty is silent on a given issue, the answer may come from other rules of international law, including customary law.

451. The principle of systemic integration must equally apply in the investment treaty context. As observed by the *AAPL v. Sri Lanka* tribunal, the first to exercise jurisdiction under a bilateral investment treaty:

“[A] Bilateral Investment Treaty *is not a self-contained closed legal system* limited to provide for substantive material rules of direct applicability, but it has to be envisaged *within a wider juridical context in which rules from other sources are integrated through implied incorporation methods*, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature.”²⁶⁸

452. More recently, the tribunal in *Urbaser* noted that a BIT “cannot be interpreted and applied in a vacuum [...] without taking the relevant rules of international law into account”, adding that it must “be construed in harmony with other rules of international law of which it forms part”.²⁶⁹ Similarly, in its discussion of Article 31(3)(c), the annulment committee in *Tulip v. Turkey* referred to the “principle of systemic integration” stating that resort to authorities stemming from fields other than investment law was a “legitimate method of treaty interpretation”.²⁷⁰

²⁶⁶ *Case Concerning Oil Platforms (Islamic Republic of Iran v. USA)*, Judgment, 6 November 2003, ICJ Reports (2003), para. 41.

²⁶⁷ **Exh. RL-0243**, *Amoco International Finance Corporation v. Iran* (1987-II) 15 Iran-USCTR 189, para. 112.

²⁶⁸ **Exh. CL-57**, *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, para. 21 (emphasis added).

²⁶⁹ **Exh. RL-0353**, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016, para. 1200.

²⁷⁰ **Exh. RL-0061**, *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID/ARB/11/28, Decision on Annulment, 30 December 2015, paras. 86-92.

453. The Tribunal agrees with these observations. BITs are not self-contained instruments; they are part of a wider system that integrates rules from other sources of international law, such as customary law. Such approach seems particularly apt under this particular Treaty, as the choice of law clause expressly refers to international law:

“Any tribunal established in accordance with this Section shall issue its ruling in the disputes submitted to it in accordance with the provisions of this Agreement and *the applicable rules and principles of international law.*” (emphasis added)

454. While Article XV appears to be (primarily) directed to the law governing the merits, it is formulated in broad terms and may also apply to a question of jurisdiction, on which the tribunal is to issue “its ruling in the disputes submitted to it”.²⁷¹ At a minimum, Article XV shows that the Contracting Parties did not envisage that a tribunal established under the Treaty would remain within the four corners of the Treaty. To the contrary, they considered that it was entitled – and indeed under the obligation – to interpret the Treaty against the background of broader rules of international law. Like in *Urbaser v. Argentina*, “it is thus [the Treaty’s choice of law clause] itself that states the evidence that the BIT is not framed in isolation, but placed in the overall system of international law”.²⁷²

e. “Relevant” rules of international law applicable between the parties

455. The next question, in terms of Article 31(3)(c) VCLT, is thus what international law rules applicable between the Parties are “relevant” and must be taken into account in interpreting the notion of “investor” under the Treaty.

456. In the Tribunal’s view, the “relevant” international rules applicable between the parties here are the rules on nationality in the context of diplomatic protection.

457. It is generally accepted, in international practice and by commentators, that investment claims are not diplomatic protection claims.²⁷³ A key difference is that the latter are

²⁷¹ See also the similar reasoning of the *Urbaser* tribunal in respect of the applicable law clause of the BIT that applied in that dispute. The tribunal noted that: “[w]hile this provision is primarily directed to the applicable law on the merits of the dispute, it may have a role to play in connection with certain specific issues to be examined concerning jurisdiction”.

²⁷² **Exh. RL-0353**, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016, para. 1201.

²⁷³ See generally K. Parlett, *Diplomatic Protection and Investment Arbitration*, in *International investment law and general international law*, Nomos (2011), p. 211 ff, at 215-216.

brought by the state of nationality of the injured person, whereas the former are raised by the investor directly. A second significant difference is that damages awarded in investment arbitration are paid to the claimant investor, while damages granted in diplomatic protection proceedings are paid to the state of nationality. That said, as stated in *Société Générale v. Dominican Republic*, “[t]he fact that [investment] treaties have substituted for diplomatic protection and may even prohibit its exercise by the States that are parties to them, does not mean that the basic principles have also been automatically derogated as it is rather the means for materializing an international claim that have changed but not in all aspects its substantive requirements”.²⁷⁴ Indeed, both sets of protective rules (diplomatic protection and investment protection) pursue the same goal and are premised on the same connecting factor, i.e. nationality. They merely provide for different means to enforce State responsibility for the treatment of aliens. As explained by James Crawford, “one might argue that bilateral investment treaties in some sense institutionalize and reinforce (rather than replace) the system of diplomatic protection”.²⁷⁵ And while BITs have advanced the protection of aliens in many respects, in the Tribunal’s view this does not mean that they intended to do away with the basic underlying principles, save where States expressly said so.

459. It is keeping in mind this reservation that the Tribunal reads the decisions of investor-State tribunals (mostly in the early years of the jurisprudence) which excluded the application of the law of diplomatic protection in an investment treaty setting. Most of these cases dealt with shareholder claims and with the question whether the principles set out in *Barcelona Traction* could limit a claimant’s right to sue under the applicable treaty.²⁷⁶ A few other cases discussed whether notions of “genuine link” or “effective

²⁷⁴ **Exh. RL-0123**, *Société Générale In Respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S. A. v. The Dominican Republic*, LCIA Case No. UN 7927, UNCITRAL, Award on Preliminary Objections to Jurisdiction, 19 September 2008, para. 109.

²⁷⁵ James Crawford, “The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect”, *American Journal of International Law* 96, no. 4 (October 2002): pp. 874-890, at 887-888.

²⁷⁶ See, e.g., among several, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision of the Arbitral Tribunal on Objections to Jurisdiction, 30 April 2004, para. 53; *Camuzzi International S.A. v. Argentine Republic I*, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction, 11 May 2005, paras. 44, 138-140; *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision of the Tribunal on Objections to Jurisdiction, 25 August 2006, para. 78; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine*

nationality” should be read into treaty definitions of *corporate* “investor” that relied on the place of incorporation as the relevant test for corporate nationality.²⁷⁷ In both of these instances, however, the applicable treaties provided specific rules. In the case of shareholder claims, the treaties specified that “shares” were protected investments and included both “direct and indirect” shareholding in the scope of investments. In the

Republic, ICSID Case No. ARB/03/19, Decision on Jurisdiction, 3 August 2006, para. 50; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction, 11 May 2005, paras. 151-153; **Exh. CL-206**, *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, para. 141; *Telefónica S.A v. Argentine Republic*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, 25 May 2006, para. 83; *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic and BP America Production Company, Pan American Sur SRL, Pan American Fueguina, SRL and Pan American Continental SRL v. Argentine Republic*, ICSID Case No. ARB/03/13 & ARB/04/8, Decision on Preliminary Objections, 27 July 2006, paras. 216-218; *Noble Energy Inc. and MachalaPower Cía. Ltd. v. Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction, 5 March 2008, para. 78 (“*Barcelona Traction* is of no assistance for present purposes. That case dealt with a claim of diplomatic protection and cannot be transposed in the context of a BIT which protects direct and indirect investment including “shares of stock or other interests in a company or interests in the assets thereof” (Article I(1)(ii) of the BIT”).

²⁷⁷ **Exh. CL-231**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent’s Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008, para. 101; **Exh. RL-0076**, *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, paras. 125-129 (“The Respondent seeks to rely on Article 31(3)(c) of the VCLT, arguing that the principle of real and effective nationality forms part of the “relevant rules of international law applicable in the relations between the parties” (MoJ, § 268). The Tribunal cannot share this view. The fundamental question is whether this Tribunal should disregard the Dutch nationality of KT Asia dictated by a plain reading of the Treaty and focus instead on the Kazakh nationality of Mr. Abyazov, its ultimate beneficial owner”. The tribunal went on to observe that “[t]his Tribunal sees no basis for applying a rule of diplomatic protection that would trump *the specific regime created by the Treaty*. In this respect, the Tribunal agrees with the Claimant that the nationality of a corporation is a legal construct and that in the absence of any obligatory test for the nationality of corporations in international law, it falls to the Contracting States of the relevant investment treaty to define the nationality of a corporation as they see fit [...]. This observation is confirmed by a review of relevant decisions. Indeed, attempts by respondents to substitute or supplement the test of nationality in a BIT with rules of diplomatic protection have failed in an overwhelming number of cases. The Tribunal concurs with the wide consensus that emerges from case law according to which rules of customary international law applicable in the context of diplomatic protection do not apply where they *have been varied by the lex specialis of an investment treaty*”. All emphases added).

case of corporate nationality, the investment treaties provided for the place of incorporation test, which is an accepted connecting factor under international law to determine the nationality of a legal entity.

460. In contrast to those situations, here the Treaty is silent on an issue for which customary law on diplomatic protection provides a rule. As noted by the tribunal in *Société Générale v. Dominican Republic*:

“while it is true that investment law has meant in some respects a departure from the law governing diplomatic protection and the traditional law of international claims, this is correct largely to the extent that applicable treaties and conventions *have so established by providing rules different from those of diplomatic protection*. While many such treaties, like the one now before the Tribunal, provide for rules on the definition of who is a national entitled to its protection, seldom do they provide for a rule establishing the moment at which such nationality is required. *The rules governing issues not addressed by the specific language of the treaty may sometimes be provided by the law of diplomatic protection, which apply as customary international law*, and thus, provides for a residual role for at least some aspects of the law of diplomatic protection.”²⁷⁸

461. To be clear, the Tribunal is not suggesting that all of the customary international law rules on diplomatic protection apply in the BIT context. Rather, as rightly observed by the tribunal in *Perenco v. Ecuador*, “the field of diplomatic protection [...] may, *depending upon the issue*, be relevant to the interpretation of a BIT”.²⁷⁹ One such issue is dual nationality, for which recourse to the rules of diplomatic protection may usefully fill the *lacuna* in the Treaty. As Christoph Schreuer writes, “[i]nternational legal practice on questions of nationality has developed primarily in the context of diplomatic protection [...] Until international practice develops new criteria for purposes of access to institutions like the Centre, *the rules as developed in the context of diplomatic protection remain the only reliable guidance*”.²⁸⁰

²⁷⁸ **Exh. RL-0123**, *Société Générale In Respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S. A. v. The Dominican Republic*, LCIA Case No. UN 7927, UNCITRAL, Award on Preliminary Objections to Jurisdiction, 19 September 2008, para. 108 (emphasis added).

²⁷⁹ **Exh. CL-232**, *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on the Remaining Issues of Jurisdiction and on Liability, 12 September 2014, para. 522.

²⁸⁰ C. Schreuer et. al., *The ICISD Convention: A Commentary*, Cambridge University Press (2nd ed., 2010), p. 267, paras. 646-647. See also **Exh. CL-0118**, Z. Douglas, *The International Law of Investment Claims*, Cambridge University Press (2009), p. 321 (“Where an individual claimant with the nationality of one contracting state also has the nationality of the host contracting state party, the tribunal's jurisdiction *ratione personae* extends to

462. This approach is consistent with the ILC Draft Articles on Diplomatic Protection. Pursuant to Article 17, the Draft Articles “do not apply *to the extent that they are inconsistent* with special rules of international law, such as treaty provisions for the protection of investments”.²⁸¹ However, “[t]o the extent that the draft articles remain consistent with the BIT in question, they continue to apply”.²⁸² There would for instance be an inconsistency if an investment treaty excluded dual nationals through a rule similar to Article 25(2)(a) of the ICSID Convention or, conversely, stipulated expressly that dual nationals do benefit from Treaty protection. Here, there is no inconsistency. The Contracting Parties left dual nationality unaddressed, with the result that the Treaty’s silence requires the Tribunal to interpret the definition of investor in light of the rules on diplomatic protection, which provide the most “reliable guidance” in this area²⁸³ and “constitute the background against which the treaty’s provision must be viewed [...]”.²⁸⁴

f. *The customary international law rules on dual nationality*

463. This being so, what is the rule on dual nationals under customary international law for purposes of diplomatic protection? A useful starting point to trace the evolution is found in the 1930 Hague Convention, which states the so-called rule of “non-responsibility” in the following terms:

“Article 4

A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses.”

464. The ILC Commentary to Article 7 of the Draft Articles on Diplomatic Protection (on which see *infra*) explains that “[e]ven before 1930 there was [...] support in arbitral decisions for another position [other than the non-responsibility rule encapsulated in Article 4 of the 1930 Hague Convention], namely that the State of dominant or effective nationality might bring proceedings in respect of a national against another State of

such an individual only if the former nationality is the dominant of the two, subject to a contrary provision of an investment treaty or the application of Article 25 of the ICSID Convention”, internal footnotes omitted).

²⁸¹ ILC Articles on Diplomatic Protection, Art. 17 (emphasis added).

²⁸² ILC Articles on Diplomatic Protection, Commentary, *ad* Art. 17, para. 3.

²⁸³ Schreuer, *supra* para. 461.

²⁸⁴ **Exh. CL-244**, *Orascom TMT Investments S.à r.l. v. Algeria*, Award, 31 May 2017, para. 298; see also para. 293.

nationality”.²⁸⁵ The ICJ adopted this approach in the *Nottebohm* case of 1955. It is true that *Nottebohm* did not involve a dual national.²⁸⁶ Yet, as stated by the ILC, “the Court found support for its finding that Mr. Nottebohm had no effective link with Liechtenstein in cases dealing with dual nationality”²⁸⁷ or in the words of the ICJ:

“International arbitrators have decided in the same way numerous cases of dual nationality, where the question arose with regard to the exercise of protection. *They have given their preference to the real and effective nationality*, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved.”²⁸⁸

465. In the same year of 1955, the Italy-United States Conciliation Commission explicitly approved the real and effective nationality rule in the *Mergé* decision:

“The principle, based on the sovereign equality of States, which excludes diplomatic protection in the case of dual nationality, *must yield before the principle of predominant nationality whenever such nationality is that of the claiming State*. But it must not yield when such predominance is not proved, because the first of these two principles is generally recognized and may constitute a criterion of practical application for the elimination of any possible uncertainty.”²⁸⁹

466. The rule on dominant nationality was then applied by the Conciliation Commission in over 50 subsequent cases concerning dual nationals.²⁹⁰

467. Subsequently, the Iran-U.S. Claims Tribunal relied on this jurisprudence to conclude that the dominant and effective test was applicable to determine the nationality of claimants under the Algiers Accords. The IUSCT jurisprudence appears particularly

²⁸⁵ ILC Draft Articles on Diplomatic Protection, Article 7, Commentary, para.3, with references to practice.

²⁸⁶ Rather, the question was whether Mr. Nottebohm who brought a diplomatic protection claim against Guatemala was a national of Liechtenstein. The Court applied a test of “genuine and effective” nationality and found that, given the lack of a genuine link between Liechtenstein and Mr. Nottebohm, Guatemala was not obliged to recognize his nationality.

²⁸⁷ ILC Commentary, fn. 80.

²⁸⁸ **Exh. CL-252, *Nottebohm***, 1955, p. 22 (emphasis added). According to Brownlie, *Principles of International law*, 8th ed. pp. 513-14: “Seen in its proper perspective, the decision in *Nottebohm* is a reflection of a fundamental concept long present in the materials concerning nationality on the international plane. The doctrine of the effective link had already been recognized for some time in continental literature and the decisions of some national courts. That was commonly in connection with dual nationality, but the particular context does not obscure its role as a general principle with a variety of applications.”

²⁸⁹ *Mergé case (United States v. Italy)*, US–Italy Conciliation Commission, 14 *Recueil des Sentences Arbitrales* (1955), p. 247.

²⁹⁰ ILC Articles on Diplomatic Protection, Commentary *ad Art. 7*, para. (3).

significant for a number of reasons. First, the dispute resolution mechanism established by the Algiers Accords presents important similarities with investment arbitration, insofar as individuals of one contracting party are granted the right to file direct claims against the other contracting party. In other words, “the agreement of the two [Contracting Parties to the Algiers Accords] to create [the IUSCT] was not a typical exercise of diplomatic protection”, as the IUSCT acknowledged.²⁹¹ Yet, despite this difference, the IUSCT relied on Article 31(3)(c) VCLT to conclude that customary international rules on nationality for diplomatic protection purposes were relevant to interpret the definition of national in the Algiers Accords, which was silent on this issue.

468. Specifically, in 1983, in the *Nasser Esphahanian v. Bank Tejarat* case, Chamber Two of the IUSCT held that:

“In the absence of any specific provision in the Claims Settlement on this point, the Tribunal must determine the meaning of the text through use of the rules of the Vienna Convention. Paragraph 3(c) of Article 31 directs us to take into account “any relevant rules of international law applicable in the relations between the parties”.

There is a considerable body of law, precedents and legal literature, analyzed herein, which leads to the conclusion that the applicable rule of international law is that of dominant and effective nationality.”²⁹²

469. The Chamber of the IUSCT then reviewed the 1930 Hague Convention, the arbitral and judicial precedents that had followed since then (including those examined in the preceding paragraphs), as well as scholarly opinions. It noted that “there has been a very strong tendency to limit the principle of non-responsibility, expressed in Article 4 of the Hague Convention, by the principle of effective nationality as expressed by Article 5 of the said Convention”.

²⁹¹ See IUSCT Case No. 157 *Nasser Esphahanian v. Bank Tejarat*, Final award (Award No. 31-157-2), 29 March 1983, para. 43 (“the agreement of the two Governments to create this Tribunal was not a typical exercise of diplomatic protection of nationals in which a State, seeking some form of international redress for its nationals, creates a tribunal to which it, rather than its nationals, is a party. In that typical case, the State espouses the claims of its nationals, and the injuries for which it claims redress are deemed to be injuries to itself; here, the Government of the United States is not a party to the arbitration of claims of United States nationals, not even in the small claims where it acts as counsel for those nationals.”)

²⁹² See IUSCT Case No. 157 *Nasser Esphahanian v. Bank Tejarat*, Final award (Award No. 31-157-2), 29 March 1983, paras. 23-24; IUSCT Case No. 211, *Ataollah Golpira v. The Government of the Islamic Republic of Iran*, Final award (Award No. 32-211-2), 29 March 1983 (adopting the same rule).

470. One year later, Iran submitted to the IUSCT the interpretive question whether the tribunal had jurisdiction over dual nationals. In decision A/18, the IUSCT, sitting in full composition under the presidency of Judge Lagergren, confirmed the conclusion reached by Chamber Two in the following terms:

“Paragraph 3(c) of Article 31 of the Vienna Convention directs the Tribunal to take into account “any relevant rules of international law applicable in the relations between the parties.” There is a considerable body of law and legal literature, analyzed herein, which leads the Tribunal to the conclusion that the applicable rule of international law is that of dominant and effective nationality.”²⁹³

471. The full tribunal examined the 1930 Hague Convention, scholarly opinions and arbitral and judicial decisions. It noted that “whatever the state of the law prior to 1945, the better rule at the time the Algiers Declarations were concluded and today is the rule of dominant and effective nationality”. It in particular referred to *Nottebohm* and *Mergé* and held that these were “[t]he two most important decisions on the subject in the years following the Second World War [which] have had a decisive effect” on the recognition of the rule of dominant and effective nationality. On *Nottebohm*, in particular, the tribunal made the following remarks:

“While *Nottebohm* itself did not involve a claim against a State of which *Nottebohm* was a national, it demonstrated the acceptance and approval by the International Court of Justice of the search for the real and effective nationality based on the facts of a case, instead of an approach relying on more formalistic criteria. *The effects of the Nottebohm decision have radiated throughout the international law of nationality.*”²⁹⁴

472. The IUSCT went on to say:

“[...] [t]he relevant rule of international law which the Tribunal may take into account for purposes of interpretation, as directed by Article 31, paragraph 3(c), of the Vienna Convention, is the rule that flows from the dictum of *Nottebohm*, the rule of real and effective nationality, and the search for “stronger factual ties between the person concerned and one of the States whose nationality is involved.” *In view of the pervasive effect of this rule since the Nottebohm decision*, the Tribunal concludes that the references to “national” and “nationals” in the Algiers Declarations must be understood as consistent with that rule *unless an exception is clearly stated*. As stated above, the Tribunal does not find that the text of the Algiers Declarations provides such a clear exception.”²⁹⁵

473. Subsequently, the rule on dominant and effective nationality was consistently applied by the IUSCT in a number of cases.²⁹⁶

²⁹³ IUSCT Case No. A/18, Decision, 6 April 1984, para. 36.

²⁹⁴ IUSCT Case No. A/18, Decision, 6 April 1984, para. 45 (emphasis added).

²⁹⁵ IUSCT Case No. A/18, Decision, 6 April 1984, para. 50 (emphasis added).

²⁹⁶ ILC Commentary on Diplomatic Protection, *ad Art. 7*, para. 3.

474. In 2006, when it concluded its work on diplomatic protection, the ILC relied on all these precedents and codified the customary rules as follows:

“Article 7 Multiple nationality and claim against a State of nationality

A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim.”

475. The ILC explained its choice of word “predominant” as opposed to “dominant” or effective in the Draft Articles on Diplomatic Protection by stressing the relativity involved in an inquiry about competing nationalities:

“Even though the two concepts are different, the authorities use the term “effective” or “dominant” without distinction to describe the required link between the claimant State and its national in situations in which one State of nationality brings a claim against another State of nationality. Draft article 7 does not use either of these words to describe the required link but instead uses the term “predominant” as it conveys the element of relativity and indicates that the individual has stronger ties with one State rather than another. A tribunal considering this question is required to balance the strengths of competing nationalities and the essence of this exercise is more accurately captured by the term “predominant” when applied to nationality than either “effective” or “dominant”. [...] the term “predominant” [...] is moreover the term used by the Italian–United States Conciliation Commission in the *Mergé* claim, which may be seen as *the starting point for the development of the present customary rule.*”²⁹⁷

476. Hence, it seems clear that today the customary international law rule on dual nationality in diplomatic protection claims is that of predominant nationality.²⁹⁸

g. Conclusion on the rule governing dual nationals

477. In sum, where, as here, the BIT fails to specify whether an investor who is a national of both the home and the host States is entitled to bring claims under the treaty, the

²⁹⁷ ILC Commentary on Diplomatic Protection, *Ad Art. 7*, para. 4 (emphasis added).

²⁹⁸ See also, among many, Peter Spiro, *Multiple Nationality*, in *Max Planck Encyclopedia of International Law*, para. 11 (“Prior majority practice (also reflected in the 1930 Hague Convention) had barred one State of nationality from making claims or exercising protection against another State of nationality, without regard to relative actual connections. *That practice eroded during the 20th century, however, to expand the ‘dominant and effective’ test to apply as between States of nationality.* Thus ruled the Iran–United States Claims Tribunal, for instance in 1984 (Decision No 32-A18-FT 5 Iran–United States Claims Tribunal Rep 251 [1984 I]). The approach is also adopted in the 2006 ILC Draft Articles on Diplomatic Protection, Art. 7 of which allows a State of nationality to exercise diplomatic protection in respect of a person against a State of which that person is also a national if the nationality of the former State is predominant.” (Emphasis added).

tribunal must have recourse to the rules on diplomatic protection, which provide that it must take account of the predominant nationality.²⁹⁹

478. In the Tribunal's view, requiring an individual, who is a national of both the home State and host State, to have a stronger connection with the former is the position most in accord with the purpose of international investment agreements, including this Treaty, which is to provide a level playing field to foreign investors who are regarded as disadvantaged vis-à-vis domestic investors
479. This rule is also inherently fair as it ensures that, in a bilateral investment treaty scenario such as the present one, an investor of a Contracting Party (e.g., Mexico), who is *also* an investor of the other Contracting Party (e.g., Spain), is not placed at an advantage over other investors who only have the nationality of the former Contracting Party (e.g., Mexico), while at the same time ensuring that he/she is not denied the possibility of bringing a BIT claim altogether.
480. Finally, the Tribunal is aware that other tribunals constituted under different treaties have either denied or granted access to investor-State arbitration to dual nationals without regard to the dominant and effective nationality test.³⁰⁰ The Tribunal has reviewed those awards, but considers that the outcome reached here is the correct one for the reasons set out above.³⁰¹

²⁹⁹ The Tribunal notes that a number of authors support this conclusion. See, e.g., Dolzer and Stevens, *Bilateral Investment Treaties*, Nijhoff (1995), p. 34; C. McLachlan et. al., *International Investment Arbitration, Substantive Principles*, Oxford University Press (2017), pp. 182-185; **Exh. CL-0118**, Z. Douglas, *The International Law of Investment Claims*, Cambridge University Press (2009), p. 321; C. Dugan, D. Wallace, N. Rubins and B. Sabahi, *Investor-State Arbitration*, Oxford University Press (2008), p. 304.

³⁰⁰ See, e.g., **Exh. CL-114**, *Serafin García Armas and Karina García Gruber v. Bolivarian Republic of Venezuela*, PCA Case No. 2013-3, Decision on Jurisdiction, 15 December 2014; *Mohamed Abdel Raouf Bahgat v. The Arab Republic of Egypt*, PCA Case 2012-07, Decision on Jurisdiction, 30 November 2017; *Sergei Viktorovich Pugachev v. The Russian Federation*, UNCITRAL Ad hoc Arbitration, Award on Jurisdiction, 18 June 2020, para. 383; **Exh. CL-246**, *Dawood Rawat v. The Republic of Mauritius*, PCA Case No. 2016-20, Award on Jurisdiction, 6 April 2018; **Exh. RL-92**, *Enrique y Jorge Heemsen v. Venezuela*, PCA Case No. 2017-18, Award on Jurisdiction, 29 October 2019; **Exh. RL-91/CL-313**, *Manuel García Armas et al. v. Venezuela*, PCA Case No. 2016-08, Award on Jurisdiction, 13 December 2019.

³⁰¹ The Tribunal notes that recently the tribunal in *Fernando Fraiz Trapote v. Venezuela* (award available at <https://www.italaw.com/sites/default/files/case-documents/italaw16446.pdf>)

h. The predominant nationality of the eight dual Mexican-Spanish nationals

481. Having set out the rule that is applicable to dual nationals who claim under this Treaty in the present UNCITRAL arbitration, it remains for the Tribunal to determine the predominant nationality of the eight Claimants who hold dual Mexican-Spanish nationalities. To determine which nationality is predominant, different factors are normally taken into consideration. For instance, in *Nottebohm*, the ICJ mentioned “the habitual residence of the individual concerned” as “an important factor”, adding that the following criteria may also be relevant: “the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc”.³⁰² In its commentary, the ILC suggested similar factors, in addition to others such as “employment and financial interests” and “taxation, bank account, social security insurance”.³⁰³ Both the ICJ and the ILC have underscored that none of these elements is decisive and that the weight attributed to each of them will vary according to the circumstances of each case.³⁰⁴
482. Taking into account these factors, the Tribunal finds that the Claimants have established that the eight dual nationals are predominantly Mexican. All of the relevant links point to Mexico, rather than Spain. Indeed, all the dual nationals reside in Mexico, are taxed in Mexico, and have family ties in Mexico. The fact that some of these individuals, including Mr. del Valle, may use their Spanish passport to enter Spain³⁰⁵ is of limited relevance in this context, especially where all the other connecting factors point to Mexico. Mr. del Valle also testified that over the last few years “the most that [he] was in Spain was about one or two weeks once or twice a year”, and that he “never

reached a similar conclusion on the applicability of the dominant and effective nationality criterion to a dual nationality situation similar to the present one. See *Fernando Fraiz Trapote v. Venezuela*, PCA Case No. 2019-11, Final Award, 31 January 2022. Additionally, while the tribunals in *Manuel García Armas et al v. Venezuela* and *Heemsen v. Venezuela* declined jurisdiction on other grounds, both expressed support for the use of the dominant and effective test in dual nationality claims in investment arbitration.

³⁰² **Exh. CL-252**, *Nottebohm case (Liechtenstein v. Guatemala)*, 2nd phase, Judgment of 6 April 1995, 1995 ICJ Reports, p. 22.

³⁰³ ILC Commentary on Diplomatic Protection, *ad Art. 7*, para. 5.

³⁰⁴ **Exh. CL-252**, *Nottebohm case (Liechtenstein v. Guatemala)*, 2nd phase, Judgment of 6 April 1995, 1995 ICJ Reports, p. 22 (“Different factors are taken into consideration, and their importance will vary from one case to the next [...]”); ILC Commentary on Diplomatic Protection, *ad Art. 7*, para. 5. (“None of these factors is decisive and the weight attributed to each factor will vary according to the circumstances of each case”).

³⁰⁵ See May Hearing Tr. [English version], 18 May 2021, 197: 1 et seq.

had a place to live” in Spain, but always stayed at a hotel.³⁰⁶ Further, Spain has not brought to the Tribunal’s attention any element (other than the use of the Spanish passport for travel purposes) that could imply a predominance of the Spanish nationality of these eight dual nationals.

483. In conclusion, the predominant nationality of the eight Mexican-Spanish nationals is that of Mexico. They are thus “investors” protected under Article I(5)(a) of the Treaty and the Tribunal has jurisdiction over disputes between them and the Kingdom of Spain. Spain’s *ratione personae* objection is accordingly denied.

F. “CLEAN HANDS”

1. The Respondent’s position

484. Spain argues that the Tribunal lacks jurisdiction or the claims are inadmissible on the ground of the “clean hands” and similar doctrines,³⁰⁷ according to which investors who engage in abusive, bad faith, or unlawful conduct “in the realisation and development of the investment” are denied treaty protection.³⁰⁸

485. More specifically, the Respondent maintains that two of the Claimants, ██████████ ██████████ did engage in such objectionable behavior. They were subject to criminal investigations for allegedly leaking confidential information obtained through Banco Popular’s Board of Directors in order to drive down Banco Popular’s share price and take control over it.³⁰⁹ Other Claimants may also have

³⁰⁶ Ibid, 197: 15-21.

³⁰⁷ SoD, paras. 701-711; Rejoinder, paras. 833-859; R-PHB1, para. 34; R-PHB2, para. 17.

³⁰⁸ Rejoinder, para. 833. See also SoD, paras. 701-711, referring to **Exh. RL-0079**, *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, Final award, 15 December 2014, paras. 645-646; **Exh. RL-0001**, *Phoenix Action Ltd v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 100. The Respondent notes that other tribunals have also addressed the abuse of right principle. See **Exh. RL-0192**, *Renée Rose Levy De Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award 26 February 2014, paras. 180-195; **Exh. RL-0238**, *Pac Rim Cayman LLC v. Republic of El Salvador*. ICSID Case No. ARB/09/12. Decision on Respondent’s Objections to Jurisdiction, 1 June 2012, paras. 2.41-2.111; **Exh. RL-0233**, *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009, paras. 146-176; **Exh. RL-0229**, *Capital Financial Holding Luxembourg S.A. v. the Republic of Cameroon*, ICSID Case No. ARB/15/18, Award, 22 June 2017, paras. 360, 365.

³⁰⁹ SoD, para. 704, referring to **Exh. R-0220**, *El Economista*, *Antonio del Valle denies conspiracy for the collapse of Banco Popular*, 26 November 2019; **Exh. R-0221**, *El*

been engaged in or, at least, aware of such misconduct.³¹⁰ Moreover, Spanish authorities are also investigating Banco Popular's 2016 capital increase for accounting irregularities and, so Spain alleges, there is substantial evidence against [REDACTED] [REDACTED].³¹¹

2. The Claimants' position

486. The Claimants submit that the "clean hands" doctrine does not apply here and that, in any event, Spain failed to prove any illegal act by [REDACTED] [REDACTED]. They also observe that the investigations concern only two Claimants out of 54.³¹²

3. Analysis

487. The Respondent's allegations of illegal conduct pertain to both the Claimants' making of their investment in Spain and activities post-dating the investment.

488. Under Articles IX(1) and XI of the Treaty, the Tribunal's jurisdiction is limited to "[a]ny dispute which may arise between one of the Contracting Parties and an *investor* of the other Contracting Party due to alleged non-compliance with an obligation under this Agreement" (emphasis added). An investor pursuant to Article I(5) of the Treaty is an individual or company of the other Contracting Party "which has made an *investment* in the territory of the other Contracting Party" (emphasis added). The term "investment", in turn, is defined in Article I(4) of the Treaty as the "assets owned or controlled by

Confidencial "New authoritative opinion validating Santander's case: Spain's National Court releases Santander from criminal liability in Banco Popular's case, 30 April 2019; **Exh. R-0223**, El Mundo, *The parties under investigation in case Banco Popular will take the stand as from September*, Mauricio Skrycky, EXPANSIÓN, 26 May 2019; **Exh. R-0218**, Invertia "Banco Popular trial starts: who's who in the proceedings against the bank's top management" Clara Alba; **Exh. R-0081**, El Sol de México, *PGR investigates businessman Antonio del Valle in case Banco Popular*, 24 July 2018; **Exh. R-0219**, El Economista *Mexican investors of Banco Popular claim compensation for losses from del Valle*, 30 July 2018; **Exh. R-0222**, ABC, *Claim in Mexico against the Mexican board members of Banco Popular for disclosing information*, M. Jesús Pérez, 29 June 2018; **Exh. R-0155**, Financial Times, I. Mount, *Banco Popular says CEO Pedro Larena to depart*, 3 April 2017. See also R-PHB1, para. 34; R-PHB2, para. 17.

³¹⁰ SoD, para. 710; R-PHB1, para. 34.

³¹¹ Rejoinder, para. 846. See also R-PHB1, para. 34.

³¹² Reply, paras. 419-427; C-PHB1, paras. 375-378; C-PHB2, para. 216.

investors of one of the Contracting Parties and *established in the territory of the other Contracting Party in accordance with the legislation of the latter*" (emphasis added).

489. Therefore, for the present dispute to come within the Tribunal's jurisdiction, it must have arisen out of assets "established [...] in accordance with the legislation" of Spain. The ordinary meaning of this formulation leaves no doubt that it requires that investments be "established", or in other words "made" in accordance with local law. By contrast, the Treaty does not address the consequences of any illegal activities in which the investor may engage *after* making the investment.
490. That said, as recalled in the context of the analysis in respect of nationality, the Tribunal's mandate under the Treaty does not exist in isolation, but in the framework of general international law (see *supra* section VI.E.3.d). The rule of systemic integration dictates that the Tribunal take into account general principles that govern the exercise of jurisdiction, one of such principles being that claims tainted by serious wrongdoings are not admissible.³¹³
491. Indeed, international tribunals have commonly recognized that claims involving wrongful conduct are inadmissible, be it under the doctrine of clean hands, international public policy, or other general principles such as the principle of good faith, *ex turpi causa non oritur actio*, or *nemo auditur propiam turpitudinem allegans*. However, to result in the inadmissibility of the claims, the investor's unlawful conduct must be severe.³¹⁴
492. On the basis of the record, the Tribunal finds that Spain has not even come close to establishing that, either in the making or carrying out their investments, any of the Claimants has engaged in wrongdoing, let alone severe wrongdoing, that would entail

³¹³ See generally *Bank Melli Iran and Bank Saderat Iran v. Bahrain*, PCA Case No. 2017-25, Award, 9 November 2021, paras. 373.; **Exh. RL-0079**, *Al Warraq v. Indonesia*, Final Award, 15 December 2014, paras. 645-646; **Exh. RL-0098**, *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/40 and 12/14, Award, 6 December 2016, paras. 507-508.

³¹⁴ *Bank Melli Iran and Bank Saderat Iran v. Bahrain*, PCA Case No. 2017-25, Award, 9 November 2021, para. 377; **Exh. CL-213**, *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No ARB/10/13, Award, 2 March 2015, para. 212; *Oxus Gold plc v. Republic of Uzbekistan*, UNCITRAL, Final Award, 17 December 2015, para. 712; **Exh. CL-238**, *Khan Resources Inc., Khan Resources B.V., and CAUC Holding Company Ltd. v. The Government of Mongolia and MonAtom LLC*, PCA Case No. 2011-09, Decision on Jurisdiction, 25 July 2012, para. 384.

lack of jurisdiction or the inadmissibility of the claims. Spain has first referred to “press reports”³¹⁵ and subsequently to “ongoing investigations”³¹⁶, maintaining that the Tribunal would lack jurisdiction or claims would be inadmissible “[i]f these allegations are confirmed”.³¹⁷ This very wording shows that there is no proof of wrongdoing. Moreover, press reports cannot substitute for established facts and the Tribunal has not been shown any record of the “ongoing investigations” referred to. Neither has it seen any court decision or other finding concluding that [REDACTED] [REDACTED] have committed illegal acts. Similarly, the evidence on record contains no indication of unlawful conduct. As a result, Spain’s objection can only be denied.

VI. LIABILITY

A. INTRODUCTION

493. In this section, the Tribunal addresses the claims. Before doing so, it is useful to briefly set out the applicable principles on burden and standard of proof.

494. As a general matter, since the claims brought in this arbitration seek to establish the responsibility of a State for breach of the latter’s international obligations, it is appropriate to apply international law to the burden of proof. The principle that each party has the burden of proving the facts on which it relies is widely recognized and applied by international courts and tribunals. The International Court of Justice as well as investment treaty tribunals have characterized this rule as a general principle of law.³¹⁸ Article 27(1) of the UNCITRAL Rules also provides that each party has the *burden* of proving the facts on which it relies in support of its claim or defense. Thus, the Claimants bear the burden of proof.³¹⁹

³¹⁵ SoD, para. 701.

³¹⁶ Rejoinder, 833.

³¹⁷ R-PHB1, para. 34 (emphasis added). See also Rejoinder, para. 858 (“If confirmed, this should result in the present Claim being declared inadmissible”).

³¹⁸ See, e.g., *Military and Paramilitary Activities in and against Nicaragua*, I.C.J. Reports 1984, p. 437, para. 101. See also in the investment arbitration context *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, para. 237.

³¹⁹ This principle appears undisputed. See Reply, paras. 470-471 (“Claimants agree with Respondent that they have the burden of proving their claims that Respondent violated the Treaty”); Rejoinder, para. 860.

495. A different matter is the applicable *standard* of proof, which relates to the degree of certainty required for a tribunal to find that a fact is proven. The formulations of the applicable standard of proof under international law vary across tribunals. Some refer to common law standards such as balance of probabilities and preponderance of evidence. Others use the civil law notion of *intime conviction du juge* or “inner conviction of the judge”. Others still adopt the standard of reasonable certainty, which appears close to *intime conviction*.³²⁰ Commentators note that, while the labels differ, there is no real difference in practice.³²¹ The Tribunal also notes that Article 27(4) of the UNCITRAL Rules provides that the tribunal “shall determine the admissibility, relevance, materiality *and weight of the evidence offered*”,³²² which confers “wide discretion” to tribunals in the assessment of the evidence.³²³ Hence, the Tribunal enjoys wide discretion in the weighing of the evidence and determining whether a fact alleged is established. In the exercise of this discretion, it will apply the standard of reasonable certainty.
496. Still in connection with evidentiary matters, the Parties have discussed whether it is appropriate to “lower” the standard of proof or shift the burden to the other Party in certain circumstances. Specifically, the Claimants request that the Tribunal apply a standard of proof that is “lower than the usual preponderance of evidence” and shift the burden of proof to the Respondent where “the [R]espondent state has exclusive control over evidence related to the [Claimants’] case and has taken steps to deny Claimants access to relevant evidence”.³²⁴ Pointing in particular to the so-called Withheld

³²⁰ See, e.g., *BSG Resources Limited (in administration), BSG Resources (Guinea) Limited and BSG Resources (Guinea) SARL v. Republic of Guinea*, ICSID Case No. ARB/14/22, Award, 18 May 2022 [Redacted], para. 493, with further references. See also **Exh. CL-291**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 865.

³²¹ See **Exh. RL-0401**, Frédéric Gilles Sourgens, Kabir Duggal, Ian A. Laird, *Evidence in International Investment Arbitration*, paras. 5.17 ff, with further references.

³²² UNCITRAL Rules, Article 27(4) (emphasis added).

³²³ David D. Caron and Lee M. Caplan, *The UNCITRAL Arbitration Rules. A Commentary* (2nd ed., 2013), pp. 572-574, citing in particular P. Sanders, *Commentary on the UNCITRAL Arbitration Rules*, in 1977 II Yearbook of Commercial Arbitration, p. 203, who explains that the discretion “of arbitrators to evaluate the evidence offered by the parties is phrased in the broadest terms possible”.

³²⁴ Reply, para. 474. See also *ibid.*, para. 470 (“the Tribunal actually should apply to Claimants a reduced standard of proof, lower than the usual preponderance of evidence test. In similar cases where the respondent state has exclusive control over evidence relevant to the

Documents,³²⁵ the Claimants submit that “[t]he only appropriate means to address this imbalance of power and evidence is to adjust the applicable standard of proof [...], by allowing Claimants to utilize adverse factual inferences, rely upon circumstantial evidence and *ultimately to shift the burden of proof to Respondent*”.³²⁶

497. Rules for shifting the burden of proof under certain circumstances are generally deemed to be part of the *lex causae*. In this case, the *lex causae* is essentially the BIT, which provides no rules on the standard of proof and on shifting the burden of proof.³²⁷ Neither do the UNCITRAL Rules, which are incorporated by reference in the BIT, regulate these matters. Therefore, in reliance on Article 27(4) of the UNCITRAL Rules quoted above, which empowers it to assess the weight of the evidence adduced, the Tribunal in its discretion may determine whether the burden of proof should be shifted or the standard lowered and ultimately whether an alleged fact can be deemed established under the circumstances.
498. Finally, the Tribunal will address the Claimants’ request for adverse inferences including the conditions for their application, at section VI.B.2.f below.

B. FAIR AND EQUITABLE TREATMENT

499. In this section, the Tribunal addresses the FET claim, by first discussing the applicable standard (1) and then examining whether Spain’s measures breached that standard (2).

1. The applicable standard

a. The Claimants’ position

500. The Claimants argue that Article IV of the Treaty accords them “the highest level” of FET protection,³²⁸ comprising the following elements:

claimant’s case and has taken steps to deny Claimants access to relevant evidence, multiple tribunals have shifted the burden of proof to the respondent”).

³²⁵ See Reply, paras. 478-482.

³²⁶ Reply, para. 482 (emphasis added).

³²⁷ See *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, para. 238.

³²⁸ SoC, paras. 329-335, Reply, paras. 503-509; C-PHB1, para. 14; C-PHB2, para. 75.

- a. *Non-arbitrariness*, which requires a Contracting Party to “act pursuant to a rational policy that is sufficiently tailored to the circumstances” and “explain that policy objective”;³²⁹
- b. *Non-discrimination*, which precludes a Contracting Party from according different treatment to two investors in similar situations, irrespective of their nationality;³³⁰
- c. *Transparency*, which requires that “the legal framework for the investor’s operations is readily apparent”, and that the host State “informs an investor before taking steps that harm its investment”;³³¹ and

³²⁹ SoC, paras. 355-363, referring to **Exh. CL-37**, *Ioan Micula v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, para. 525; **Exh. CL-49**, *Teco Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013, para. 587; **Exh. CL-48**, *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 307. See also Reply, paras. 515-522; C-PHB1 para. 15.

³³⁰ SoC, para. 337, referring to **Exh. CL-45**, *Ulysseas, Inc. v. Republic of Ecuador*, UNCITRAL, PCA Case No. 2009-19, Final Award, 12 June 2012, para. 293. See also Reply, paras. 510-514; C-PHB1, para. 16.

³³¹ SoC, para. 337, referring to **Exh. CL-37**, *Ioan Micula v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, para. 530; **Exh. CL-47**, UNCTAD, *Fair and Equitable Treatment*, in Vol. 3 UNCTAD Series on Issues in International Investment Agreements (1999), p. 51. See also Reply, paras. 523-532, referring to **Exh. CL-19**, *Cargill Incorporated v. Republic of Poland*, ICSID Case No. ARB(AF)/04/2, UNCITRAL, Final Award, 29 February 2008, para. 511; **Exh. CL-14**, *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/01, Partial Final Award, 6 May 2015, para. 206; **Exh. RL-0080**, *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000, para. 83; **Exh. CL-75**, *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, para. 308; **Exh. CL-37**, *Ioan Micula v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, paras. 864, 872; **Exh. CL-281**, *Nordzucker AG v. The Republic of Poland*, UNCITRAL, Second Partial Award (Merits), 28 January 2009, para. 77; **Exh. CL-282**, R. Dolzer & C. Schreuer, *Principles Of International Investment Law* (1st ed. 2008), p. 133; **Exh. CL-283**, *F. Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, para. 557; **Exh. CL-284**, *Frontier Petroleum Services Ltd. v. Czech Republic*, UNCITRAL, Final Award, 12 November 2010, para. 285, **Exh. CL-58**, *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, paras. 99, 101; **Exh. RL-0187**, A. Newcombe & L. Paradell, *Law and Practice of Investment Treaties-Standards of Treatment* (2009), p. 291 (PDF p. 22); **Exh. CL-285**, Salacuse, *The Law of Investment Treaties* (2nd Ed. 2015); **Exh. RL-0056**, *Charanne BV y Construction Investment S.A.R.L. v. The Kingdom of Spain*, SCC Arbitration V 62/2012, Award, 21

d. *A stable and predictable framework*, which “prohibits the state from deviating from the fundamental principles of its regulatory framework”.³³²

501. The Claimants dispute that Article IV refers to the minimum standard of treatment under customary international law, as defined in *Neer* (the “*Neer* standard”). In their view, investment tribunals have repeatedly rejected the *Neer* standard³³³ and held that the reference to international law in a FET clause does not limit it to the minimum standard of treatment.³³⁴ The Claimants invoke in particular the formulation of the FET standard given by the tribunal in *Waste Management II*, which they consider “particularly influential” and “seminal”.³³⁵

January 2016, paras. 476-477; **Exh. RL-0058**, *Isolux Infrastructure Netherlands, B.V. v. The Kingdom of Spain*, SCC Arbitration V 2013/153, Award, 12 July 2016, paras. 764-766; **Exh. CL-286**, *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case No. 2015/063, Award, 15 February 2018, paras. 641-646; **Exh. CL-256**, *Foresight Luxemburg Solar et al v. The Kingdom of Spain*, SCC Arbitration V 2015/150, Final Award, 14 November 2018, para. 361. See also C-PHB1, para. 17.

³³² SoC, para. 337, referring to **Exh. CL-25**, *Merrill & Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award, 31 March 2010, para. 233. See also SoC, paras. 364-365; Reply, paras. 533-536; C-PHB1, para. 18.

³³³ Reply, paras. 493-500, referring to **Exh. CL-59**, *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits Phase II, 10 April 2001, para. 118; **Exh. CL-88**, *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award in Respect of Damages, 31 May 2002, paras. 57-58; **CL-21**: *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, paras. 180-181; **Exh. CL-39**, *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 93; **Exh. RL-0197**, *GAMI v. Mexico*, NAFTA/UNCITRAL, Award, 15 November 2004, para. 95; **Exh. CL-24**, *William Ralph Clayton, et. al. v. Government of Canada*, PCA Case No. 2009-04, Award, 17 March 2015, para. 440; **Exh. CL-37**, *Ioan Micula et. al. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, para. 524; **Exh. CL-23**, *Mondev International Ltd. V. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, paras. 123, 125; **Exh. CL-13**, *Rusoro Mining Ltd. V. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, para. 519; **Exh. CL-273**, *Anglo American PLC v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, 18 January 2019, para. 442.

³³⁴ Reply, paras. 488-490, referring to **Exh. CL-12**, *Abengoa S.A v. United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award, 18 April 2013, paras. 641-643; **Exh. CL-39**, *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, paras. 98-99.

³³⁵ See Reply, para. 489 (“[t]he formulation announced by the *Waste Management* tribunal has been particularly influential, as a number of other tribunals have since applied its

502. In the alternative, the Claimants submit that the minimum standard of treatment and the so-called autonomous FET standard are “functionally equivalent”. Even if Article IV were deemed to reflect the minimum standard of treatment, it would nevertheless include all of the elements listed above.³³⁶
503. In the further alternative, the Claimants assert that the most-favored nation clause in Article III(1) (the “MFN clause”) allows them to import the more favorable FET standards contained in Spain’s BITs with Libya or the Dominican Republic.³³⁷ They contend that, contrary to what Spain argues, there is no requirement to identify specific Libyan or Dominican investors with a similar treaty claim having benefited from a more favorable FET interpretation.³³⁸ The Claimants argue that the relevant enquiry is whether the respondent state has agreed to confer more favorable treatment on other investors, not whether a tribunal decided to apply it.³³⁹

b. The Respondent’s position

504. The Respondent argues that Article IV provides for the minimum standard of treatment, which is identical to the *Neer* standard and does not include the elements cited by the Claimants.³⁴⁰ According to the Respondent, Article IV encapsulates the following standard of treatment:

“[T]he treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency”.³⁴¹

formulation of the international minimum standard”) and para. 490 (“seminal quote”). See also C-PHB1, para. 14 (relying on *Waste Management*).

³³⁶ SoC, para. 333; Reply, para. 484; C-PHB1 para. 14.

³³⁷ SoC, paras. 334-335; Reply, para. 503 ff. See **Exh. CL-31**, Treaty Between Spain and Libya, signed 12 December 2007, p. 82537, Article 3(1); **Exh. CL-32**, Treaty Between Spain and Dominican Republic, signed 16 March 1995, p. 2, Article 4(1).

³³⁸ Reply, paras. 504-509, referring to **Exh. CL-35**, *Bayindir Insaat Turizm Ticaret ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, paras. 153-160 and 163-167.

³³⁹ Reply, para. 504.

³⁴⁰ SoD, paras. 716-733; Rejoinder, paras. 954-1003; R-PHB1, paras. 205-206; R-PHB2, para. 33.

³⁴¹ SoD, paras. 718-719, referring to **Exh. RL-0159**, *Neer and Neer (USA) v. United Mexican States*, General Claims Commission – United States and Mexico, Docket No. 136, Opinion, 15 October 1926, 21 American Journal of International Law 555 (1927), p. 556.

505. In the Respondent's view, the proposed interpretation is supported by the drafting history of the Treaty. Unlike the previous BIT between Mexico and Spain, the current Treaty refers to "international customary law", which shows the States' intention to limit the scope of the FET standard to the minimum standard of treatment.³⁴²
506. Furthermore, Spain's interpretation was confirmed in *Abengoa v. Mexico*, where an arbitral tribunal acting under the same Treaty concluded that "[t]here is no doubt that Article IV of the Treaty refers to the minimum level of treatment in line with customary international law".³⁴³
507. Moreover, says the Respondent, its interpretation is supported by Article 1105(1) of the NAFTA, whose wording is identical to Article IV. In July 2001, the NAFTA Contracting States clarified that Article 1105(1) "prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party". In Spain's view, investment tribunals have interpreted Article 1105(1) based on the *Neer* standard.³⁴⁴
508. Spain further disputes the Claimants' alternative position that the minimum standard of treatment is identical to the autonomous FET standard.³⁴⁵ For Spain, any violation of

³⁴² SoD, paras. 728-730.

³⁴³ SoD, para. 723, referring to **Exh. CL-12**, *Abengoa S.A v. The United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award, 18 April 2013, para. 640.

³⁴⁴ SoD, paras. 720-722, referring to **Exh. RL-0156**, North American Free Trade Agreement (NAFTA), Chapter 11, Article 1105; **Exh. CL-22**, *Glamis Gold v. The United States of America*, UNCITRAL, Award, 8 June 2009, para. 22; **Exh. RL-0162**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98; **Exh. RL-0039**, *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Award, 26 January 2006, para. 194; **Exh. RL-0163**, *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)98/3, Award, 26 June 2003, paras. 128, 132; **Exh. RL-0164**, *Mercer International Inc. v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, 6 March 2018, para. 7.76; **Exh. RL-0063**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, paras. 259, 262,-263; **Exh. RL-0165**, *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)05/02, Award, 18 September 2009, paras. 267-268, 284-285, 294; **Exh. RL-0254**, *Mesa Power v. Canada*, PCA Case No. 2012-17, Award, 24 March 2016, paras. 500 and 502; **Exh. CL-24**, *William Ralph Clayton, et. al., v. Government of Canada*, PCA Case No. 2009-04, Award, 17 March 2015, para. 433.

³⁴⁵ SoD, paras. 734-752; Rejoinder, paras. 957, 964-973, referring, *inter alia*, to **Exh. CL-21**, *ADF, Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003, para. 182; **Exh. CL-23**, *Mondev, International Ltd v. United States*, ICSID

Article IV “must be of such magnitude as to be shocking or egregious”.³⁴⁶ Moreover, both the minimum standard of treatment and the autonomous standard impose a high degree of deference to a State’s regulatory decisions, which tribunals cannot second-guess.³⁴⁷

Case No. ARB(AF)/99/2, Award, 11 October 2002, paras. 119, 123; **Exh. CL-25**, *Merrill and Ring Forestry L.P. v. Government of Canada*, ICSID Case No. UNCT/07/1, Award, 31 March 2010, para. 187.

³⁴⁶ SoD, paras. 780, 751, referring to **Exh. RL-0164**, *Mercer International Inc. v Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, 6 March 2018, para. 7.76; **Exh. RL-0170**, *Spence International Investments LLC, Berkowitz, et. al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Partial Award, 25 October 2016, para. 282; **Exh. RL-0171**, *Adel A Hamadi Al Tamimi v Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015, paras. 383, 390.

³⁴⁷ SoD, paras. 802-814, referring to **Exh. CL-22**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009, para. 779; **Exh. RL-0064**, *Gemplus, SLP, S.A. and Gemplus Industrial, S.A. de C.V. v United Mexican States*, ICSID Cases No. ARB (AF)/04/3 & ARB (AF)/04/4, Award, 16 June 2010, paras. 6-26; **Exh. RL-0189**, *Les Laboratoires Servier, S.A.S., Biofarma, S.A.S., and Arts et Techniques du Progrès S.A.S. v Republic of Poland*, UNCITRAL, Final Award, 14 February 2012, para. 568; **Exh. RL-0078**, *Chemtura Corporation v Government of Canada*, NAFTA Arbitration under UNCITRAL Rules, Award, 2 August 2010, para. 153; **Exh. RL-0067**, *Joseph Charles Lemire v Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para. 283; **Exh. RL-0055**, *Electrabel v. Hungary*, Award, 25 November 2015, paras. 179-180; **Exh. RL-0179**, *Eastern Sugar B.V. v Czech Republic*, SCC Case No. 088/2004, Partial Award dated 27 March 2007, para. 272; **Exh. RL-0083**, *Stadtwerke München GmbH, RW Innogy GmbH, and others v. Kingdom of Spain*, ICSID Case No. ARB/15/1, Award, 2 December 2019, paras. 319, 321; **Exh. RL-0190**, *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, ICSID Cases Nos. ARB/08/1 and ARB/09/20, Award, 16 May 2012, para. 258; **Exh. RL-0068**, *Philip Morris Brands SÀRL, Philip Morris Products S.A. and Abal Hermanos S.A., Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7. Final Award, 8 July 2016, para. 388; **Exh. RL-0059**, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016, para. 318; **Exh. RL-0191**, *Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award, 26 June 2009, paras. 452-459, 462; **Exh. RL-0160**, *Alex Genin, Eastern Credit Limited, Inc. and A. S. Baltoil v Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, para. 352; **Exh. RL-0192**, *Renée Rose Levy De Levi v Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014, paras. 239-250; **Exh. RL-0193**, *Marfin Investment Group v. The Republic of Cyprus*, ICSID Case No. ARB/13/27, Award, 26 July 2018, paras. 825, 832, 898-899; **Exh. RL-0194**, *Valeri Belokon v. Kyrgyz Republic*, UNCITRAL, Award, 24 October 2014; **Exh. CL-48**, *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, paras. 272-273.

509. Spain further contends that the MFN clause cannot serve to import standards of treatment from other treaties. The Claimants have failed to demonstrate that (i) Spain granted more favorable treatment to non-Mexican investors; (ii) the investments of the non-Mexican investors were in circumstances similar to the Claimants' investments; (iii) the difference in treatment was due to nationality; and (iv) the difference in treatment was not based on objective criteria and reasonable public policy. For these reasons, the MFN clause cannot be used to import the FET standard from the Spain-Libya or Spain-Dominican Republic BITs.³⁴⁸
510. Moreover, it is the Respondent's submission that, even if the so-called "autonomous" standard were to apply in this case, the obligations imposed on Spain under such standard are different from those described by the Claimants:
- a. With regard to *non-arbitrariness*, a conduct is arbitrary only if it violates "the rule of law" (*ELSI* standard),³⁴⁹
 - b. Concerning *non-discrimination*, the Claimants must prove "objectively" that they were treated differently from other investors in similar circumstances,³⁵⁰

³⁴⁸ SoD, paras. 753-774; Rejoinder, paras. 1004-1030.

³⁴⁹ SoD, paras. 776-780, referring to **Exh. RL-0176**, *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v Italy)*, International Court of Justice, Decision of 20 July 1989, 15 International Court of Justice Reports (1989), para. 128; **Exh. CL-15**, *Duke Energy Electroquil Partners & Electroquil S.A. v. Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 387; **Exh. CL-11**, *Azurix Corp. v. Argentine Republic*, ICSID case No. ARB/01/12, Award, 14 July 2006, para. 392; **Exh. CL-41**, *LG&E Energy Corp., et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 157; **Exh. RL-0160**, *Alex Genin, Eastern Credit Limited, Inc. and A. S. Baltoil v Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, para. 371; **Exh. RL-0177**, *Enron Corporation Ponderosa Assets, L.P. v Argentine Republic*, ICSID Case No. ARB/01/13, Award, 22 May 2007, para. 281; **Exh. RL-0007**, *EDF (Services) Limited v Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, para. 303; **Exh. RL-0162**, *Waste Management, Inc. v United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98; **Exh. RL-0039**, *International Thunderbird Gaming Corporation v United Mexican States*, UNCITRAL, Award, 26 January 2006, para. 200; **Exh. RL-0165**, *Cargill, Incorporated v United Mexican States*, ICSID Case No. ARB(AF)05/02, Award, 18 September 2009, paras. 284, 286. See also Rejoinder, paras. 1032-1041; R-PHB1, paras. 207-213; R-PHB2, paras. 34, 36.

³⁵⁰ SoD, paras. 781-783, referring, *inter alia*, to **Exh. CL-17**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 602; **Exh. RL-0069**, *Parkerings-Compagniet AS v Republic of Lithuania*, ICSID Case No.

- c. *Transparency* is not part of the FET standard. Alternatively, only a “manifest”, “gross”, “complete” lack of transparency would be capable of triggering State responsibility;³⁵¹
- d. Further, the obligation to provide a stable and predictable framework does not form part of the FET standard either. . In any event, the Claimants fails to address the threshold against which a State would be held liable, which would be an extremely high one: “complete dismantling of the very legal framework constructed to attract investors.”³⁵²

511. Finally, the Respondent contends that the obligation to provide FET is limited in scope when it comes to the financial sector.³⁵³

c. Analysis

512. Article IV of the Treaty is entitled “Minimum Level of Treatment” and reads as follows:

ARB/05/8, Award, 11 September 2007, para. 368; **Exh. RL-0180**, Andrea K. Bjorklund, *The National Treatment Obligation, in Arbitration under International Investment Agreements: A Guide to the Key Issues* (Katia Yannaca-Small, ed., Oxford University Press 2010), p. 411. See also Rejoinder, paras. 1042-1056; R-PHB1, para. 214.

³⁵¹ SoD, paras. 784-789, referring, *inter alia*, to **Exh. RL-0186**, United Nations Conference on Trade and Development, Fair and Equitable Treatment (United Nations 2012), pp. 63, 72; Rejoinder, paras. 1057-1073, referring to, *inter alia*, **Exh. RL-0165**, *Cargill, Incorporated v United Mexican States*, ICSID Case No. ARB(AF)05/02, Award, 18 September 2009, para. 285; **Exh. RL-0162**, *Waste Management, Inc. v United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98; R-PHB1, paras. 217-219.

³⁵² Rejoinder, para. 1089, referring to **Exh. RL-0073**, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 139.

³⁵³ SoD, paras. 790-801, referring, *inter alia*, to **Exh. RL-0073**, *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, paras. 124, 127; **Exh. RL-0077**, *Occidental Exploration and Production Company v The Republic of Ecuador*, LCIA Case No. UN 3467, Award, 1 July 2004, para. 183; **Exh. RL-0053**, *El Paso Energy International Company v The Argentine Republic*, ICSID Case No. ARB/03/15, Final Award, 31 October 2011, para. 369; **Exh. RL-0188**, *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, para. 258; **Exh. CL-48**, *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 255; **Exh. RL-0186**, United Nations Conference on Trade and Development, Fair and Equitable Treatment (United Nations 2012), pp. 67, 90. See also SoD, paras. 802-814; Rejoinder, 1074-1089; R-PHB1, paras. 215-216.

"1. Each Contracting Party shall give to the investments of investors of the other Contracting Party *treatment in accordance with international customary law, including fair and equitable treatment*, as well as full protection and security.

2. A resolution to the effect that another provision of this Agreement or of a separate international agreement has been violated shall not establish that this article has been violated".³⁵⁴

513. In accordance with the rules of interpretation set out above (see *supra* para. 246), the Tribunal starts with the text of the Treaty.³⁵⁵ In its original Spanish wording, Article IV is titled "[n]ivel mínimo de trato", which is translated as "[m]inimum level of treatment" in the unofficial English version of the BIT. The text of the provision then refers to "treatment in accordance with international customary law, including fair and equitable treatment". A textual interpretation of the clause, including its title, leaves no doubt that the standard contained in Article IV of the Treaty is the minimum standard of treatment in accordance with customary international law.
514. The Claimants have not provided any element that would contradict this conclusion, such as for instance an agreement between the Contracting Parties or an instrument made by one Party and accepted by the other Party "in connection with the conclusion of the treaty" (Article 31(2)(a) and (b) VCLT), or any subsequent agreement or practice within the meaning of Article 31(3)(a) and (b) of the VCLT.
515. The arbitral awards invoked by the Claimants are equally unhelpful, as the applicable FET provisions at issue in those cases referred to either "international law" or "principles of international law", and not to the "minimum" standard or "customary" international law.³⁵⁶ As noted by Spain, the decision that is most apposite is *Abengoa v. Mexico*, which applied the same Treaty and came to the same conclusion as this Tribunal:

³⁵⁴ **Exh. C-1**, Treaty, Article IV (emphasis added).

³⁵⁵ See **Exh. CL-239**, *Libya v. Chad*, "[i]nterpretation must be based above all upon the text of the treaty" (Territorial Dispute (*Libyan Arab Jamahiriya v. Chad*), Judgment, ICJ Reports 1994, p. 22, para. 41).

³⁵⁶ For instance, the Argentina-France BIT which was at issue in *Vivendi v. Argentina* provided for "fair and equitable treatment according to the principles of international law". See **Exh. CL-10**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, paras. 7.4.1-7.4.7. Similarly, the Canada-Venezuela BIT applicable in *Rusoro v. Venezuela* set forth that "[e]ach Contracting Party shall, in accordance with the principles of international law, accord investments or returns of investors of the other Contracting Party fair and equitable treatment and full protection and security". See **Exh. CL-13**, *Rusoro Mining Ltd. V. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016,

"[t]here is no doubt that Article IV of the [Treaty] refers to the minimum level of treatment in accordance with customary international law".³⁵⁷

516. In summary, Article IV enshrines the minimum standard of treatment under customary international law. This being so, the Parties diverge on the content of that standard. Such content and its evolution have been discussed at length by scholars and arbitral tribunals, especially in the context of Article 1105 of the NAFTA, a provision that bears the same Spanish title ("*n*ivel mínimo de trato") and contains very similar wording to Article IV of the Treaty.³⁵⁸
517. The Tribunal agrees with the Claimants that the content of the minimum standard of treatment was appropriately articulated in *Waste Management II*. The *Waste Management II* tribunal first reviewed relevant case law under NAFTA and noted that prior decisions had "rejected any suggestion that the standard of treatment of a foreign investment set by NAFTA is confined to the kind of outrageous treatment referred to in the *Neer* case, i.e. to treatment amounting to an 'outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency'".³⁵⁹ It then described conduct in breach of the minimum standard in the following terms:

"98 [...] the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is

para. 510. Furthermore, the U.S.-Argentina BIT applicable in *Azurix v. Argentina* provided that "Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than required by international law". The tribunal noted that "[t]he paragraph consists of three full statements, each listing in sequence a standard of treatment to be accorded to investments: fair and equitable, full protection and security, not less than required by international law. Fair and equitable treatment is listed separately". See **Exh. CL-11**, *Azurix Corp. v. Argentine Republic*, ICSID case No. ARB/01/12, Award, 14 July 2006, para. 361.

³⁵⁷ **Exh. CL-12**, *Abengoa S.A v. The United Mexican States*, ICSID Case No. ARB(AF)/09/2, Award, 18 April 2013, para. 640.

³⁵⁸ While the text of Article IV refers to "international *customary* law", the text of Article 1105 of the NAFTA refers to "treatment in accordance with international law". In 2001, the Free Trade Commission interpreted Article 1105 as "prescrib[ing] the *customary* international law minimum standard of treatment of aliens". See **Exh. RL-0166**, NAFTA, Free Trade Commission, Notes of interpretation of certain provisions under Chapter 11, 31 July 2001.

³⁵⁹ **Exh. RL-0162**, *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 93.

discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety - as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.

99. Evidently the standard is to some extent a flexible one which must be adapted to the circumstances of each case. [...]"

518. The use in *Waste Management II* of intensifying adjectives or adverbs such as “manifest”, “complete” or “grossly” for certain characteristics of non-conforming conduct makes it clear that acts or omissions constituting a breach must be of a serious nature.³⁶⁰ The enumeration of these characteristics conveys the idea that there is a high threshold for the conduct of a host State to rise to the level of a breach, although there is no requirement that the challenged conduct reach the level of shocking or outrageous behavior.
519. On this basis, and to the extent relevant to the facts pleaded in this case, the Tribunal considers that the following types of conduct are prohibited by Article IV of the Treaty: arbitrariness; “gross” unfairness, injustice or idiosyncratic conduct; discrimination; “complete” lack of transparency and candor in an administrative process; lack of due process “leading to an outcome which offends judicial propriety”; and “manifest failure” of natural justice in judicial proceedings. Further, the Tribunal shares the view held by a majority of tribunals acting under a treaty where the FET clause was confined to the minimum standard of treatment³⁶¹ that the failure to respect an investor’s legitimate expectations in and of itself does not constitute a breach of the minimum standard of treatment under customary international law, but is an element to take into account when assessing whether other components of the standard are breached.
520. Finally, when elucidating the content of the minimum standard of treatment, one should further take into consideration that international law requires tribunals to afford an appropriate level of deference to the manner in which a State exercises the discretion

³⁶⁰ See also **Exh. CL-262**, *Bilcon of Delaware et. al., v. Government of Canada* (NAFTA), UNCITRAL, Award on Jurisdiction and Liability, 17 March 2015, para. 443.

³⁶¹ See, e.g., **Exh. RL-0162**, *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98 (quoted supra in the text); **Exh. RL-0165**, *Cargill Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, para. 296; **Exh. RL-0254**, *Mesa Power Group, LLC v. Government of Canada* Award, 24 March 2016, para. 502.

which it enjoys under the domestic law. A number of investment tribunals operating both under the minimum standard and autonomous notions of FET have acknowledged the requirement for deference.³⁶²

521. That being said, deference to the primary decision-makers cannot be unfettered, as otherwise a host state would be entirely shielded from state responsibility and the standards of protection contained in BITs would be rendered nugatory.³⁶³ As noted by the tribunal in *RREEF v. Spain*, “discretionary” cannot be equated with “arbitrary”.³⁶⁴ Or, in the words of the tribunal in *Unglaube v. Costa Rica*:

“deference [...] is not without limits. Even if such measures are taken for an important public purpose, governments [...] will not be excused from liability if their action has been arbitrary or discriminatory”.³⁶⁵

522. Differently put, “a tribunal cannot simply put itself in the position of the S[t]ate and weigh the measure anew, particularly with hindsight”.³⁶⁶ This is especially so where hefty and potentially costly decisions must be taken and in situations requiring the State to act with urgency. Hence, rather than assessing whether in a given situation the Spanish authorities acted adequately or correctly, the Tribunal must examine whether Spain's actions show serious flaws which resulted in the Claimants' being treated in a manner

³⁶² See, among others, **Exh. RL-0189**, *Les Laboratoires Servier, S.A.S., Biofarma, S.A.S. and Arts et Techniques du Progres S.A.S. v. Republic of Poland*, UNCITRAL, Award, 14 February 2012, para. 568; **Exh. CL-291**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, paras. 583-585; *Muszynianka v. Slovakia*, PCA Case. 2017-08, Award, 7 October 2020, para. 558.

³⁶³ See **Exh. CL-291**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 584; *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018, para. 468.

³⁶⁴ See *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018, para. 468.

³⁶⁵ **Exh. CL-277**, *Marion & Reinhard Unglaube v. The Republic of Costa Rica*, ICSID Case Nos. ARB/08/1 and ARB/09/20, Award, 16 May 2012, para. 247 (internal footnote omitted).

³⁶⁶ *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award, 30 October 2017, para. 7.20. See also *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Award, 05 November 2021, para. 340.

inconsistent with the standard articulated above. It is with this standard of review in mind that the Tribunal will scrutinize Spain's conduct under Article IV.

523. Before turning to the review of the impugned measures, the Tribunal must address the Claimants' submission that they are entitled to a less restrictive FET standard by operation of the MFN clause contained in Article III(1) of the Treaty. Considering the facts of this dispute, the Tribunal is of the view that it may leave open whether an MFN clause such as the one contained in the Treaty allows the Claimants to import a less stringent FET standard. As further explained in section VI.B.2.g below, even if the Tribunal were to adopt a more generous FET standard, the outcome of its analysis would remain the same.

2. Challenged measures

524. In their written and oral submissions, the Claimants have argued that a myriad of measures which Spain enacted, or failed to enact, breached Article IV of the Treaty. The presentation of these allegedly wrongful measures has somewhat evolved in the course of the proceedings.³⁶⁷ In sum, as argued in their Reply, the Claimants have complained of five categories of allegedly wrongful acts, which are addressed in this order in the following sections: (i) the deposit withdrawals;³⁶⁸ (ii) the statements and "non-statements" by Spanish officials;³⁶⁹ (iii) the failure to prohibit short sales of Banco Popular shares;³⁷⁰ (iv) the failure to grant the Emergency liquidity assistance ("ELA");³⁷¹ and (v) the resolution of Banco Popular and the sale to Santander.³⁷²

³⁶⁷ See, e.g., SoC, section III.A.3-7 (where the Claimants argued their FET case by "sub-elements" of the standard); Reply, section IV.B.2 (where the Claimants presented the allegedly wrongful measures in the five categories mentioned *infra* in the text).

³⁶⁸ Reply, section IV.B.2.a (entitled "Respondent's Massive Deposit Withdrawals from [Banco Popular]").

³⁶⁹ Reply, section IV.B.2.b (entitled "Respondent's harmful public statements and 'non-statements'").

³⁷⁰ Reply, section IV.B.2.c (entitled "Respondent's Failure to Prohibit Short Sales").

³⁷¹ Reply, section IV.B.2.d (entitled "Respondent's Failure to Provide ELA").

³⁷² Reply, section IV.B.2.e (entitled "Respondent Engineered [Banco Popular]'s Resolution and the Sham Auction that Resulted in the Fire Sale to Banco Santander").

a. Deposit withdrawals

i. The Claimants' position

525. The Claimants contend that, in 2015 and 2016, Spain's public entities made massive deposit withdrawals of approximately € 14 billion, and continued to withdraw critical deposits in 2017, in violation of the FET standard.³⁷³ These withdrawals contributed to Banco Popular's liquidity shortage and subsequently led to Banco Popular's resolution. Spain was aware of such withdrawals,³⁷⁴ yet failed to take appropriate steps to mitigate their effects.³⁷⁵
526. The Claimants challenge Spain's argument that the withdrawals were reasonable, as Spain failed to cite any internal policies that the agencies allegedly followed in making those withdrawals. In any event, the Respondent failed to prove that such policies should prevail over Spain's obligation to prevent Banco Popular from failing.³⁷⁶

ii. The Respondent's position

527. Spain argues that the Claimants have not established that the public withdrawals breached FET.³⁷⁷ First, Spain had no duty to monitor or impose restrictions on deposit withdrawals,³⁷⁸ especially where Banco Popular was a so-called "significant" institution supervised by the ECB.³⁷⁹ Second, the Claimants failed to prove that Spanish public

³⁷³ SoC, paras. 26(a), 339-378; Reply, paras. 556-585; C-PHB1, paras. 65-69; C-PHB2, paras. 23-29.

³⁷⁴ Reply, para. 580, referring to **Exh. C-361**, EuropaPress, *Guindos sondeó sin éxito a gran banca para que comprara el Popular y pidió publicar el informe de la JUR*, 30 September 2020. See also C-PHB1, para. 65.

³⁷⁵ Reply, para. 556-571. See also C-PHB1, para. 64; C-PHB2, para. 29.

³⁷⁶ Reply, para. 561. See also C-PHB1, paras. 67, 69.

³⁷⁷ SoD, paras. 819-832; Rejoinder, paras. 273-301; R-PHB1, paras. 84-94; R-PHB2, paras. 23-31.

³⁷⁸ SoD, para. 820; Rejoinder, para. 1097; R-PHB1, para. 87; R-PHB2, para. 49.

³⁷⁹ Rejoinder, para. 1097, referring to **Exh. RL-0402**, Judgment of 19 December 2018, C 219/17, *Berlusconi and Fininvest*, EU:C:2018:1023, para. 38; **Exh. R-0403**, Opinion issued by the Consejo de Estado, 29 June 2020 in file 232/2020, pp. 19-20; **Exh. R-0404**, Opinion issued by the Consejo de Estado, 29 June 2020 in file 237/2020, p. 20; **Exh. R-0405**, Opinion issued by the Consejo de Estado, 29 June 2020 in file 242/2020, p. 20; **Exh. R-0406**, Opinion issued by the Consejo de Estado, 29 June 2020 in file 247/2020, p. 19; **Exh. R-0407**, Opinion issued by the Consejo de Estado, 29 June 2020 in file 252/2020, p. 20; **Exh. R-0401**, Judgment of the Audiencia Nacional, 9 September 2020

entities conspired against Banco Popular, especially considering that individuals and private entities were also withdrawing their deposits from Banco Popular.³⁸⁰ Spain notes that 70% of total withdrawals were effected by individuals and private entities,³⁸¹ whereas deposits by State-related entities increased by almost € 1 billion between late 2016 and June 2017.³⁸² Third, Spanish public entities withdrew their deposits in accordance with the terms of their deposit agreements and internal policies. The reasons for such withdrawals were legitimate,³⁸³ *inter alia* because Spanish public entities had a responsibility to safeguard public funds.³⁸⁴

iii. Discussion

528. The Tribunal starts by recalling that it has no jurisdiction over disputes arising out of the public deposit withdrawals that occurred in 2015 and 2016 as such withdrawals predated the Claimants' investments.³⁸⁵ In other words, the Tribunal only has jurisdiction over acts related to the deposit withdrawals that occurred from 2017 onwards. This temporal limitation restricts the scope of its examination as a significant part of the withdrawals occurred before that date.³⁸⁶ Second, the Tribunal notes that it has jurisdiction over claims about the deposit withdrawals to the extent that they concern acts or omissions taken *by the Respondent in the exercise of sovereign powers*.³⁸⁷
529. In this latter respect, the Claimants argue that the "Respondent had effective tools at its disposal to quell a panic-driven run on deposits".³⁸⁸ They submit that "[a]t a time when Respondent knew that depositors were at risk of developing irrational fears about the safety of their deposits with [Banco Popular], Respondent stoked those fears by

(Rec 664/2019), p. 7; **Exh. R-0402**, Judgment of the Audiencia Nacional, 10 June 2020 (Rec 666/2019), p. 14.

³⁸⁰ SoD, para. 824.

³⁸¹ SoD, para. 824; R-PHB2, para. 48.

³⁸² R-PHB1, para. 57, referring to RER-2, Expert Report of Versant, paras. 96-97, Table 2.

³⁸³ SoD, paras. 823, 829, referring to **Exh. R-0226**, Bank of Spain, Certificate, 21 April 2017; **Exh. R-0017**, SEITTSA, Cash management public procurement 2014. See also Rejoinder, 1092 ff.

³⁸⁴ SoD, para. 829; R-PHB1, paras. 85-87.

³⁸⁵ See *supra* 383-409.

³⁸⁶ See 391.

³⁸⁷ See *supra* 294.

³⁸⁸ C-PHB1, para. 231.

allowing its agencies to withdraw massive sums from the bank”.³⁸⁹ In particular, the Claimants maintain that the Respondent should have resorted to the “the ability of the [Bank of Spain] or the Ministry of Economy *to order the suspension of deposit withdrawals* in order to safeguard the stability of the banking system”.³⁹⁰ The Claimants also contend that, among the steps that Spain should have taken “to reassure the market and depositors”, “[t]he [Bank of Spain] should have alerted Spanish authorities about the excessive withdrawals from public authorities and then considered all possible means to strengthen [Banco Popular’s] deposit holdings”.³⁹¹

530. In support of these arguments, the Claimants have particularly relied on the expert evidence of Dr. de la Mano and Prof. Goldstein. The former explained that “the [Bank of Spain] and the [Ministry of Economy] had the responsibility to monitor withdrawals by public institutions as well as to guide and inform deposit withdrawal decisions”.³⁹² The latter opined that “withdrawals by government entities serve[d] as a negative signal for other depositors, and so such withdrawals can lead to an amplification of withdrawals and significant worsening of the liquidity crisis” and that it was “surprising that Spanish government entities did the opposite of what would be expected with respect to their deposits in Banco Popular”.³⁹³ Relying on Prof. Goldstein’s testimony at the hearing, the Claimants further contend that “even if Respondent could not have prohibited such withdrawals, Respondent should, at a minimum, have sought to understand the effects of continuing public deposit withdrawals on [Banco Popular’s] liquidity position and taken appropriate steps to mitigate the effects of these substantial withdrawals”.³⁹⁴

531. The rules on burden of proof provide that it is for the party alleging a fact to prove that fact. It is thus the Claimants’ burden to show that Spain had an obligation to prevent the deposit withdrawals and that its failure to do so violated FET. By contrast, it is not for Spain to demonstrate that the deposit withdrawals are justified, as the Claimants appear to suggest in some of their submissions.³⁹⁵

³⁸⁹ Reply, para. 562.

³⁹⁰ Reply, para. 561 (emphasis added).

³⁹¹ Reply, para. 575, citing to CER-5, paras. 7.19-20. See also CER-6, paras. 65-70.

³⁹² CER-5, para. 7.20.

³⁹³ CER-6, para. 69.

³⁹⁴ C-PHB1, para. 66.

³⁹⁵ See, e.g., C-PHB1, para. 65 (“Respondent has never adequately explained its deposit withdrawals.”).

532. On the basis of the record, the Tribunal finds that neither the Ministry of Economy, nor the Bank of Spain, nor any other organ of the Respondent had an obligation to take specific steps to prevent the Spanish agencies, municipalities, and state-owned entities from withdrawing their funds from their Banco Popular accounts, which withdrawals conformed to the terms of the deposit agreements.
533. In particular, neither the Claimants nor their experts have referred to any rule requiring Spain to monitor or limit deposit withdrawals by its organs and state-owned entities when the withdrawals risked harming a bank, its shareholders or creditors.
534. In their Reply, the Claimants referred to Spain's "supervisory powers over the solvency and conduct of credit institutions and other financial auxiliaries, which it exercises either independently or as part of the Single Supervisory Mechanism ('SSM') in the euro area, cooperating with other national supervisors in the area of their respective powers". In the Claimants' view, these powers "*necessarily include* [...] collaborating with other agencies to reduce government withdrawals".³⁹⁶ Beyond these broad statements, the Claimants have pointed to no legal basis allowing, let alone obliging, Spain to order its public entities to suspend withdrawals. At the hearing, the Claimants' expert Dr. de la Mano was asked to indicate "what provisions of law made the Ministry of Economy or Bank of Spain responsible from preventing public entities, including local government or State-owned entities from withdrawing deposits from Banco Popular".³⁹⁷ His response was: "the answer is no, there is no provision of law".³⁹⁸
535. Furthermore, and leaving aside the lack of any statutory obligation, the Claimants and their experts have also failed to show that taking steps to prevent the public entities from withdrawing funds from a private bank would have been in accordance with appropriate regulatory practice. In particular, they have not referred to any document, precedent, or authority to support a finding that monitoring the withdrawals, or directing their *suspension*, would have been the "expected" regulatory practice in the circumstances. With regard to Prof. Goldstein's explanation that a State "would be expected" to act in such a fashion to counter the "negative signal for other depositors",³⁹⁹ the Tribunal considers that there is at least equal merit in Spain's

³⁹⁶ Reply, para. 582 (emphasis added).

³⁹⁷ May Hearing Tr. [English version], 22 May 2021, 949: 11-15.

³⁹⁸ May Hearing Tr. [English version], 22 May 2021, 950: 20-21.

³⁹⁹ CER-6, para. 69 (opining that "it is important to emphasize that withdrawals by government entities serve as a negative signal for other depositors, and so such withdrawals can lead

refutation that an instruction to cease the withdrawals could have been counterproductive, as the market may have perceived it as a warning about Banco Popular's financial status. In the circumstances, the Tribunal sees nothing arbitrary or grossly unfair in Spain not taking action in respect of the deposit withdrawals.

536. Nor is the Tribunal persuaded by Dr. de la Mano's suggestion that, to avoid any stigmatizing effect, the directions to stop the withdrawals could have been given "privately".⁴⁰⁰ Even assuming such instructions may have been given confidentially, the possibility that the instructions may have leaked was not remote given the number of entities involved, with the result that the confidential nature of the acts would have increased any negative perception.
537. Finally, the Claimants rely on the testimony of Mr. de Guindos, the then Minister of Economy, before the *Audiencia Nacional* to argue that Spain's conduct was improper. As reported in a press statement, Mr. de Guindos gave the following testimony before the *Audiencia Nacional*:

"De Guindos said on Wednesday that he and then-Secretary of State for the Economy Irene Garrido contacted public bodies to try to stop the withdrawal of deposits, but it was impossible, because these institutions have their own criteria, embodied in their bylaws, to preserve their investments."⁴⁰¹

to an amplification of withdrawals and significant worsening of the liquidity crisis. This is because withdrawals by the government might be perceived as containing negative information about the bank or indicating that the government does not intend to support it. Recall that the role of the government in a liquidity crisis is to inject liquidity and provide reassuring statements, partly because this helps to calm the panic. By the same token, an act of withdrawal by a government entity can amplify panic because markets may read it as a statement expressing a lack of confidence. Hence, *it is surprising that Spanish government entities did the opposite of what would be expected with respect to their deposits in Banco Popular*", emphasis added).

⁴⁰⁰ CER-2, para. 1.91 ("The [Ministry of Economy] has control or influence over some of the entities withdrawing funds from [Banco Popular]. It is difficult to understand why the [Ministry of Economy] would not have communicated, at least privately, an instruction not to withdraw significant deposits, particularly since all supervisory and regulatory authorities agreed that [Banco Popular] was solvent. There is no evidence that the [Ministry of Economy] or the [Bank of Spain] acted to limit the withdrawal of massive deposits by public institutions").

⁴⁰¹ Reply, para. 185; **Exh. C-361 ENG**, Europa Press, *Guindos unsuccessfully probed a large bank to buy Popular and asked to publish the SRI report*, 30 September 2020; See also **Exh. C-360 ENG**, *De Guindos asserts that none of the five big Spanish Banks wanted to buy Popular in 2017*, 30 September 2020.

538. The Tribunal sees nothing in this short press report that suggests that the Respondent's conduct breached its international law obligations. To the contrary, the press report confirms that the governmental authorities in fact made an attempt to stop the withdrawals, but were unable to do so because these government bodies follow their own rules or policies with a view to protecting their assets. Moreover, the Claimants have not established that the Respondent was under an obligation to take "further action"⁴⁰² and that failure to do so was a breach of the FET standard.

539. In conclusion, there is no basis for the assertion that in the circumstances the Respondent was required to take steps to put an end to the deposit withdrawals. Neither is there any indication in the record that it somehow coordinated the withdrawals in order to destroy Banco Popular.⁴⁰³ Hence, Spain's conduct cannot be said to have been arbitrary, unfair, not to speak of "grossly" unfair, or otherwise contrary to the minimum standard of treatment enshrined in Article IV.

b. Statements and "non-statements" of public officials

i. The Claimants' position

540. The Claimants argue that Spain violated the FET standard by (i) failing to publicly support Banco Popular; (ii) making public announcements that harmed Banco Popular; and (iii) failing to correct certain statements by EU authorities about Banco Popular.⁴⁰⁴

541. First, the Claimants contend that Spain was obliged to publicly reassure Banco Popular's depositors. Nothing prevented Spain from speaking out in support of Banco Popular, as it did for other Spanish banks, including Catalunya Banc, BMN and Liberbank. Spain's failure to support the bank, so say the Claimants, is therefore arbitrary and discriminatory.⁴⁰⁵ The "constructive ambiguity" doctrine, invoked by Spain at the hearing to show that the public statements were neutral and truthful, lacks credibility.⁴⁰⁶

⁴⁰² Reply, para. 580.

⁴⁰³ See SoC, para. 26(a).

⁴⁰⁴ See SoC, paras. 336-378; Reply, paras. 586-613; C-PHB1, paras. 47-63, 79; C-PHB2, paras. 12-19.

⁴⁰⁵ SoC, paras. 26, 342, 355, 358.

⁴⁰⁶ C-PHB1, paras. 27, 71-82; C-PHB2, paras. 20-22.

542. Second, the Respondent's officials made arbitrary and discriminatory public statements implying that Spain would not support Banco Popular. This aggravated Banco Popular's liquidity crisis and caused the share price to drop. The Claimants refer to the following statements made by Mr. de Guindos, then Minister of Economy, and Ms. Garrido, then Secretary of the Department of Economy and Support to the Companies of the Ministry of Economy, and stress that Spain did not present these two officials as witnesses and gave no reasonable explanation for their detrimental statements:⁴⁰⁷

- Mr. Luis de Guindos' "negative" statement of 10 April 2017;⁴⁰⁸
- Ms. Irene Garrido's statement of 12 April 2017, according to which Banco Popular needed "private solutions" because it was a "private bank," thereby suggesting that the bank was on its own and would not receive any governmental support;⁴⁰⁹
- Mr. Luis de Guindos' statement of 19 April 2017, where he implied that the bank would not receive any public support;⁴¹⁰ and
- Mr. Luis de Guindos' statement of 18 May 2017, by which he implied that Banco Popular was the EU's problem, rather than Spain's, and Spanish depositors were on their own.⁴¹¹

543. Third, Spain failed to publicly correct certain "harmful" statements of EU officials, specifically Dr. Elke König's statement of 23 May 2017 that Banco Popular was one of the banks that the ECB was watching; the statement of 31 May 2017 by an unnamed EU official about the ECB issuing warning to Banco Popular;⁴¹² and Bankia's "negative"

⁴⁰⁷ Reply, paras. 589-596; C-PHB1, para. 56-58; C-PHB2, paras. 12, 15.

⁴⁰⁸ SoC, para. 157; Reply, para. 125, 589-592; C-PHB1 para. 51(a), discussing **Exh. C-74**, L. Pellicer, *Guindos ve al Popular "solvente" y dice que la banca española está "saneada"*, El País, 10 April 2017, translated at **Exh. C-74 ENG**.

⁴⁰⁹ **Exh. C-76**, *El Gobierno dice que el Banco Popular requiere una "solución privada,"* La Vanguardia, 12 April 2017, translated at **Exh. C-76 ENG**. See also SoC, para. 158; Reply, para. 128; C-PHB1 para. 51(b).

⁴¹⁰ SoC, para. 159; Reply, para. 129; C-PHB1 para. 51(c), discussing **Exh. C-75**, El Mundo, *Guindos: Banco Popular no tiene "problemas de solvencia ni de liquidez"*, 19 April 2017.

⁴¹¹ See also SoC, para. 171; Reply, para. 130; C-PHB2, para. 51(d), discussing **Exh. C-88**, El Economista, *Guindos asegura que no se va a inyectar dinero público en Banco Popular*, 18 May 2017, translated at **Exh. C-88 ENG**.

⁴¹² Reply, paras. 132-136; C-PHB1 para. 79.

announcement of 2 June 2017 that it was no longer considering a purchase of Banco Popular.⁴¹³

544. For the Claimants, the Respondent's attempt to link Banco Popular's deteriorating condition with other events occurring at that time is groundless and not supported by the evidence.⁴¹⁴

ii. ***The Respondent's position***

545. Spain denies that the public statements of the officials cited by the Claimants were in breach of the FET standard.⁴¹⁵ First, these statements were neutral observations and, in any event, did not harm Banco Popular.⁴¹⁶ Second, Spain had no obligation or power to publicly support Banco Popular, because the bank was supervised by the ECB and State aid is prohibited under EU law.⁴¹⁷ In any event, statements of support could have been counterproductive. Moreover, on 12 May 2017, Ms. Garrido made a positive statement about the bank.⁴¹⁸ Third, Spain disputes being under an obligation to correct public statements made by the EU authorities, as the FET standard does not require States to do anything within their power to advance the interests of foreign investors.⁴¹⁹

iii. ***Discussion***

546. The Claimants argue that Spain breached FET by making "unprecedented and alarming public statements that effectively announced to the public and to depositors that Banco Popular was on its own and would receive no state assistance, thus contributing to the loss of confidence that caused the bank run in the first place".⁴²⁰ In addition to "negative" statements (addressed below under (a)), the Claimants contend

⁴¹³ See SoC, para. 189; Reply, para. 220; C-PHB2, para. 51(e), discussing **Exh. C-103**, elEconomista.es, *Santander se queda solo en la puja por el Popular; Bankia no quiere sorpresas*, 2 June 2017.

⁴¹⁴ C-PHB2, paras. 13-14.

⁴¹⁵ SoD, paras. 833-840; Rejoinder, paras. 308-317; R-PHB1, paras. 95-109; R-PHB2, paras. 52-64.

⁴¹⁶ SoD, para. 834; Rejoinder, paras. 310, 318; R-PHB1, paras. 95-105; R-PHB 2, paras. 52-64.

⁴¹⁷ SoD, para. 841-845; Rejoinder, paras. 315-317; R-PHB1, paras. 105-106; R-PHB2, paras. 62-64.

⁴¹⁸ R-PHB 2, para. 60, referring to **CER-1-50**, *Expansión*, p. 2.

⁴¹⁹ Rejoinder, paras. 316-317; R-PHB1, paras. 106-107.

⁴²⁰ SoC, para. 26(a)(ii).

that Spain's officials failed to make certain "positive" statements to support of Banco Popular or *to correct* declarations made by other actors (addressed below under (b)).

547. Before looking at the specific statements and non-statements, a few general observations are in order. First, the Tribunal agrees with the Claimants' expert Prof. Goldstein that "statements that are negative in nature or that cause doubts about the commitment of the central bank might amplify a panic and make it much more severe", which explains why "regulators are cautious before releasing bad assessments on a bank to the public".⁴²¹ In other words, given the weight of the perceptions in the market and the role of confidence for the stability of a bank, it is not seriously in dispute that national authorities must be prudent when communicating about a bank.
548. That said, the role of the Tribunal in this context is limited to assessing whether certain statements or non-statements breached FET, because they were "arbitrary, grossly unfair, unjust", "idiosyncratic", or "discriminatory".⁴²² By contrast, the standard will not be breached if the Tribunal were to find, in hindsight, that a statement could have been nuanced or a given message conveyed more carefully or more forcefully. For there to be a breach of Article IV, the statement must be discriminatory, lacking any rational basis, or displaying evident and serious administrative negligence on the part of the public authorities. Furthermore, the standard is particularly high when the allegation at issue is that the State *failed to make a declaration*. Indeed, it should not be assumed lightly that a State must make a statement and the failure to do so engages its international responsibility. There may be myriad reasons why national authorities with the knowledge of the facts at the relevant time decide to remain silent, and it is not for the Tribunal to second-guess those reasons in hindsight.
549. Moreover, the fact that the markets may have reacted negatively to a certain statement, as evidenced in particular by a decrease in the stock price, does not in itself show that the statement at issue was grossly unfair, idiosyncratic or discriminatory. In reality, it is not always possible to isolate the effect of a statement on the share price, especially where around the same time other events may have contributed to strong fluctuations in the market and to a loss of confidence in Banco Popular. In this case, the allegedly controversial statements were made in April and May 2017 and coincide with a number of other occurrences which may have affected the market capitalization of Banco

⁴²¹ CER-3, para. 30.

⁴²² **Exh. RL-0162**, *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98.

Popular. Specifically, the (non-)statements fell into the time frame when (i) Banco Popular released the results of an internal audit of its credit portfolio identifying certain issues related to the capital raise of 2016, which concluded that Banco Popular's 2016 financial statements would not need to be "re-expressed", but proper amendments would be included in the financial statements for the first semester of 2017;⁴²³ (ii) international rating agencies, including S&P and Moody's, downgraded Banco Popular;⁴²⁴ (iii) Banco Popular announced that no dividends would be paid to shareholders and that it needed to pursue a capital increase, private sale, or merger;⁴²⁵ (iv) lower than expected quarterly results were published, showing a loss of € 137 million;⁴²⁶ and (v) news were released about the "[u]rgent sale of [Banco] Popular due to bankruptcy risk".⁴²⁷ This environment must be taken into account when assessing the various statements and non-statements of which the Claimants complain.

550. Finally, to capture their effect, it is important to look at the relevant statements in their entirety, rather than focusing on individual words or sentences taken out of context.

⁴²³ **Exh. C-69**, Comisión Nacional Del Mercado De Valores, Relevant Fact by Banco Popular Español, S.A. (Register No. 250244), 3 April 2017.

⁴²⁴ **Exh. C-71**, Comisión Nacional Del Mercado De Valores, Relevant Fact by Banco Popular Español, S.A. (Register No. 250535), 7 April 2017; **Exh. R-0158**, Moody's, "Moody's downgrades Banco Popular's senior unsecured debt ratings to B1 and deposit ratings to Ba3; outlook negative", 21 April 2017, available at https://www.moodys.com/research/Moodys-downgrades-Banco-Populars-senior-unsecured-debt-ratings-to-B1--PR_365395; **Exh. C-77**, Comisión Nacional Del Mercado De Valores, Relevant Fact by Banco Popular Español, S.A., 21 April 2017.

⁴²⁵ **Exh. R-0092**, ECB, 'Failing or Likely to Fail' Assessment of Banco Popular Español, 6 June 2017, para. 7(b) and n. 3

⁴²⁶ **Exh. C-79**, Comisión Nacional Del Mercado De Valores, Interim Financial Report Publications - Banco Popular; **Exh. C-5**, Banco Popular 2017 Q1 Report, p. 6; SoD, para. 428, referring to **Exh. R-0092**, ECB, FOLTF Assessment of Banco Popular Español, 6 June 2017, para. 7, nn. 5, 6; **Exh. R-0160**, FINANCIAL TIMES, T. Buck, *Spain's Banco Popular reports €137m first-quarter loss*, 5 May 2017; **Exh. R-0161**, FINANCIAL TIMES, T. Buck, *Banco Popular reports Q1 loss; sets aside € 496m for real estate losses*, 5 May 2017. See also Reply, para. 89; Rejoinder, para. 219, referring to **Exh. C-5**, Banco Popular Español, S.A., Quarterly Report, First Quarter 2017, p. 6.

⁴²⁷ **Exh. C-80**, A. Marco, *Saracho encarga la venta urgente del Popular a JP Morgan y Lazard por riesgo de quiebra*, El Confidencial, 11 May 2017, translated at **Exh. C-80 ENG**; **Exh. C-81**, Banco Popular, Informe Complementario para el Consejo de 6 de junio, 6 June 2017, p. 2, translated at **Exh. C-81 ENG**.

551. With these general observations in mind, the Tribunal now turns to the instances which, in the Claimants' submission, gave rise to breaches of Article IV of the Treaty.

(a) The alleged "negative" statements

552. As was mentioned above, the Claimants take issue with the statements of (i) 10 April 2017 by Mr. Luis de Guindos; (ii) 12 April 2017 by Ms. Irene Garrido; (iii) 19 April 2017 by Mr. de Guindos; and (iv) 18 May 2017 by Mr. de Guindos.

(i) 10 April 2017 statement by Mr. Luis de Guindos

553. On 10 April 2017, the Minister of Economy, Industry and Competitiveness Mr. Luis de Guindos was quoted by the Spanish newspaper *El País* as follows:

"The Minister of Economy, Industry and Competitiveness, Luis de Guindos, defended on Monday the solvency of the Spanish financial system as a whole, the minister has stated that "in general terms", the financial system is "absolutely healthy". Guindos maintained that the crisis at Banco Popular, which today has announced a new capital increase, **"does not tarnish the health of the bank in the slightest"**. **"What I see in Banco Popular is that it is a solvent bank that has to take important decisions in the coming months,"** said Guindos, who added that it is its shareholders who must decide if the entity should **"be part of the consolidation process of the financial sector"**, this is, the shareholders will have to determine if it requires any integration."⁴²⁸

554. In the Tribunal's opinion, this statement is largely positive. On the one hand, Mr. de Guindos gave an optimistic indication about Banco Popular's solvency, going as far as saying that the "crisis at Banco Popular" "does not tarnish the health of the bank in the slightest". On the other hand, he described in neutral terms that the shareholders had to determine whether Banco Popular should be part of the consolidation process of the financial sector.

(ii) 12 April 2017 statement by Ms. Irene Garrido

555. On 12 April 2017, another Spanish newspaper, *La Vanguardia* reported the following statement by Ms. Irene Garrido, the Secretary of the Department of Economy and Support to the Companies of the Ministry of Economy:

"The Secretary of State for Economy and Business Support, Irene Garrido, said Wednesday that Banco Popular requires a **"private solution"** and has indicated that the Government follows **"very closely"** the alternatives proposed by the general meeting of shareholders Banco Popular to take forward the project of the new presidency of the entity.

⁴²⁸ **Exh. C-74**, L. Pellicer, *Guindos ve al Popular "solvente" y dice que la banca española está "saneada"*, *El País*, 10 April 2017, translated at **Exh. C-74 ENG** (emphasis added).

In the press conference to analyze the CPI data for March, Garrido indicated that Banco Popular requires a **"private solution"**, since it is a **"private entity"** and the Government has received indications from the [ECB] and the Bank of Spain regarding that **"it does not present solvency problems"**.

The Government follows **"very closely"** the process of the new presidency of Banco Popular. **"We follow the process of the new chairmanship of Banco Popular, with the formation of its team, and we closely follow the general meeting of shareholders in which they have proposed alternatives to take forward the project in which the new presidency trusts,"** pointed Garrido in reference to the possible capital increase of the entity that would be carried out at the end of the year directed **"only"** to wholesalers and **"without ruling out processes of merger of convergence, of consolidation"**.

Asked if the Executive discards a preventive recapitalization in line with what happened in Italy, Garrido has pointed out that the situations are **"totally different"** and has reaffirmed that it is **"a problem of a private bank"**.

Garrido says that Spain has **"a completely healthy bank"**

The 'number two' of Economy has stressed that at this time the entity is **"trying to find a way to make effective that future project"**, and stressed that in the Italian financial sector are doing **"things"** that has already made the Spanish Government. [sic] **"We have a completely healthy bank that is not affected by this type of events, a restructuring process has been carried out, I think it is unparalleled"**, [s]he emphasized".⁴²⁹

556. The Tribunal observes that, in her remarks, Ms. Garrido spoke in ways that could have both reassured and worried Banco Popular's depositors. While she sought to distinguish the Spanish situation from the one in the Italian financial sector, she did refer more than once to Banco Popular as a "private bank" requiring a "private solution", which may have conveyed the idea that the Spanish Government was reluctant to help Banco Popular. At the same time, she emphasized that the Government was "following closely" the events at Banco Popular, which does not give the impression that the bank was "on its own", as the Claimants maintain. On balance, the Tribunal finds that the statement was neutral and in any event not discriminatory, arbitrary or grossly unfair.

(iii) 19 April 2017 statement by Mr. Luis de Guindos

557. On 19 April 2017, still another Spanish press organ, *El Mundo* reported the following statement by Minister de Guindos:⁴³⁰

"Guindos: Banco Popular does not have "neither solvency nor liquidity problems"
The Minister of Economy, Luis de Guindos, said Wednesday that Banco Popular has no problems of liquidity or solvency and has indicated that the entity **"will be what its shareholders want it to be"**.

After his participation in the XXIV Meeting of the Financial Sector, organized by ABC, Deloitte and Sociedad de Tasación, the Minister of Economy stressed that when he asks the supervisor for the entity that presides Emilio Saracho, the

⁴²⁹ **Exh. C-76 ENG**, *El Gobierno dice que el Banco Popular requiere una "solución privada"*, La Vanguardia, 12 April 2017, translated at **Exh. C-76 ENG** (emphasis added).

⁴³⁰ **Exh. C-75**, *El Mundo, Guindos: Banco Popular no tiene "problemas de solvencia ni de liquidez"*, 19 April 2017, translated at **Exh. C-75 ENG** (emphasis added).

answer he receives is that he [*sic*] is a solvent bank **"that does not have any liquidity problem"**.

"The Government and the Ministry of Economy do not have inspectors, the supervisor has them and it is the one that analyzes the situation of the entity, which is what they tell me: neither solvency nor liquidity problems", insisted Guindos.

The minister has stressed that Popular is a private bank, so it is his [*sic*] management team that has to make the right decisions. **"[It] has already given directions in this regard and the Government has nothing to say,"** he said.

In this regard, he recalled that Popular has a part of its business focused on SMEs, a segment in which it is one of the entities with more presence. **"Popular will be what its shareholders want it to be, the government will apply the competition rules,"** he added.

Regarding the possibility that the bank may participate in a corporate operation, de Guindos has avoided pronouncing and has stressed again that Popular is a private entity. **"Whatever the managers decide, as long as it is within the regulations and the Law, the Government has nothing to say"**, [he] has settled.

The bank held last week its ordinary shareholders meeting in which its president, Emilio Saracho, said that Popular was doomed to expand capital again, without ruling out corporate operations, it [*sic*] understands that the entity's independence "is a value until it becomes in a load."

558. The Tribunal finds Mr. de Guindos' statement of 12 April 2017 similar to the one made two days earlier by Ms. Garrido. While pointing to the "private" nature of the bank and the shareholders' and management roles, Mr. de Guindos made positive statements according to which Banco Popular was solvent. As such, this statement appears neutral and in any event not in breach of the minimum standard under international law.

(iv) 18 May 2017 statement by Mr. Luis de Guindos

559. Finally, as reported by *El Economista*,⁴³¹ on 18 May 2017 Mr. de Guindos made the following statement:

"Guindos assures that no public money will be injected into Banco Popular. The Minister of Economy, Industry and Competitiveness, Luis de Guindos, affirmed today that the Government **"did not foresee injecting any public capital"** into Banco Popular. In an act organized by the Association for the Progress of Management (APD), the minister stated this when asked about the situation of Banco Popular and the possibility of a corporate operation with another organization. De Guindos indicated that it is not his place to speak about specific organizations, and added that neither the Government nor the Ministry of Economy have inspectors, and that Popular is being monitored by the [ECB]. **"When I've asked the Bank of Spain, which is the 'connecting thread' with the single supervisor, what they say is that their capital level is above the minimum regulatory levels,"** said the minister, who assured that this affirmation is **"what [the Bank of Spain] tells me constantly."**

⁴³¹ **Exh. C-88**, *El Economista*, *Guindos asegura que no se va a inyectar dinero público en Banco Popular*, 18 May 2017, translated at **Exh. C-88 ENG** (emphasis added).

560. This statement was also reported by *Europa Press*:⁴³²

"The minister of Economic Affairs, Industry and Competitiveness, Luis de Guindos, asserted last Thursday that the Government **"has no plans to inject public funds"** into Banco Popular and highlighted that Banco de España **"constantly"** informs him that the entity exceeds the minimum regulatory capital levels.

Such was his statement during a lunch-colloquium on Spain's role in refounding the EU organised by the Association for Progress in Management (APD). He said that, **"notwithstanding Community regulation, of course the Government is not planning to inject any public funds"**. De Guindos pointed out that Popular runs one traditional business line that is **"very good"**, with a real estate exposure above the sector's average, a new management team and private shareholders. **"Usually I never speak about any specific entity because it is not for me to do so,"** said De Guindos to then add that the European Central Bank (ECB) data show that Spain has made a **"huge"** effort in cleaning up its financial system.

He further explained that neither the Government nor the Ministry of Economic Affairs have any inspectors, but rather that Banco Popular is supervised by the ECB, which is the only supervisor, and when he asks Banco de España –the **"connecting thread"** between the ECB and Spanish financial institutions– he is **"constantly"** told that Popular's capital level is **"above minimum regulatory levels"**.

Likewise, he said that the ECB ran an asset quality review (AQR) and stress on Spanish banks, that went **"very well, including Popular"**. In this regard, he emphasised that stress tests were conducted under **"dreadful"** scenarios to determine how much entities could endure with a capital level above minimum levels, and **"the truth is that Popular passed the test"**.

In fact, he added that since then the economic scenario has been **"quite different"**, shifting from recession to an average 3% growth, coupled with a recovery in real estate prices.

"Popular runs one traditional business line that is very good, with a real estate exposure above the sector's average, a new management team and private shareholders and, notwithstanding Community regulation, of course the Government is not planning to inject any public funds," he said.

561. In this statement, Mr. de Guindos gave positive indications about Banco Popular, specifically that the bank's capital level was above the minimum regulatory levels; that the bank successfully passed the stress tests conducted under **"terrifying"** scenarios; and that the traditional activity of the bank was **"good"**, and that it had a new management team. He also stated that the Government did not plan to inject public

⁴³² **Exh. R-15**, *Europa Press*, *Guindos states that the Government will not inject public funds into Banco Popular*, 18 May 2017 (emphasis added).

funds into the bank. This assertion can be understood in two ways: either it meant that the State would not provide needed assistance or it meant that a contribution of public funds was unnecessary, without implying that funds would not be available if required. In this connection, the Tribunal notes that indeed the first request for ELA was only made later, in June 2017. Again, on balance, Mr. de Guindos' statement cannot be deemed to be negative or to cause doubts about the availability of funds if required.

562. In conclusion, none of the statements by Spanish officials were “unprecedented and alarming”,⁴³³ “irresponsible”,⁴³⁴ or “damning”,⁴³⁵ as the Claimants contend. While some may have been ambivalent, none of them rose to the level of an FET breach.
563. Finally, contrary to the Claimants' suggestion, none of the impugned statements can be equated to the type of statements that other tribunals have found in breach of investment treaty standards. Specifically, in *Vivendi* and *Azurix*, the Argentine provincial authorities had told citizens “not to pay their water bills” “in all tones and in all the forms”, and made “an explicit appeal about not paying for the water”.⁴³⁶ In *Crystallex*, Venezuelan President Hugo Chávez announced that the Government would “take back” gold mines and would “nationalize all of [the gold industry], recuperate and put an end to concessions, which led to degeneration”.⁴³⁷ Finally, in *Biwater*, the competent Minister had informed the public that the contract with the investor “had been

⁴³³ SoC, para. 26(a).

⁴³⁴ Reply, para. 19.

⁴³⁵ C-PHB1, para. 4.

⁴³⁶ See **Exh. CL-10**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, paras. 7.4.39-42; **Exh. CL-11**, *Azurix Corp. v. Argentine Republic*, ICSID case No. ARB/01/12, Award, 14 July 2006, paras. 373, 376 (referring to “the repeated calls of the Provincial Governor and other officials for non-payment of bills by customers”).

⁴³⁷ See **Exh. CL-291**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, paras. 672–684. The tribunal discussed these statements in the context of expropriation. . They are nonetheless referred to here because in this case the Claimants contend that “[w]hile the *Crystallex* tribunal was analyzing Venezuela’s conduct under an [expropriation] standard, the logic of its conclusion that government statements can harm investments is equally (if not more) applicable to the FET standard”. See Reply, n. 1039.

terminated”, which was found to be incorrect by the arbitral tribunal, and had stated that the Tanzanian governmental entity “was taking over”.⁴³⁸

(b) The alleged “non-statements”

564. In connection with the so-called “non-statements”, the Claimants’ argument is two-fold. First, the Claimants complain that the “Respondent never made a single public statement telling [Banco Popular’s] depositors that there was no need to withdraw their deposits, that their deposits were safe and that there was no need for any depositor concern”.⁴³⁹ Second, they maintain that the Spanish authorities failed to correct declarations of the EU authorities and Bankia, a commercial bank who is majority owned by the Respondent.
565. Starting with Spain’s failure to make reassuring statements, the Tribunal is unpersuaded that, under the circumstances, Spain had an obligation to make statements aimed at convincing depositors to keep their funds with Banco Popular. As mentioned above, one cannot assume that mere silence amounts to a breach of the Treaty. This is particularly so in the case of Banco Popular, which as a “significant” financial institution was directly supervised by the ECB, not the Bank of Spain.⁴⁴⁰ As confirmed in Article 6.2.1 of the Memorandum of Understanding between the SRB and the ECB, these two bodies are in charge of coordinating external communication and, therefore, of approving what information can be published.⁴⁴¹ In those conditions, the Tribunal sees no basis to hold that Spain should have been more proactive in its communication in support of Banco Popular.

⁴³⁸ See **Exh. CL-17**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, paras. 624, 627 (finding that “[f]ar from seeking to manage the public’s expectations, the Minister acted in such a way as to undermine the public’s confidence in City Water” and “[the public statements] inflamed the situation, and polarised public opinion still further”).

⁴³⁹ Reply, para. 134.

⁴⁴⁰ **Exh. C-008**, ECB, List of Supervised Entities, 3 April, 2017, pp. 3-4.

⁴⁴¹ **Exh. R-0413**, Memorandum of Understanding between the ECB and the SRB on cooperation and information Exchange, Article 6.2.1 (“The Participants [i.e., the ECB and the SRB] strive to cooperate, if appropriate, in external communication with interest groups and the media on matters related to recovery and resolution within their respective responsibilities. The Communication Services of the SRB and the ECB will be responsible for coordinating external communication. Both Participants will provide a list of relevant units and responsible persons as well as general contact points responsible for external communication”).

566. Still in respect of the Respondent's alleged failure to make positive statements, the Claimants argue that such conduct is in contrast with Spain's stance vis-à-vis Catalan banks. They point in particular at Mr. de Guindos' statement of 5 October 2017 to show that Banco Popular was treated differently from the banks in Catalonia:

"The Spanish market is suffering from Catalans' independence attempt [...] the government has already made it (indirectly) clear that they have the backing of the [ECB] and that "there is nothing to fear". Luis de Guindos, stated that: "The Catalan banks are Spanish banks and European banks, they are solid entities and customers have nothing to fear. He also referred to the evolution of the Catalan economy, describing it as "positive", given that "No one has believed this independentist threat".⁴⁴²

567. As is evident from the quotation, Mr. de Guindos statement is directly linked to the political crisis concerning Cataluña. It is obvious that the primary concern expressed in this statement is that Cataluña's claims for independence could adversely affect banks established in this region of Spain. Cataluña's claims for sovereignty prompted the Spanish Minister to re-assure the markets that Catalan banks would continue to be Spanish and European banks and, accordingly, depositors had "nothing to fear". Banco Popular and the Catalan banks were not in a comparable situation for these purposes. Hence, Mr. de Guindos' failure to issue a similar statement regarding Banco Popular is in no way discriminatory to Banco Popular or its shareholders.

568. Moreover, the Claimants contend that Spain was under a duty to "correct" the following statements made by other actors:

- On 23 May 2017, the Chairman of the SRB, Dr. Elke König, confirmed in an interview that Banco Popular was one of the banks that "we are watching";⁴⁴³
- On 31 May 2017, Reuters, relying on unnamed European officials, reported that "[o]ne of Europe's top bank watchdogs has warned European Union officials that Spain's Banco Popular [...] may need to be wound down if it fails to find a buyer" and reported that "Elke König, who chairs an EU body that winds down

⁴⁴² **Exh. C-192**, S. Bustamante, *Por el efecto Cataluña, bancos ya sufren retiro de depósitos*, Cronista, 5 October 2017, translated at **Exh. C-192 ENG**.

⁴⁴³ SoC, para. 176, referring to **Exh. C-93**, Bloomberg, *Single Resolution Board Says EU Should not Be Bailing Out Banks* (Video), 23 May 2017, 5:17-5:20.

troubled banks, recently issued an ‘early warning’ [in relation to Banco Popular]”;⁴⁴⁴

- On 2 June 2017, Bankia, a commercial bank in which Spain holds a majority interest, refused to participate in the auction for Banco Popular, which led the media to report that Santander was the only bidder. The press report to which the Claimants refer reads in relevant part as follows:

“Santander is left alone in bidding for Popular: Bankia doesn’t want any surprises

2/06/2017 – 14:26 Updated 18:20 – 2/06/2017

Santander is the only left in the pending sales process for Banco Popular opened by President Emilio Saracho. Although the operation originally aroused the curiosity of big organizations, only the Cantabrian group and Bankia presented last 16th a proposal [...].”⁴⁴⁵

569. The Tribunal disagrees with the Claimants that Spain had an obligation to “correct” or rectify any of these statements, let alone that failure to do so breached FET. It is true that the statements attributed to the EU officials, including Dr. König, and to Bankia were somewhat ambivalent. In saying that the ECB “was watching” Banco Popular, Dr König could have referred to the ECB’s supervision over Banco Popular. At the same time, she could have meant that the situation deserved to be watched because it was worrisome and any worries could have increased by the reference to an “early warning”.
570. Similarly, while the press report indicating that Bankia had withdrawn from the sale process was truthful, the newspaper’s commenting that Bankia “doesn’t want any surprises” could be understood as implying that Banco Popular’s financial condition was hiding bad surprises. Overall, despite this ambivalence, the Tribunal does not find that Spain’s failure to issue corrective statements rose to a breach of the minimum standard of treatment.
571. In summary, Spain did not breach Article IV through the statements or non-statements of its public officials.

⁴⁴⁴ **Exh. C-101**, F. Guarascio, *Exclusive: EU warned of wind-down risk for Spain's Banco Popular – source*, Reuters, 31 May 2017.

⁴⁴⁵ **Exh. C-103**, elEconomista.es, *Santander se queda solo en la puja por el Popular; Bankia no quiere sorpresas*, 2 June 2017, translated at **Exh. C-103 ENG**.

c. Failure to enact short sales ban

i. The Claimants' position

572. The Claimants argue that Spain's failure to impose a short sales ban on Banco Popular's shares was in breach of the FET standard.⁴⁴⁶ They contend that the use of this regulatory tool was warranted and could have improved Banco Popular's liquidity situation. In the Claimants' submission, that failure was arbitrary, in particular because its alleged process for evaluating the short-sale ban was unsupported by any documentary evidence.⁴⁴⁷ It was also discriminatory, because Spain treated Banco Popular differently from Liberbank, in respect of which it had enacted a short sales ban in similar circumstances.⁴⁴⁸

ii. The Respondent's position

573. For Spain, its decision not to impose a short sales ban on the bank complied with the FET standard.⁴⁴⁹ First, the circumstances did not justify the ban. Banning short sales is appropriate when a share price experiences a significant and anomalous fall over a single day. As to Banco Popular's share price, it had been constantly declining since 2007. According to Spain, the National Securities Market Commission (*Comisión Nacional del Mercado de Valores* or "CNMV") monitored the short positions in Banco Popular in 2016-2017 and considered that the ban was inappropriate.⁴⁵⁰

574. Second, short-selling was not the reason for Banco Popular's declining share price or liquidity crisis,⁴⁵¹ which is one of the differences between Liberbank and Banco Popular.⁴⁵² Consequently, imposing a short sales ban would not have prevented Banco

⁴⁴⁶ See SoC, paras. 339-378; Reply, paras. 614-628; C-PHB1, paras. 83-93; C-PHB2, paras. 42-54.

⁴⁴⁷ C-PHB1, para. 83 (emphasis added). See also SoC, paras. 355, 361; C-PHB2, para. 54.

⁴⁴⁸ See, e.g., C-PHB1, para. 85 ("Respondent's unjustified failure to impose a short-sale ban on [Banco Popular] breached its obligation to treat comparable banks equally since it imposed a ban in a comparable case shortly after [Banco Popular]'s resolution").

⁴⁴⁹ SoD, paras. 323-341; Rejoinder, paras. 1145-1160; R-PHB1, paras. 121-131; R-PHB2, para. 65-73.

⁴⁵⁰ R-PHB1, paras. 123-124, referring to RWS-5, paras. 4-19, 20-35.

⁴⁵¹ Rejoinder, para. 1154; R-PHB1, paras. 121-131; R-PHB2, paras. 65-73.

⁴⁵² R-PHB1, para. 129, referring to Netvalue, Presentation, "The role of the CNMV in relation to the short positions of Banco Popular in the first half of 2017", 26 May 2021, p. 36.

Popular's liquidity crisis. On the contrary, it could have signaled that the bank was facing a crisis instead of restoring confidence.⁴⁵³

575. Moreover, the Respondent notes that neither the Claimants nor Banco Popular ever requested the CNMV to adopt a short sales ban.⁴⁵⁴

iii. *Discussion*

576. The Claimants argue that Spain breached FET by failing to ban short sales of Banco Popular shares. As explained by the Claimants' expert Prof. Goldstein, short sellers "attempt to profit by borrowing stock, selling it at a relatively high price and then covering their position once the price has deteriorated later on".⁴⁵⁵ The Claimants maintain that the "Respondent did nothing to respond to the short sales, despite its inherent power to ban such predatory conduct without any cost to taxpayers".⁴⁵⁶ In particular, they submit that the "Respondent acted arbitrarily in its alleged process for evaluating the short sale ban, unsupported by not even a shred of documentary evidence"⁴⁵⁷ and in a discriminatory manner by treating a comparable bank, namely Liberbank, differently under similar circumstances.⁴⁵⁸

577. The Respondent does not dispute that it had the power to ban short sales.⁴⁵⁹ It asserts, however, that under the applicable framework the conditions for such an "exceptional measure" were not met and that there was nothing arbitrary or discriminatory in its decision not to ban short sales of Banco Popular shares.

578. The Parties and their experts agree on the legal framework that applies to the enactment of short sales bans and which primarily rests on Regulation (EU) No. 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps ("Regulation No. 236/2012").⁴⁶⁰ Regulation No. 236/2012 lays down "a common regulatory framework with regard to the requirements and powers relating to short selling" and seeks "to ensure greater

⁴⁵³ Rejoinder, paras. 1154, 1159.

⁴⁵⁴ R-PHB1, para. 124.

⁴⁵⁵ CER-3, para. 33

⁴⁵⁶ SoC, para. 126.

⁴⁵⁷ C-PHB1, para. 83 (emphasis added). See also SoC, para. 355, 361; C-PHB2, para. 54.

⁴⁵⁸ See, e.g., C-PHB1, para. 85.

⁴⁵⁹ See, e.g., SoD, para. 325.

⁴⁶⁰ **Exh. RL-0285**, Regulation No. 236/2012.

coordination and consistency between Member States where measures have to be taken in exceptional circumstances”.⁴⁶¹

579. Recital (5) of Regulation No. 236/2012 explains that “[t]he requirements to be imposed should address the identified risks without unduly detracting from the benefits that short selling provides to the quality and efficiency of markets” and adds that “[w]hile in certain situations it could have adverse effects, under normal market conditions, short selling plays an important role in ensuring the proper functioning of financial markets, in particular in the context of market liquidity and efficient price formation”.⁴⁶² Recital (36) further specifies that “[p]owers of intervention of competent authorities and ESMA [the European Securities and Markets Authority] to restrict short selling, credit default swaps and other transactions should be only of a temporary nature and should be exercised only for such a period and to the extent necessary to deal with the specific threat”.⁴⁶³
580. Regulation No. 236/2012 envisages two situations in which the competent national authorities may impose short sales restrictions, which are addressed in Articles 20 and 23. Article 20 of Regulation No. 236/2012 provides that the authorities may enact restrictions on short selling “in exceptional circumstances”:

“Article 20

Restrictions on short selling and similar transactions in exceptional circumstances

1. Subject to Article 22, a competent authority may take one or more of the measures referred to in paragraph 2 of this Article where:

(a) there are adverse events or developments which constitute a serious threat to financial stability or to market confidence in the Member State concerned or in one or more other Member States; and

(b) the measure is necessary to address the threat and will not have a detrimental effect on the efficiency of financial markets which is disproportionate to its benefits.”

[...]

581. The provision’s title makes it clear that short selling restrictions are limited to “[...] exceptional circumstances”, where “adverse events or developments constitute a

⁴⁶¹ **Exh. RL-0285**, Regulation No. 236/2012, Recital (2).

⁴⁶² **Exh. RL-0285**, Regulation No. 236/2012, Recital (5).

⁴⁶³ **Exh. RL-0285**, Regulation No. 236/2012, Recital (36).

serious threat to financial stability or to market confidence”.⁴⁶⁴ In the presence of exceptional circumstances, the competent authorities must assess whether “the measure is necessary to address the threat and will not have a detrimental effect on the efficiency of financial markets which is disproportionate to its benefits”.⁴⁶⁵

582. The second situation in which competent authorities may adopt short selling restrictions is described in Article 23 of Regulation No. 236/2012 as one involving a “significant fall in prices” of a financial instrument, which is defined as “10% or more” for liquid shares (such as those of Banco Popular). In that case, the competent authority “shall consider whether it is appropriate” to restrict short selling:

“1. Where the price of a financial instrument on a trading venue has fallen significantly during a single trading day in relation to the closing price on that venue on the previous trading day, the competent authority of the home Member State for that venue shall consider whether it is appropriate to prohibit or restrict natural or legal persons from engaging in short selling of the financial instrument on that trading venue or otherwise limit transactions in that financial instrument on that trading venue in order to prevent a disorderly decline in the price of the financial instrument.

[...]

5. The fall in value shall be 10 % or more in the case of a liquid share, as defined in Article 22 of Regulation (EC) No 1287/2006 [...].”

583. Pursuant to Articles 20 and 23 of Regulation No. 236/2012, a short sale ban may only be imposed in exceptional circumstances, as opposed to the ordinary course of action.⁴⁶⁶ In other words, the threshold to trigger restrictions to short selling appears high, which is clear from the reference to “a serious threat to financial stability or to

⁴⁶⁴ Examples are provided in the supplementing regulations, notably Article 24 of Commission Delegated Regulation No. 918/2012, supplementing Regulation (EU) No 236/2012 with regard to definitions, the calculation of net short positions, covered sovereign credit default swaps, notification thresholds, liquidity thresholds for suspending restrictions, significant falls in the value of financial instruments and adverse events, **Exh. RL-0286**.

⁴⁶⁵ **Exh. RL-0285**, Regulation No. 236/2012, Article 23(1)(b). See also Recital 27 (“In taking such measures [including restrictions on short selling], competent authorities should pay due regard to the principle of proportionality”).

⁴⁶⁶ See also, in addition, in addition to the provisions discussed in the text, Article 27(2) of **Exh. RL-0285**, Regulation No. 236/2012, which states that “After receiving notification under Article 26 of any measure that is to be imposed or renewed under Article [...] 20 [...], ESMA [the European Securities and Markets Authority] shall within 24 hours issue an opinion on whether it considers the measure or proposed measure is *necessary to address the exceptional circumstances*” (emphasis added).

market confidence” and a “significant fall in price”. When exceptional circumstances exist, Regulation No. 236/2012 affords a wide margin of discretion to the competent authority, here the CNMV. In exercising their discretion, national authorities must either undertake a proportionality analysis in the presence of a serious threat to financial stability or market confidence (Article 20(1)(a)) or consider the appropriateness of a restriction or ban on short sales, if the share price drops significantly (Article 23(1)). The competent national authority is thus tasked with weighing the pros and cons linked to restricting short selling in a given situation, balancing the potential benefits of short selling⁴⁶⁷ with their possible “adverse effects”. The discretion entrusted in the national authorities under Regulation No. 236/2012 is not disputed by the Claimants’ expert Dr. de la Mano, who acknowledges that “[i]t is evident that the SSR [Regulation No. 236/2012] grants certain discretion to the NCA [national competent authority] to determine what constitute exceptional circumstances”.⁴⁶⁸

584. As it already noted,⁴⁶⁹ the Tribunal owes deference to the national authority and should not second-guess the correctness of its decision. The Tribunal’s scope of review is limited to verifying whether the impugned conduct was arbitrary or discriminatory, which are in fact also the two grounds raised by the Claimants in this connection.⁴⁷⁰ In this context, a failure to enact a ban would be arbitrary if the supervisor’s decision was based on an excess or abuse of discretion, on prejudice or personal preference, or if it was taken for reasons other than those put forward by the decision maker.⁴⁷¹ That failure would be discriminatory, if there were no reasonable or justifiable grounds to adopt a different treatment in like circumstances.⁴⁷²

585. The evidence in the record, including the expert evidence, contains no indication that Spain’s decision not to enact a short sales ban of Banco Popular shares was arbitrary. On the one hand, the Claimants and their experts have shown that Banco Popular’s

⁴⁶⁷ **Exh. RL-0285**, Regulation No. 236/2012, Recital (5).

⁴⁶⁸ CER-5, para. 9.11.

⁴⁶⁹ See supra paras. 520-523.

⁴⁷⁰ See, e.g., C-PHB2, para. 42 (“Respondent’s conduct [in connection with the failure to enact a short sales ban] was arbitrary and discriminatory, in breach of the Treaty’s FET [...]”).

⁴⁷¹ See **Exh. CL-291**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para. 578; **Exh. RLA-0007**, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, para. 303.

⁴⁷² See, eg., **Exh. RL-0046**, *Plama Consortium Limited v. The Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 200, para. 184.

short positions reached 12% of its capital, which was the largest reported short-sale position in Spain,⁴⁷³ and that Banco Popular's stock experienced a significant price drop a number of times.⁴⁷⁴ On the other hand, the Respondent has convincingly explained that the selling pressure came mainly from investors with long positions who sold these positions, and not from investors with short positions, which means that a ban on short selling would not have resolved the bank's crisis. It is also reasonable to expect a ban on short-selling to send a "stigmatizing" signal about the financial condition of Banco Popular, which would have aggravated, rather than alleviated, the market's distrust in the bank. Moreover, Banco Popular's shares only once fell more than 10%, on 1 June 2017, following a constant decline over the years.

586. In support of its explanations, the Respondent has offered the evidence of Mr. Rodrigo Buenaventura, CNMV's current Chairman and then Director General for Markets. In his written statements, Mr. Buenaventura testified that the CNMV considered and discarded a short sales ban and explained the reasons for the decision.⁴⁷⁵ While at the hearing Mr. Buenaventura admitted that there was no paper trail of the "verbal discussions" leading to the CNMV's decision against a short-sale ban,⁴⁷⁶ the Tribunal has no reason to doubt his testimony that such exercise did in fact take place. It also notes that the Claimants have not shown that the CNMV was under an obligation to keep a record or to give reasons for its decision.⁴⁷⁷ This is especially so where the Claimants made no request for the imposition of a short sales ban. Taking into account all these facts, including in particular the reasons for Spain's decision not to impose a

⁴⁷³ CER-2-053, Net Short Positions data from the CNMV.

⁴⁷⁴ CER-1, Figure 3; **Exh. R-304**, Banco Popular, variation of short positions in May–June 2017, June 2017.

⁴⁷⁵ RWS-5, para. 34; RWS-11, paras. 31-35.

⁴⁷⁶ May Hearing Tr. [English version], 21 May 2021, 819:21–23, 821:6, 15–16.

⁴⁷⁷ See, e.g., C-PHB1, para. 83 ("Per the standard announced by *the Saluka v. Czech Republic* tribunal, the State's decision not to help the claimant's bank [through a short sales ban], as it did with other banks, had to be reasonably justifiable by public policies. That requirement includes an obligation to provide reasons for a particular course of action", internal footnotes omitted), para. 91 ("Respondent's failure to provide contemporaneous evidence of its decision not to impose a short-sale ban further confirms its FET breach. As the tribunal in *Teco v. Guatemala* observed, the minimum standard includes an obligation to provide reasons for a particular course of action", internal footnote omitted). According to Mr. Buenaventura, supportive documentation "should exist in the event of adopting a measure that the SSR clearly classifies as exceptional [...]. Not vice-versa [...]". See RWS-11, para. 34.

short sales ban, the Tribunal can only conclude that Spain did not misuse its discretion under the applicable regulations nor did it act arbitrarily otherwise.

587. As was just observed, Banco Popular itself never requested a ban on short selling. The Claimants have not convincingly explained why they made no request, except to say that Banco Popular “was neither required nor expected to request a short-sale ban under the applicable regulation”. They also underlined that Regulation No. 236/2012 “imposes detailed reporting requirements on short-sellers so that the competent authorities such as the CNMV are in a position to monitor short-sales and intervene as necessary”.⁴⁷⁸ While it is true that a request from Banco Popular was not a pre-requisite for the CNMV to enact a ban, the fact that Banco Popular did not request one suggests that even Banco Popular did not regard a ban to be necessary.

588. The Tribunal now turns to the claim of discriminatory treatment of Banco Popular vis-à-vis Liberbank. It is undisputed that, contrary to Banco Popular, [REDACTED]
[REDACTED]
[REDACTED].⁴⁷⁹ Furthermore, the Respondent has sufficiently justified its decision in favor of a short sale ban of Liberbank’s shares.⁴⁸⁰ These justifications are found in Mr. Buenaventura’s testimony, Netvalue’s expert report, and ESMA (“European Securities and Markets Authority”)’s opinion of 12 June 2017, whereby the European supervisory authority reviewed whether the measure proposed by CNMV in respect of Liberbank was “necessary to address the exceptional circumstances” envisaged in the regulation.⁴⁸¹ This opinion offers detailed reasons for the decision to ban short selling of Liberbank shares. It also gives indications distinguishing the situations of the two banks.

589. Indeed, the two banks were not in like circumstances. On the one hand, Banco Popular’s share price had constantly been declining years before its resolution and the bank was suffering from an impaired financial situation and serious liquidity problems.

⁴⁷⁸ C-PHB2, para. 47.

⁴⁷⁹ **Exh. R-0486**, [REDACTED] to extend for a period of two months the agreement to impose restrictions on short selling and similar transactions in Liberbank, S.A. under Article 20 of Regulation (EU) No. 236/2012 in view of the exceptional circumstances, 11 July 2017.

⁴⁸⁰ In particular, RER-8, paras. 114-158.

⁴⁸¹ **Exh. C-161**, European Securities and Markets Authority, Opinion of the ESMA on a proposed emergency measure by CNMV under Section 1 of Chapter V of Regulation (EU) No 236/2012, 12 June 2017, para. 1.

By contrast, Liberbank's financial situation was overall positive without liquidity issues. Its share price had remained stable since 2015, and enjoyed an upward trend since June 2016.⁴⁸² However, as noted in EMSA's opinion, in the trading sessions of 7, 8 and 9 of June 2017, Liberbank's share price abruptly "fell respectively 7,68%, 18,02% and 17,57%, with noticeable increases in the traded volumes" and there was "no underlying inside information from Liberbank that could justify this downward trend".⁴⁸³ As Mr. Buenaventura also set out, "[a]s opposed to Banco Popular, there were no profit warnings, impairment announcements, changes or discrepancies in the management team or any other circumstance that could explain the abrupt price movement".⁴⁸⁴

590. On the basis of the reasons that prompted the ESMA to opine favorably, and the CNVM to order a ban on short sales of Liberbank shares, the Tribunal finds that there was sufficient justification to treat Banco Popular and Liberbank differently, with the result that the complaint of discrimination must be rejected.
591. In conclusion, Spain did not breach Article IV of the Treaty by failing to enact a short sales ban.

d. Failure to grant the ELA

i. The Claimants' position

592. The Claimants argue that Spain violated the FET standard by failing to provide the bank with ELA in the amount of € 9.5 billion. While they acknowledge that the grant of ELA is discretionary, they maintain that Spain abused its discretion.⁴⁸⁵
593. According to the Claimants, Spain's decision to suspend ELA was unjustified and unreasonable. Through various communications, the Bank of Spain made Banco Popular believe that ELA of € 9.5 billion was forthcoming, yet eventually refused to provide it. In particular, on 5 June 2017, the Bank of Spain informed the ECB that Banco Popular had pledged sufficient collateral to cover € 9.5 billion of ELA.⁴⁸⁶ The next day,

⁴⁸² RER-8, paras. 137-138, 142-143.

⁴⁸³ **Exh. C-161**, European Securities and Markets Authority, Opinion of the ESMA on a proposed emergency measure by CNMV under Section 1 of Chapter V of Regulation (EU) No 236/2012, 12 June 2017, para. 8.

⁴⁸⁴ RWS-5, para. 37(2).

⁴⁸⁵ SoC, paras. 339-378; Reply, paras. 629-667; C-PHB1, paras. 100-147; C-PHB2, paras. 30-41.

⁴⁸⁶ **Exh. C-113**, Letter from Banco de España to ECB, 5 June 2017, p. 2.

the Bank of Spain confirmed that the pledged collateral would cover € 10.034 billion of ELA.⁴⁸⁷ Notwithstanding these statements, by 6 June 2017, the Bank of Spain provided only € 3.8 billion and suspended the remaining ELA without any explanation. For the Claimants, had Spain granted ELA as promised, Banco Popular would have been saved.⁴⁸⁸

594. The Claimants highlight that even the Bank of Spain's employees did not understand why the ELA process was stayed. For instance, [REDACTED], who were responsible for reviewing Banco Popular's collateral at the Bank of Spain, confirmed that they were ready to continue working on Banco Popular's request after 7 June 2017.⁴⁸⁹ In the absence of any contemporaneous evidence showing the reasons for the ELA suspension, Spain's *post hoc* rationalizations, specifically those contained in expert reports of Versant, lack credibility.⁴⁹⁰
595. It is the Claimants' submission that Banco Popular was eligible to receive the requested ELA, as it satisfied the applicable requirements. Although some documentation related to Banco Popular's collateral may not have been entirely in order,⁴⁹¹ this does not justify the complete suspension of the ELA, as any irregularities could have been fixed. In any event, there is no evidence that Banco Popular could not have pledged additional collateral.⁴⁹²
596. Finally, the Claimants assert that the entire ELA process was unclear and poorly managed. Specifically, the Bank of Spain failed to communicate to Banco Popular what collateral should be presented and how far in advance. In the Claimants' submission,

⁴⁸⁷ Reply, para. 634, referring to **Exh. C-349**, Email from [REDACTED] to [REDACTED], 4 June 2017 (23:04 hours); **Exh. C-350**, Email and Attachment from [REDACTED] to [REDACTED], 5 June 2017 (09:14 hours); **Exh. C-351**, Email and Attachments from [REDACTED] to [REDACTED], 5 June 2017 (16:53 hours); **Exh. C-352**, Email from [REDACTED] to [REDACTED], 6 June 2017 (19:19 hours); **Exh. C-353**, Information Banco de España, 6 June 2017, attached to Email from [REDACTED] to [REDACTED], 6 June 2017 (19:19 hours); CER-7, paras. 7.1-7.125.

⁴⁸⁸ Reply, paras. 255-257, 632, 679, 836. See also C-PHB2, para. 40.

⁴⁸⁹ C-PHB1 paras. 122-126.

⁴⁹⁰ Reply, para. 632; C-PHB1 para. 101.

⁴⁹¹ C-PHB1 paras. 131, 139-140, referring to **Exh. C-316**, Bank of Spain, Modifying and Non-Extinguishing Novation Contract (ELA), 5 June 2017, Annex 1.

⁴⁹² C-PHB1, paras. 128-147; C-PHB2, paras. 30-41.

such information should have been communicated in May, rather than in June 2017 when the bank was suffering from severe liquidity shortage.⁴⁹³

ii. ***The Respondent's position***

597. As a preliminary issue, Spain notes that the ELA contract contains an exclusive choice of the courts of Madrid. Thus, the Claimants cannot challenge the ELA procedure in this arbitration.⁴⁹⁴ In any event, Spain's conduct in connection with the ELA complied with FET.⁴⁹⁵
598. First, so argues Spain, it is undisputed that the grant of ELA is discretionary. Banco Popular was not entitled to receive ELA in the amount of € 9.5 billion, and Spain was under no obligation to grant it.⁴⁹⁶
599. Second, Spain denies suspending the ELA and notes that (i) ELA may only be suspended upon the decision of the Executive Commission, which was not obtained here;⁴⁹⁷ (ii) the Bank of Spain continued to value potential collateral throughout the evening of 6 June 2017;⁴⁹⁸ and (iii) it was Banco Popular that requested the termination of the ELA contract.⁴⁹⁹
600. Third, Spain took proactive measures to facilitate a potential request for ELA by Banco Popular:⁵⁰⁰

⁴⁹³ Reply, para. 654; C-PHB1, paras. 105-106.

⁴⁹⁴ Rejoinder, para. 1164, referring to **Exh. R-0251**, Bank of Spain, Emergency Liquidity Provision Agreement, 5 June 2017, Clause 15.

⁴⁹⁵ SoD, paras. 858-879; Rejoinder, paras. 1161-1211; R-PHB1, paras. 132-178; R-PHB2, paras. 78-108.

⁴⁹⁶ Rejoinder, paras. 27, 1170.

⁴⁹⁷ R-PHB1, para. 159. See also R-PHB2, paras. 79-80, 102-108.

⁴⁹⁸ R-PHB1, para. 159, referring to **Exh. R-0451**, Email from [REDACTED] to [REDACTED], 6 June 2017 (19:36); **Exh. R-0453**, Email from [REDACTED] to [REDACTED], 6 June 2017 (21:34).

⁴⁹⁹ R-PHB2, para. 108, referring to **Exh. R-0260**, Termination Agreement of ELA contracts and Pledge Agreements, 7 June 2017, Recitals XI-XIII; **Exh. R-0454**, Email from [REDACTED] to [REDACTED], 7 June 2017 at 09:35am.

⁵⁰⁰ SoD, paras. 859-863. See also Rejoinder, paras. 383-384, referring to RER-1, para. 183(b); RER-4, para. 60.

- a. In May 2017, the Bank of Spain authorized ELA up to € 1.8 billion (subsequently increased to € 2.8 billion) to be granted if Banco Popular requested it, on the condition that (i) Banco Popular was solvent and (ii) provided sufficient collateral.
- b. Between March and early June 2017, the Bank of Spain and Banco Popular conducted several dry-run exercises and two ELA simulations. The Bank of Spain valued the potential collateral that Banco Popular could offer on a preliminary basis. However, the Claimants waited until 3 June 2017 to present new categories of assets that it had never presented before during the earlier simulations.
- c. The Bank of Spain continued to value the assets that Banco Popular had identified as potential collateral until the bank informed that it was *failing or likely to fail* ("FOLTF").
601. Fourth, the refusal to grant ELA in the total amount of € 9.5 billion was justified by the lack of sufficient collateral required under the ELA contract.⁵⁰¹ After the appropriate haircuts, the collateral provided was only worth € 3.8 billion and by 6 June 2017 ELA in that amount had been granted.⁵⁰² The Bank of Spain could not grant ELA without sufficient collateral because it would have compromised its financial independence.⁵⁰³
602. Fifth, Spain disputes having ever confirmed that Banco Popular pledged sufficient collateral for € 9.5 billion in ELA. In connection with the e-mails of the Bank of Spain of early June 2017, the Respondent clarifies that they attached preliminary valuations of the assets which Banco Popular has identified as collateral. ██████████, who was the author of the emails, confirmed this fact.⁵⁰⁴ In relation to the ECB's Non-Objection ("ECB's Non-Objection"),⁵⁰⁵ the ECB authorized a "ceiling", meaning that the Bank of Spain could disburse less than the maximum authorized amount. Although the email

⁵⁰¹ SoD, para. 873; Rejoinder, para. 1199; R-PHB1, paras. 163-168; R-PHB2, paras. 90-101.

⁵⁰² SoD, para. 873; R-PHB2, para. 81.

⁵⁰³ SoD, paras. 863-864.

⁵⁰⁴ R-PHB1, paras. 147-151, 154, referring to **Exh. C-319**, Email forwarded from ██████████ to ██████████ regarding the Collateral Evaluation Summary of Banco Popular, 4 June 2017, p. 1; **Exh. C-310**, Emails from ██████████ to ██████████ regarding the Collateral Evaluation Summary and updates from Banco Popular, 4-5 June 2017; **Exh. C-532**, Email from ██████████ to ██████████, 6 June 2017 (19:19 pm); **Exh. C-353**, Information from Banco de España, 6 June 2017, attached to **Exh. CER-7-44**, Email from ██████████ to ██████████, 6 June 2017 (19:19 pm); RWS 10, para. 62; RWS-9, paras. 24-27. See also R-PHB2, para. 92.

⁵⁰⁵ **Exh. C-113**, Letter from Bank of Spain to ECB, 5 June 2017, p. 2.

sent by the Bank of Spain to the ECB on that occasion indicated that “[a]ppropriate collateral for the purpose of ELA has been provided by the bank”, [REDACTED]

[REDACTED]⁵⁰⁶ Such indication had no bearing on whether the bank could pledge any of these assets as collateral.

603. Finally, Spain notes that, in front of a parliamentary committee, Mr. Emilio Saracho, Banco Popular’s executive chairperson at the time, had confirmed that the Bank of Spain’s handling of the ELA procedure had been reasonable.⁵⁰⁷

iii. *Discussion*

604. The Claimants contend that Spain’s failure to grant the ELA requested by Banco Popular breached FET. Specifically, they argue that the “Respondent failed to act in a consistent and professional manner” when it first “confirm[ed] that Banco Popular met the requirements to obtain the liquidity assistance that it requested (including confirmation that Banco Popular was solvent and presented sufficient collateral)” and then “rescinded its approval to provide ELA”,⁵⁰⁸ thereby “reneging on [Banco Popular’s] legitimate expectation of ELA”.⁵⁰⁹ The Claimants also submit that the “Respondent abuse[d] the discretionary element of ELA decision-making to justify its complete lack of transparency”,⁵¹⁰ acted with “evident negligence”,⁵¹¹ and breached “the most basic obligations imposed by the Treaty – those of transparency, of non-arbitrary decision-making, of non-discrimination, and of a stable and predictable investment environment”.⁵¹²

⁵⁰⁶ R-PHB1, para. 149; R-PHB2, para. 95.

⁵⁰⁷ SoD, para. 867, referring to **Exh. R-0094**, Parliamentary Inquiry Committee on Spain’s financial crisis and the financial aid programme, Special Session No. 41, Testimony by Mr. Emilio Saracho Rodríguez de Torres dated 12 July 2018, p. 59.

⁵⁰⁸ SoC, para. 370.

⁵⁰⁹ Reply, para. 636.

⁵¹⁰ Reply, para. 630.

⁵¹¹ Reply, para. 666 (“Respondent’s abrupt decision to retract the ELA that [Banco Popular] needed to continue operating constituted evident negligence, as it fell below what would be expected of a reasonable regulator”).

⁵¹² Reply, para. 633. See also *ibid.*, para. 664 (where the Claimants argue that Spain “failed to provide any reasons justifying its denial of ELA, and as such cannot prove that its decision was made in an objective and rational way”).

605. For its part, Spain maintains that its conduct in connection with Banco Popular's ELA request was at all times consistent with its domestic, EU, and international law obligations.⁵¹³
606. Before assessing whether Spain breached the Treaty by failing to provide the requested ELA, the Tribunal will briefly deal with Spain's inadmissibility objection. In one single paragraph in the Rejoinder, Spain "notes that in the ELA contracts, Banco Popular and the Bank of Spain had agreed to the exclusive jurisdiction of the 'courts and tribunals of the city of Madrid' to resolve any dispute arising out of the ELA contracts, and had 'expressly waived any other jurisdiction that may correspond to them, for any actions and claims that may arise out of [the ELA contracts]'. Accordingly, Claimants cannot bring before this Tribunal any action or claim that may arise out of the ELA contracts and, consequently, such actions or claims are inadmissible."⁵¹⁴ The Tribunal is of the view that this objection should have been raised in Spain's Statement of Defense, rather than in the Rejoinder, and is therefore belated. Even if it were not belated, Spain has not sufficiently substantiated this objection. In any event, the Tribunal is not adjudicating the disputes arising out of the ELA contract,⁵¹⁵ but is assessing whether Spain's conduct in connection with ELA is in breach of the Treaty. In that context, it may have to consider the ELA contract, but doing so, it does not exercise jurisdiction under the ELA contract. It merely reviews Spain's conduct in the exercise of its jurisdiction under the BIT. Therefore, the dispute resolution clause contained in that contract does not render the Treaty claims inadmissible.
607. Moving now to the claim, the Tribunal finds it helpful first to review the framework that governs ELA. Emergency liquidity assistance or "ELA" is, as its name indicates, emergency lending provided by the national central banks of the Eurosystem to solvent banks that face temporary illiquidity problems and are unable to obtain liquidity on the interbank market or via monetary policy operations administered by the ECB.⁵¹⁶
608. The main responsibility for the provision of ELA "lies at the national level, with the NCBs [national central banks] concerned",⁵¹⁷ in this case the Bank of Spain. It is not seriously

⁵¹³ See SoD, paras. 858-879; Rejoinder, paras. 1161-1211; R-PHB1, paras. 132-178; R-PHB2, paras. 78-108.

⁵¹⁴ See Rejoinder, para. 1164 (internal footnote omitted).

⁵¹⁵ **Exh. R-0251**, Bank of Spain, Emergency Liquidity Provision Agreement, 5 June 2017.

⁵¹⁶ See **Exh. R-0231**, ELA Agreement, 17 May 2017 para. 1.2.

⁵¹⁷ **Exh. R-0231**, ELA Agreement, 17 May 2017, para. 2.1.

disputed that the grant of ELA by national central banks is discretionary.⁵¹⁸ As noted by the ECB, it is within “the competence of central banks to decide independently and *at their full discretion* on the provision of central bank liquidity to solvent credit institutions, both in standard monetary policy operations as well as [ELA], within the limits imposed by the monetary financing prohibition under the Treaty”.⁵¹⁹ Therefore, a bank cannot assume that ELA will be available to it.⁵²⁰

609. It is undisputed that ELA can only be granted to solvent financial institutions⁵²¹ and must be secured by “sufficient” collateral.⁵²² The National Central Bank (“NCB”) has discretion in designing the applicable collateral framework, which should however always ensure that “sufficient” collateral is pledged.⁵²³ As can be inferred from the ELA

⁵¹⁸ See, e.g., C-PHB2, para. 31 (where the Claimants explain that they “do not contest that ELA is discretionary”, although they contend that it is “constrained by Respondent’s obligations under the Treaty”); May Hearing Tr. [English version], 22 May 2021, 859:6-9 (de la Mano) (“the Banco de España has discretion to grant or deny ELA, but this discretion should not be exercised arbitrarily”); 902:19-20 (“Emergency Liquidity Assistance is discretionary”).

⁵¹⁹ **Exh. R-0233**, Opinion of the ECB CON/2012/99, para. 3.2 (emphasis added).

⁵²⁰ See, e.g., **Exh. R-0234**, ECB Monthly Bulletin, The EU Arrangements for Financial Crisis Management, February 2007, p. 80 (“A credit institution cannot, however, assume automatic access to central bank liquidity. As a central banking function, the provision of ELA is within the discretion of the national central bank”).

⁵²¹ See **Exh. R-0231**, ELA Agreement, 17 May 2017, paras. 4 (entitled “ELA solvency criterion for credit institutions”) and 5.4 (which sets forth that “ELA provision to insolvent institutions and institutions for which insolvency proceedings have been initiated according to national laws violates the prohibition of monetary financing”); Claimant’s Opening See May Hearing Tr. [English version], 17 May 2021, 29:24-25, 30:1-7 (“[t]he process for applying [for] and receiving ELA also is undisputed. ELA can only be granted to institutions that are solvent. The borrower bank also must request the ELA. If requested, the ELA must be secured against sufficient collateral. And if sufficient collateral is provided, ELA may be granted up to the amount of the eligible collateral provided net of haircuts, and those haircuts are designed to take into account the risks associated with specific collateral assets”).

⁵²² See Claimant’s Opening May Hearing Tr. [English version], 17 May 2021, 29:24-25, 30:1-3 (“[t]he process for applying [for] and receiving ELA also is undisputed. ELA can only be granted to institutions that are solvent. The borrower bank also must request the ELA. If requested, the ELA *must be secured against sufficient collateral*”, emphasis added).

⁵²³ See, for instance, **Exh. R-0232**, ECB, The financial risk management of the Eurosystem’s monetary policy operations, July 2015, p. 35 (“NCBs can in principle autonomously design their own collateral framework for ELA, including the applicable risk control measures. Such a framework should, however, ensure that sufficient collateral is provided, according to the

agreement, the document issued by the ECB that sets out the rules and procedures related to ELA, collateral is deemed “sufficient” for ELA if the asset is both eligible for ELA and its post-haircut value is greater than or equal to the amount of ELA disbursed, including interest.⁵²⁴

610. In terms of procedure, the assessment of assets offered as collateral is a cooperative process between the bank seeking ELA and the NCB. The bank must give the NCB detailed information on the potential collateral to allow the NCB to determine the eligibility of the assets as collateral and the collateral's effective value in ELA operations by applying the relevant haircuts. A “haircut” is the amount by which the effective value of the asset used as collateral is reduced to reflect the credit rating and other risk factors that may impact its value. Following this assessment, the bank must satisfy the legal requirements to pledge the assets.
611. Under the 2017 version of the ELA agreement applicable at the relevant time, a NCB must report its decision to provide ELA, along with information relating to the applicable terms and conditions, to the ECB within two days after the operation is carried out, where it involves up to € 500 million in ELA, and in advance of the operation or limit, where it involves a higher amount.⁵²⁵ The ECB may veto ELA if it determines, by a two-third majority of the Governing Council, that the provision of ELA would interfere with the objectives and tasks of the Eurosystem, including the single monetary policy and the prohibition against monetary financing.⁵²⁶ If the ELA amount exceeds € 2 billion, the NCB must seek the ECB Governing Council's Non-Objection to the ELA operation.⁵²⁷

NCB's own risk assessment, to cover the risks arising from such operations to such an extent that the financial independence of the NCB is ensured”).

⁵²⁴ **Exh. R-0231**, ELA Agreement, 17 May 2017, para. 3.2(a)(i) (“NCBs should always inform the ECB of the details of any ELA operation, at the latest, within two business days after the operation was carried out. The information needs to include, at least, the following elements: [...] (5) the collateral/guarantees against which the ELA is (intended to be) provided, including the valuation of, and any haircuts applied to, the collateral provided and, where applicable, details on the guarantee provided and terms of any contractual safeguards; (6) the interest rate to be paid by the institution receiving ELA that is (intended to be) provided; [...]”).

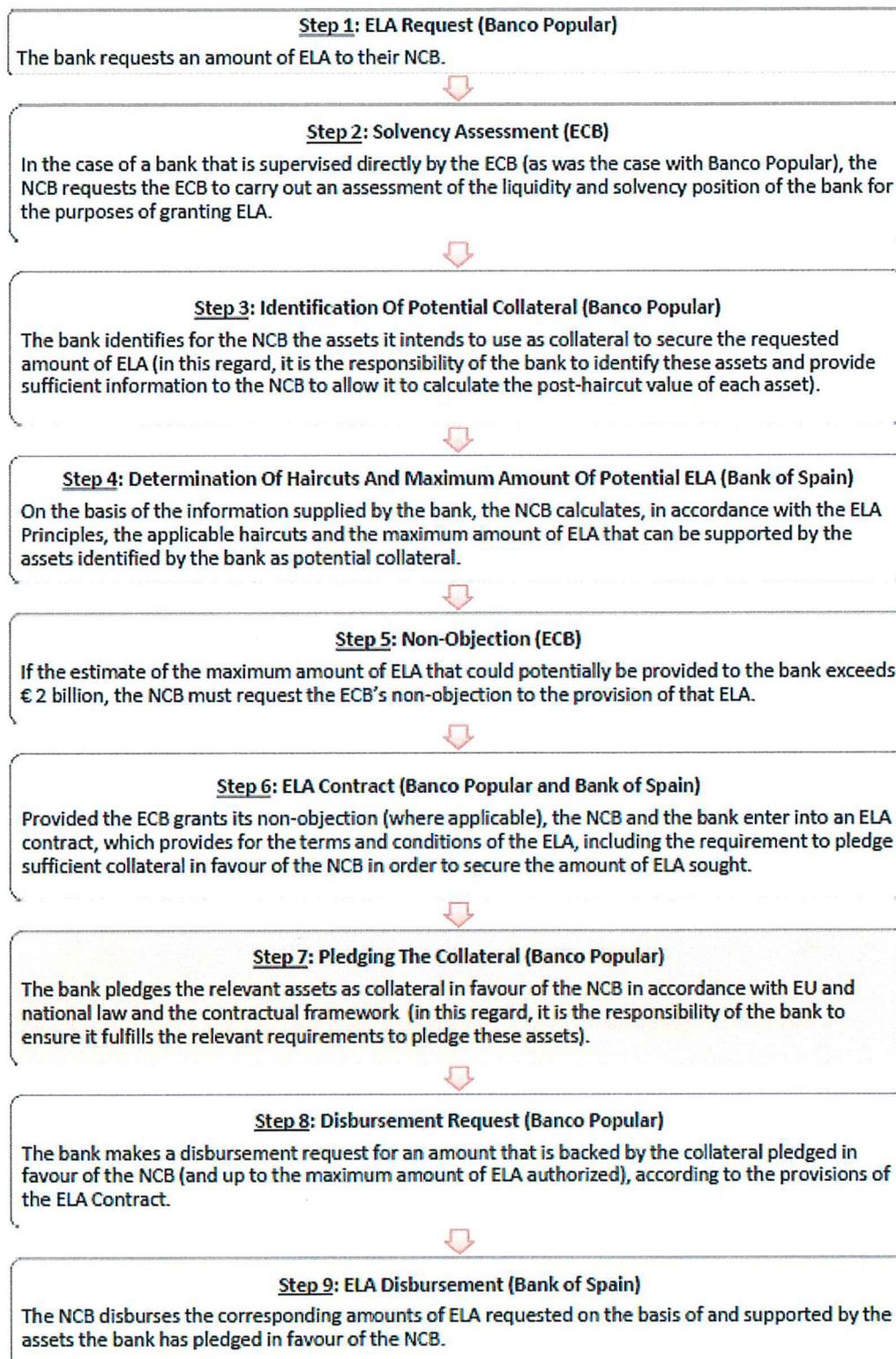
⁵²⁵ **Exh. R-0231**, ELA Agreement, 17 May 2017, para. 3.2.

⁵²⁶ **Exh. R-0231**, ELA Agreement, 17 May 2017, para. 5.1.

⁵²⁷ **Exh. R-0231**, ELA Agreement, 17 May 2017, para. 3.3.

612. In its Rejoinder, the Respondent provided the following step-by-step presentation of the ELA process, which the Claimants have not disputed:⁵²⁸

⁵²⁸ Rejoinder, para. 130.



613. The Tribunal will revert to some of the steps described in this graph in the discussion below, as relevant.

614. The legal framework which was just described and is largely undisputed has the following consequences for the Tribunal's scope of review under FET. First, as a result of the discretion which the Bank of Spain enjoyed in granting or refusing ELA, a financial institution cannot expect that it will necessarily receive ELA, nor does it have an entitlement to ELA. Second, the Tribunal cannot second-guess the appropriateness of granting or refusing ELA in the specific circumstances, which is a decision inherently reserved to the NCBs. Rather, its task is to review whether the State's conduct in connection with an ELA request was arbitrary, grossly lacking in transparency or otherwise in breach of the minimum standard of treatment.⁵²⁹
615. With these observations in mind, the Tribunal reviews the process followed by Spain in connection with Banco Popular's ELA requests.
616. In late March 2017, Banco Popular and the Bank of Spain began to discuss the possibility of Banco Popular requesting ELA.⁵³⁰ The Respondent's witnesses have explained (without being contradicted on this point by the Claimants' witnesses) that on 31 March 2017, the Bank of Spain proposed to commence so-called "dry run" exercises with Banco Popular, pursuant to which Banco Popular would identify assets to be used as potential collateral and send information regarding such assets to the Bank of Spain.⁵³¹ The dry runs lasted until early June 2017.⁵³²
617. During this time, on 5 April 2017, the Bank of Spain provided Banco Popular with a draft ELA contract, which set forth, among other things, the requirement for Banco Popular to pledge sufficient collateral to support any ELA disbursement.⁵³³
618. On 4 May 2017, the Bank of Spain authorized the grant of ELA *up to* € 1.8 billion subject to three conditions:

"a. the submission by Banco Popular, S.A. of a formal request for an ELA, b. attainment of an assessment from the ECB confirming the solvency of Banco Popular, S.A. for the purposes of the provision of the ELA and

⁵²⁹ See *supra* paras. 517-519.

⁵³⁰ RWS-3, paras. 8-12, discussing a telephone conference between Bank of Spain and Banco Popular. See SoC, para. 146; SoD, para. 374, referring to RWS-3, para. 14; Reply, para. 634; Rejoinder, paras. 385-390.

⁵³¹ RWS-3, para.15; RWS-9, paras. 5-18, 31; RWS-4, para. 46.

⁵³² RWS-3, paras. 16-18; RWS-4, para. 47; RWS-9, para. 7; RWS-10, paras. 8-9.

⁵³³ See **Exh. R-0469**, Draft ELA contract, 5 April 2017, Clauses 2.1, 2.3 and 7; **Exh. R-0427**, Email from ██████████ to Banco Popular, 5 April 2017.

c. the *provision of adequate* guarantees in accordance with the report to be drawn up by the Directorate General of Operations, Markets and Payment Systems describing the guarantees, *assessing their suitability and establishing the appropriate haircuts*".⁵³⁴

619. Such conditional "pre-authorization" was initially set to expire on 16 May 2017⁵³⁵ and was later renewed first until 26 May 2017⁵³⁶ and then until 6 June 2017.⁵³⁷ On 26 May 2017, the maximum amount of ELA was increased to € 2.8 billion and the conditional approval was made subject to the ECB's Non-Objection in accordance with the 2017 version of the ELA agreement,⁵³⁸ since the ELA exceeded the € 2 billion threshold requiring ECB approval.⁵³⁹
620. On 30 May 2017, the Bank of Spain and Banco Popular conducted a first simulation, with the purpose of ensuring that Banco Popular would be ready to sign the relevant ELA contracts on the basis of the assets which it had identified as potential collateral.⁵⁴⁰
621. On 1 June 2017, the Bank of Spain and Banco Popular prepared a draft contract for ELA.⁵⁴¹
622. On 2 June 2017, the Bank of Spain conducted a second ELA simulation on the basis of a portfolio of corporate loans provided by Banco Popular as potential collateral and valued at € 2.13 billion. After having received the ECB's approval, the Bank of Spain confirmed that it was ready to provide ELA in the amount of € 2.13 billion if Banco Popular so requested.⁵⁴²
623. During the weekend of 3 and 4 June 2017, Banco Popular continued to provide the Bank of Spain with information about assets to be used as collateral.⁵⁴³

⁵³⁴ **Exh. R-0263**, Draft for approval by the Executive Committee, 4 May 2017.

⁵³⁵ **Exh. R-0263**, Draft for approval by the Executive Committee, 4 May 2017, p. 2.

⁵³⁶ This is not disputed between the Parties. See SoC, para. 170; SoD, para. 379.

⁵³⁷ **Exh. R-0248**, Bank of Spain, Provision of ELA to Banco Popular Español, S.A., 26 May 2017.

⁵³⁸ **Exh. R-0231**, ELA Agreement, 17 May 2017, para. 3.3.

⁵³⁹ This is not disputed between the Parties. See SoC, para. 178, SoD, para. 380.

⁵⁴⁰ RWS-3, paras. 28, 31,.

⁵⁴¹ **Exh. C-316**, ELA contract between Bank of Spain and Banco Popular, 1 June 2017, translated at **Exh. C-316 ENG**.

⁵⁴² Undisputed, see Reply, para. 160; Rejoinder, para. 405.

⁵⁴³ Undisputed, see SoC, para. 207; SoD, para. 391.

624. On 5 June 2017 at 8:33, Banco Popular made its first formal request of ELA in the amount of €1.9 billion ELA,⁵⁴⁴ offering to pledge a sub-portfolio of the corporate loans that had been the subject of the 2 June 2017 simulation.⁵⁴⁵ That same day at 11:41, the Bank of Spain granted the requested ELA and credited the total amount requested on Banco Popular's account,⁵⁴⁶ shortly after Banco Popular had signed the ELA contract.⁵⁴⁷
625. At 15:32 of the same day, Banco Popular increased its request for ELA to € 9.5 billion.⁵⁴⁸ The Bank of Spain agreed to grant the request, if Banco Popular provided sufficient collateral.⁵⁴⁹ Still on the same day, the ECB confirmed that it had no

⁵⁴⁴ See **Exh. C-317** Bank of Spain, Modifying and Non-Extinguishing Novation Contract (ELA) between Bank of Spain, Banco Popular and Banco Pastor, 5 June 2017, pp. 1-2 ("the Borrower requested on June 5, 2017 from the Banco de España the provision of emergency liquidity in the amount of up to one billion nine hundred million euros (€ 1,900,000,000.00), so that Banco Popular can meet its transitional and urgent liquidity needs").

⁵⁴⁵ May Hearing Tr.[English version], 19 May 2021, 457:13-458:6 (██████████).

⁵⁴⁶ **Exh. RWS-9-3**, Bank of Spain, Bank Statement reflecting the disbursement of € 1.9 billion to Banco Popular on June 5, 2017, attaching ██████████'s authorization to make such a disbursement; **Exh. R-0254**, Bank of Spain, Banco Popular TARGET 2 Account Statement, p. 1; **Exh. R-0449**, Email from ██████████ to ██████████ and ██████████, 5 June 2017 at 12:25.

⁵⁴⁷ **Exh. R-0251**, Emergency Liquidity Provision Agreement, 5 June 2017; **Exh. R-0252**, Pledge Agreement on Non-Mortgage Credit and Loans, 5 June 2017; **Exh. R-0253**, Framework Agreement for Repurchase Transactions for the Provision of Emergency Liquidity, 5 June 2017.

⁵⁴⁸ Undisputed, see SoC, para. 213; SoD, para. 400. See also **Exh. C-317**, Bank of Spain, Modifying and Non-Extinguishing Novation Contract (ELA) between Bank of Spain, Banco Popular and Banco Pastor, 5 June 2017, pp. 1-2 ("after the provision of the credit referred to in the previous statement IV, the Borrower has requested on 5 June 2017 from the Bank of Spain an extension of the maximum amount of emergency liquidity provision up to nine thousand five hundred million euros (€ 9,500,000,000.00)").

⁵⁴⁹ **Exh. R-0250**, Bank of Spain, Provision of ELA to Banco Popular Español, S.A. (II), 5 June 2017; **RWS-3**, paras. 46-47; **Exh. C-307**, Bank of Spain, Minutes No. 25/17 of Executive Commission Meeting held on 5 June 2017, p. 3, translated at **Exh. C-307 ENG**.

objection to granting additional ELA to Banco Popular⁵⁵⁰ and attested Banco Popular's solvency for the purpose of receiving ELA.⁵⁵¹

626. In light of Banco Popular's new request, the Bank of Spain continued to review information about assets offered as collateral. By the end of the day on 5 June 2017, the Bank of Spain determined that it could distribute an additional ELA amount of € 700 million.⁵⁵²
627. In the night between 5 and 6 June 2017, Bank of Spain and Banco Popular formalized the necessary documentation to pledge assets to secure that disbursement of € 700 million.⁵⁵³ On 6 June at 1:52, the Bank of Spain ordered the payment of that amount, which was credited on Banco Popular's account at the opening of the markets at 7:01.⁵⁵⁴ This transfer brought the total amount of ELA provided to Banco Popular to € 2.6 billion.
628. By 15:12 on 6 June, the Bank of Spain assessed additional collateral previously proposed by Banco Popular, which it valued at € 890 million. Shortly thereafter, the Bank of Spain granted additional ELA for € 900 million,⁵⁵⁵ which raised the total ELA provided to Banco Popular to € 3.5 billion.
629. At 17:53 still on 6 June, the Bank of Spain valued the remaining collateral at € 327 million and granted Banco Popular a last ELA tranche of € 300 million,⁵⁵⁶ bringing

⁵⁵⁰ **Exh. C-317**, Bank of Spain, Modifying and Non-Extinguishing Novation Contract (ELA) between Bank of Spain, Banco Popular and Banco Pastor, 5 June 2017, p. 2 (“the Governing Council of the ECB has agreed on 5 June 2017 not to object to the Bank of Spain providing the financing requested to the Borrower, for the maximum amount indicated in Exhibit V above, which decision will be evaluated again at its next meeting”).

⁵⁵¹ **Exh. C-113**, Letter from Bank of Spain to ECB, 5 June 2017, p. 2.

⁵⁵² RWS-3, para. 53; RER-2, , Appendix A, para. 45.

⁵⁵³ RWS-3, para. 53; **Exh. R-0256**, Non-extinctive amending novation agreement of the credit agreement for a provision of ELA, 5 June 2017; **Exh. R-0257**, Non-extinctive amending novation agreement of the framework agreement for repurchase transactions for the provision of ELA, 5 June, 2017.

⁵⁵⁴ **Exh. R-0254**, Bank of Spain, Extract of Banco Popular's TARGET 2 statement, p. 2.

⁵⁵⁵ **Exh. R-0254**, Bank of Spain, Extract of Banco Popular's TARGET 2 statement, p. 2.

⁵⁵⁶ **Exh. R-0254**, Bank of Spain, Extract of Banco Popular's TARGET 2 account, p. 2.

the total amount of ELA transferred by the Bank of Spain to Banco Popular on 5 and 6 June to € 3.8 billion.⁵⁵⁷

630. In the meantime, at 17:00 on 6 June, the Board of Directors of Banco Popular had determined that “*despite access to the urgent liquidity provision mechanism*” the bank was “failing or likely to fail”.⁵⁵⁸ Three hours later, at 20:02, the Bank of Spain received from the ECB a copy of a letter that Banco Popular had sent to the ECB earlier that evening, together with a copy of the minutes of Banco Popular’s Board of Directors meeting of earlier that day.⁵⁵⁹ In that letter, Banco Popular informed the ECB of “the written decision of the Board of Directors confirming the assessment that Banco Popular was failing or likely to fail”.⁵⁶⁰ That same day, the ECB informed the SRB of its preliminary assessment that Banco Popular was at risk of FOLTF,⁵⁶¹ which the ECB later confirmed after the completion of its formal consultation process.⁵⁶²
631. The Claimants take issue with the manner in which Spain conducted the ELA process. They contend that “[t]he dispute over ELA ultimately centers on why, on 6 June 2017, Respondent suddenly refused to provide the ELA that [Banco Popular] requested— ELA that [Banco Popular] was led to believe it would receive through the [Bank of Spain’s] numerous pre-approvals”.⁵⁶³ In essence, the Claimants argue that the Bank of

⁵⁵⁷ See **Exh. R-0251**, Bank of Spain, Emergency Liquidity Provision Agreement, 5 June 2017, Clause 3.1(2) reflecting Banco Popular’s ELA disbursement request in the amount of € 1.9 billion; **Exh. C-317**, Bank of Spain, Modifying and Non-Extinguishing Novation Agreement (ELA), 5 June 2017, Clause 3.1(2)(ii), reflecting Banco Popular’s ELA disbursement request in the amount of € 700 million; **Exh. R-0417**, Banco Popular, ELA disbursement request in the amount of € 900 million, 6 June 2017; **Exh. R-0418**, ELA disbursement request in the amount of € 300 million, 6 June 2017.

⁵⁵⁸ **Exh. C-229**, Banco Popular, Minutes of the Board of Directors, 6 June 2017, p. 3.

⁵⁵⁹ **Exh. R-0264**, Bank of Spain, Information Systems Certificate, 25 February 2020.

⁵⁶⁰ **Exh. C-118**, Letter from Banco Popular Español to the ECB, 6 June 2017.

⁵⁶¹ **Exh. C-52**, SRB, Decision of the SRB at its executive meeting of 7 June 2017 regarding the adoption of a resolution plan in respect of Banco Popular Español, S.A., No. SRB/EES/2017/08, 7 June 2017, p. 8.

⁵⁶² **Exh. C-52**, SRB, Decision of the SRB at its executive meeting of 7 June 2017 regarding the adoption of a resolution plan in respect of Banco Popular Español, S.A., No. SRB/EES/2017/08, 7 June 2017, p. 8.

⁵⁶³ Reply, para. 148. See also *ibid.*, para. 13 (“[Banco Popular] and its investors [...] were led to believe that the [Bank of Spain] would be there, as Spain’s lender of last resort, if and when the time came”); para. 635 (“Through these repeated interactions, Respondent led [Banco Popular] to believe that liquidity assistance would be forthcoming, as and when requested. This was an entirely reasonable and legitimate expectation”).

Spain “confirmed that [Banco Popular] met all the requirements to receive up to € 9.5 billion in ELA”⁵⁶⁴ and, notwithstanding this confirmation, “abruptly” suspended the ELA.⁵⁶⁵

632. It is common ground⁵⁶⁶ that the Bank of Spain’s approval and grant of ELA was subject to the following conditions: (1) the presentation by Banco Popular of a formal request for an ELA disbursement; (2) the ECB’s confirmation of Banco Popular’s solvency for the purposes of the ELA provision; (3) the provision of adequate collateral in accordance with the report to be drawn up by the Directorate-General for Operations, Markets and Payment Systems describing the collateral, assessing its adequacy and establishing the appropriate haircuts to determine the actual value of the asset when pledged as collateral; and (4) the ECB’s Non-Objection.⁵⁶⁷
633. It is common ground that Banco Popular made formal requests for ELA, first in the amount of € 1.9 billion and subsequently of € 9.5 billion.⁵⁶⁸ It is also undisputed that on 5 June 2017, the ECB provided its Non-Objection to the Bank of Spain’s grant of ELA up to € 9.5 billion.⁵⁶⁹ The Bank of Spain’s letter of 5 June 2017 to the ECB further confirms that “[a]ccording to the Agreement on ELA we have requested and received *a positive assessment from the ECB supervision authority responsible for the microprudential supervision of the bank of its solvency for the purpose of receiving ELA and of its liquidity position.* Additional observations (if any) on the bank’s request or on the decision to be made by Banco de España have also been taken into account”.⁵⁷⁰ Hence, the first, second and fourth conditions were satisfied.
634. The main point in dispute is whether Banco Popular satisfied the third condition for the grant of ELA, i.e. “the provision of adequate collateral in accordance with the report to be drawn up by the Directorate-General for Operations, Markets and Payment Systems describing the collateral, assessing the said adequacy and establishing the appropriate

⁵⁶⁴ C-PHB1, section II.D.2.

⁵⁶⁵ C-PHB1, paras. 102, 144.

⁵⁶⁶ See, e.g., C-PHB1, para. 109; Rejoinder, para. 423.

⁵⁶⁷ See, e.g., **Exh. R-0263**, Draft for approval by the Executive Committee, 4 May 2017; **Exh. RML-145**, Decision of the Executive Commission of Bank of Spain of 5 June 2017, Acta 25/17, Document, Bank of Spain, Minutes No. 25/2017 of Executive Commission Meeting held on 5 June 2017, pp. 3-4.

⁵⁶⁸ See *supra* 624-625.

⁵⁶⁹ See *supra* 625.

⁵⁷⁰ **Exh. C-113**, Letter from Bank of Spain to ECB, 5 June 2017, p. 2 (emphasis added).

valuation haircuts to determine the actual amount of the collateral". While the Claimants insist that they provided sufficient collateral to secure € 9.5 billion in ELA,⁵⁷¹ Spain argues that Banco Popular only pledged collateral with a post-haircut value of € 3.902 billion, which meant that the Bank of Spain could only disburse € 3.8 billion in ELA (after covering € 102 million in expenses and interest), which it did.⁵⁷²

635. Upon a review of the entirety of the record, the Tribunal comes to the conclusion that there was nothing unreasonable or arbitrary in the conclusion of the Bank of Spain that Banco Popular had not managed to provide sufficient collateral and to pledge it in accordance with the applicable requirements to justify disbursement in excess of the sum of € 3.8 billion that Bank of Spain had released to Banco Popular.
636. To start with, the Bank of Spain made it clear from the beginning that any approval of ELA was subject to Banco Popular pledging sufficient security, specifically:
- a. On 4 May 2017, when the Bank of Spain pre-emptively authorized the provision of a potential amount of ELA up to € 1.8 billion, the Executive Commission specified that any potential disbursement of ELA to Banco Popular was subject to "the provision of sufficient collateral" (*aportación de garantías adecuadas*);⁵⁷³
 - b. The same requirement for sufficient collateral was repeated on 17 and 26 May 2017, as evidenced in the draft ELA contracts circulated by the Bank of Spain, which specified, *inter alia*, that "the Bank of Spain may, at its discretion, refuse any requests for Credit [from Banco Popular] while the guarantees detailed in Clause 6 below have not been validly established in favour of the Bank of Spain and remains in force [...]".⁵⁷⁴
 - c. On 5 June 2017, on the basis of the drafts previously circulated, the Bank of Spain and Banco Popular entered into the ELA contracts, which once again made it clear that any disbursement of ELA was conditional on the assets used to secure any

⁵⁷¹ See, e.g., C-PHB1, para. 110.

⁵⁷² Rejoinder, para. 380.

⁵⁷³ **Exh. R-0263**, Draft for approval by the Executive Committee, 4 May 2017, p. 2.

⁵⁷⁴ **Exh. R-0247**, Bank of Spain, Provision of ELA to Banco Popular Español, S.A., 17 May 2017, Clause 2.3, translated at **Exh. R-0247 ENG**; **Exh.R-0248**, Bank of Spain, Provision of ELA to Banco Popular Español, S.A., Clause 2.3. translated at **Exh. R-0248**.

ELA amount being validly and effectively pledged. Clause 2.3 of the ELA contract reads as follows:

"At its discretion, the Bank of Spain may reject any drawdown request submitted by the Borrower. In particular, the Bank of Spain may reject any such requests if the Borrower or the Guarantor have failed to validly provide the Bank of Spain with the collateral security referred to in Section 6 below, which shall remain in full force and effect, in an amount sufficient to cover the requested drawdown and any remaining sums owed to the Bank of Spain at that time under this Agreement, including any accrued unpaid interest (as well as any late payment interest.)"⁵⁷⁵

637. In sum, all of the so-called "pre-approvals" granted by the Bank of Spain were conditional on the provision of sufficient collateral, a fact that the Claimants could not have misunderstood. No contrary "expectation", let alone a reasonable one, could have arisen from these "pre-approvals".
638. In support of their argument that Banco Popular provided sufficient collateral, the Claimants point *inter alia* to (i) internal emails exchanged between officials of the Bank of Spain, and (ii) letters from the Bank of Spain to the ECB.
639. With reference to the internal correspondence within the Bank of Spain,⁵⁷⁶ the Claimants maintain that ██████████, Director of the Risk Department of the Bank of Spain, confirmed that "[Banco Popular] had posted collateral sufficient to support €7.787 billion in ELA by 4 June 2017; €8.426 billion by 5 June; and €10.034 billion by 6 June".⁵⁷⁷

⁵⁷⁵ **Exh. C-317**, Bank of Spain, Modifying and Non-Extinguishing Novation Contract (ELA) between Bank of Spain, Banco Popular and Banco Pastor, 5 June 2017, translated at Exh. **C-317**.

⁵⁷⁶ See, in particular, **Exh. C-349**, Email from ██████████ to ██████████, 4 June 2017 (23:04 hours); **Exh. C-350**, Email and Attachment from ██████████ to ██████████, 5 June 2017 (09:14 hours); **Exh. C-351**, Email and Attachments from ██████████ to ██████████, 5 June 2017 (16:53 hours); **Exh. C-352**, Email from ██████████ to ██████████, 6 June 2017 (19:19 hours); **Exh. C-353**, Information Bank of Spain, 6 June 2017, attached to Email from ██████████ to ██████████, 6 June 2017 (19:19 hours);

⁵⁷⁷ Reply, para. 640, referring to **Exh. C-349**, Email from ██████████ to ██████████, 4 June 2017 (23:04 hours), translated at **Exh. C-349 ENG**; **Exh. C-350** Email and Attachment from ██████████ to ██████████, 5 June 2017 (09:14 hours), translated at **Exh. C-350 ENG**; **Exh. C-351**, Email and Attachments from ██████████ to ██████████, 5 June 2017 (16:53 hours), translated at **Exh. C-351**; **Exh. C-352**, Email from ██████████ to ██████████, 6 June 2017 (19:19 hours), translated at **Exh. C-352**; **Exh. C-353**, Information Bank of Spain, 6 June 2017, attached to Email from ██████████ to ██████████, 6 June 2017 (19:19 hours).

640. The series of emails to which the Claimants refer concern information exchanged between ██████████ and his supervisor ██████████, Director General of Operations, Markets and Payment Systems at the Bank of Spain. In the Tribunal's view, when read in the context of the then ongoing collateral review process, these emails make it clear that the Risk Department of the Bank of Spain had performed a preliminary valuation of certain assets on the basis of information shared by Banco Popular. Indeed, the first email in the chain from ██████████ to ██████████ contains a number of important caveats:

"I highlight the following precautions:

- *We have worked with the information provided by the entity. The integrity and reliability of such information has not been verified.* It is recommended that a *separate review* be carried out as soon as possible.
- *The collateral's situation for the purposes of its pledge is not assessed by this department, so we do not know if it can affect the effective collateral calculated in case there are problems for its pledge.*
- There are cuts that will need to be *recalculated when more accurate information is available* (either provided by the entity or by other bank departments). In general, conservative solutions have been chosen when there is not enough information and efforts have been made to apply similar regulatory references.
- Calculations should be reviewed periodically. It will be necessary to request the entity to keep the information up to date.

Finally, I must point out that the entity has changed several times some of the files sent which, besides forcing us to reprocess the information, indicates that the situation can repeat itself the next few days being difficult to predict the impact. This fact, as discussed in the first point, reinforces the need for an independent review of the reliability of the information provided, or at least compare and contrast it with information available from other departments to detect possible inconsistencies."⁵⁷⁸

641. In other words, none of these preliminary valuations to which ██████████ referred in this and subsequent communications related to whether the relevant assets could be, let alone had been, pledged in accordance with the applicable requirements. As confirmed in the email from ██████████, this was a subsequent step with which was entrusted to a different department within the Bank of Spain.⁵⁷⁹

⁵⁷⁸ Exh. C-349, Email from ██████████ to ██████████, 4 June 2017 (23:04 hours), translated at Exh. C-349 ENG.

⁵⁷⁹ See May Hearing Tr. [English version], 19 May 2021, 504:2-506:7 (██████████).

642. No other conclusion can be derived from ██████████'s email to ██████████ of 6 June 2017 at 19:19,⁵⁸⁰ to which ██████████ attached a table reflecting an "ELA value" of "€10.034 billion" in connection with the assets identified by Banco Popular as potential collateral. The table does not support the allegation that Banco Popular had pledged sufficient collateral to secure € 10.034 billion. Once again, this figure refers to an internal estimate of the Risk Department of the Bank of Spain, which does not say that collateral in that amount had actually been pledged. At the hearing, ██████████ also confirmed that the term "ELA value" in this communication means "the nominal value of the collateral, after filtering, then applying the haircut that has been determined by the Risk Department to be applicable to those assets".⁵⁸¹

643. That finding is not contradicted by two letters in which the Bank of Spain advised the ECB of the potential ELA disbursement between € 500 million and € 2 billion, and requested the ECB's Non-Objection to any grant of ELA exceeding € 2 billion. In the first letter,⁵⁸² the Bank of Spain informed the ECB of a potential ELA disbursement to Banco Popular of € 1.9 billion (following Banco Popular's first ELA request). Governor Linde wrote to then ECB President Draghi as follows:

"The ELA will be provided later on today. ██████████
██████████. The maximum ELA volume is € 1.9 billion, to be disbursed if and when needed in tranches denominated in euros.

Appropriate collateral for the purpose of ELA has been provided by the bank, consisting of loans and credits denominated in euros for a nominal value of 5,089 million euros. An average haircut of 58% has been applied to determine the value of the guarantee."⁵⁸³

644. In its second letter of that same 5 June, Governor Linde conveyed to President Draghi that Banco Popular had told the Bank of Spain "of the extremely acute liquidity movements they are experiencing" and "asked for an extension of the ELA to a maximum amount of 9.5 billion euros". The Bank of Spain consequently asked for the ECB's Non-Objection to an ELA up to € 9.5 billion. Attached to the letter was a "note

⁵⁸⁰ **Exh. C-352**, Email from ██████████ to ██████████, 6 June 2017 (19:19 hours), translated at **Exh. C-352**; **Exh. C-353**, Information Bank of Spain, 6 June 2017, attached to Email from ██████████ to ██████████, 6 June 2017 (19:19 hours).

⁵⁸¹ May Hearing Tr. [English version], 19 May 2021, 497: 1-7.

⁵⁸² **Exh. C-111**, Letter from Bank of Spain to ECB, 5 June 2017.

⁵⁸³ **Exh. C-111**, Letter from Bank of Spain to ECB, 5 June 2017, p. 1.

prepared by Banco de España's staff concerning the situation of the bank", which included the following passage:

"Appropriate collateral for the purpose of ELA has been provided by the bank. In particular, loans, credits, stocks and participations in different financial and non-financial firms with a total nominal value close to 40 billion euros. After applying the corresponding haircuts, the effective value of the guarantees covers the maximum amount requested by Banco Popular S.A. The interest rate that will be applied to the ELA will be that of the Marginal Lending Facility plus 1 percentage point."⁵⁸⁴

645.

[REDACTED]

646. In the Tribunal's view, the language employed by the Bank of Spain in its letters to the ECB is indeed ambiguous and could thus either signify that information on potential collateral had been provided or that assets had actually been pledged as collateral. Be this as it may, such ambiguity is immaterial for a number of reasons.

647. First, the ECB understood the mention of appropriate collateral as reference to *information* on the collateral. Indeed, the Governing Council confirmed as such in its Non-Objection Decision.⁵⁹⁰

⁵⁸⁴ **Exh. C-113**, Letter from Bank of Spain to ECB, 5 June 2017, p. 2.

⁵⁸⁵ May Hearing Tr. [English version], 19 May 2021, 466:23-467:10.

⁵⁸⁶ May Hearing Tr. [English version], 19 May 2021, 408: 18-21.

⁵⁸⁷ May Hearing Tr. [English version], 19 May 2021, 410:24-411:3.

⁵⁸⁸ May Hearing Tr. [English version], 19 May 2021, 467:18-22.

⁵⁸⁹ May Hearing Tr. [English version], 19 May 2021, 486:2-7.

⁵⁹⁰ **Exh. RML-163**, ECB, Governing Council non-objection decision, 5 June 2017.

- (e) took note that the ELA provision by the Banco de España as specified under decision point (d) was assessed *ex ante* as not violating the monetary financing prohibition based on the currently available information;
- (f) requested the Banco de España to provide a detailed daily update (including pricing and haircuts) of the assets used as ELA collateral;

648. Accordingly, the ECB assessed the ELA provision by the Bank of Spain of up to € 9.5 billion *ex ante* and “based on the currently available information”. The reference to further “daily updates (including pricing and haircuts) of the assets used as ELA collateral” confirms that additional steps were required and that Banco Popular still needed to pledge those assets. The graph depicting the ELA process at paragraph 612 above shows that at the time of the ECB’s Non-Objection, the pledging formalities are not necessarily complete (step 7). This is reinforced by Prof. Tirado’s evidence according to which further assessments of collateral take place after the ECB grants its Non-Objection.⁵⁹¹ In other words, through this letter the Bank of Spain sought the ECB’s Non-Objection to the disbursement of a maximum amount of ELA. The letter is not a representation or confirmation by the Bank of Spain to the ECB – let alone to Banco Popular, who was not copied – that ELA would be granted.

649. More importantly, whatever the Bank of Spain may have “represented”, Banco Popular failed to pledge sufficient collateral. Indeed, the record shows that Banco Popular only pledged assets sufficient to secure € 3.8 billion of ELA,⁵⁹² which it did receive.⁵⁹³ By contrast, Banco Popular failed to meet the legal requirements to obtain additional ELA. In particular, it did not pledge the shares it held in companies such as Aliseda, Canvives, Allianz, Wizink, TotalBank, Cevasa, Metrovacesa Suelo and Metrovacesa Promoción,⁵⁹⁴ nor did it provide accurate information regarding certain loan

⁵⁹¹ May Hearing Tr. [English version], 25 May 2021, 1470:22-1471:3.

⁵⁹² **Exh. R-0256**, Non-extinctive amending novation agreement of the credit agreement for a provision of ELA, 5 June 2017; **Exh. R-0257**, Non-extinctive amending novation agreement of the framework agreement for repurchase transactions for the provision of emergency liquidity, 5 June 2017; RWS-3, paras. 54-55.

⁵⁹³ **Exh. R-0254**, the Bank of Spain, Banco Popular TARGET 2 Account Statement, pp. 1-2; **Exh. R-0251**, the Bank of Spain, Contract for the Provision of ELA, 5 June 2017, Clause 3.1(2) reflecting the ELA disbursement request for €1.9 billion; **Exh. C-317**, the Bank of Spain, Modifying and Non-Extinguishable Novation Agreement (ELA), 5 June 2017, Clause 3.1(2)(ii), reflecting the ELA disbursement request for € 700 million; **R-0417**, Banco Popular, ELA disbursement request for € 900 million, 6 June 2017.

⁵⁹⁴ See, **RWS-9**, para. 55; **Exh. R-0335**, Inspector’s Report by Santiago Ruiz-Clavijo Ruiz and Pablo Hernández Romeo, 10 April 2019, nn. 320, 321 and 322. See for instance, with

portfolios.⁵⁹⁵ These unpledged assets had a post-haircut value (or ELA value) of € 5.570 billion.⁵⁹⁶ Only the shares of Aliseda and Canvives accounted for a post-haircut value of € 3.309 billion.⁵⁹⁷

650. Moreover, the Claimants contend that Spain's review of the assets to be pledged was excessively formalistic.⁵⁹⁸ Indeed, the determination whether assets can serve to secure a loan and for what value is inherently formalistic and it is unsurprising that the Bank of Spain sought to ensure that it was adequately covered in the event of a default on the ELA. Under the circumstances, it was not unreasonable for the Bank of Spain to insist that Banco Popular provide the original share and mortgage transfer certificates or CTHs (*certificados de transmisión de hipotecas*), or furnish proof that the book value of the companies whose shares were pledged was positive.
651. Mr. Saracho, Banco Popular's then Chairman, testified before a parliamentary committee to the bank's shortcomings in identifying and pledging assets of sufficient quality:

regard to Aliseda and Canvives, **Exh. R-0428**, Email from ██████████ to ██████████, 6 June 2017 at 11:23 am; **Exh. R-0429**, Aliseda share certificate, attached to email from ██████████ to ██████████, 6 June 2017 at 11:23 am; **Exh. R-0430**, Canvives share certificate, attached to email from ██████████ to ██████████, 6 June 2017 at 11:23 am; **Exh. R-0423**, Banco Popular, Capitalización de deudas de filiales inmobiliarias, attached to email from ██████████ to ██████████, 4 June 2017 at 9:15 pm; **Exh. R-0424**, Email from ██████████ to ██████████, 4 June 2017 at 9:15 pm; **Exh. R-0431**, Registro Mercantil Central, Relación de Inscripciones, Aliseda SA; **Exh. R-0432**, Registro Mercantil Central, Relación de Inscripciones, Inversiones Inmobiliarias Canvives SA. See, in respect of Wizink, **Exh. R-0433**, Email from ██████████ to ██████████, June 6, 2017 at 8:23 pm; **Exh. R-0434**, Wizink share certificate, attached to email from ██████████ to ██████████, June 6, 2017 at 8:23 pm.

⁵⁹⁵ **Exh. R-0461**, Email from ██████████ to ██████████, ██████████, ██████████ and ██████████, June 6, 2017 at 3:35pm; **Exh. R-0462**, Email from ██████████ to ██████████, ██████████ and ██████████, June 4, 2017 at 7:10pm; **R-0463**, Email from ██████████ to ██████████, ██████████, ██████████, ██████████, 6 June 2017 at 12:35; **Exh. R-0464**, Email from ██████████ to ██████████, ██████████ and ██████████, 6 June 2017 at 11:09.

⁵⁹⁶ Claimants' May Hearing Opening Presentation, slide 37.

⁵⁹⁷ Claimants' May Hearing Opening Presentation, slide 37.

⁵⁹⁸ See, e.g., Reply, para. 650 (taking issue with the "Respondent's after-the-fact focus on formalities").

“So the forty billion, when they [Bank of Spain officials] look at it, they don't like it, they don't like it and it's not capricious because the risk of that liquidity transaction is assumed by Banco de España; this means that we all assume it. It doesn't mean that Banco de España can whip out that money, that money belongs to the Spanish people. It is managed by Banco de España and they are responsible if it is lost, which is why they are very cautious and they didn't like the collateral I was offering. Besides that, some had defects in form. What does that mean? They were correctly recognised on my balance sheet and confirmed by internal and external audits. It seemed to me that I could have property holding companies of one hundred percent of the bank, but the shares were not registered and Banco de España did not regard it as feasible. I think Banco de España did exactly what any custodian would have done. It was prudent and it did what it could, amounting to three billion in the end. That's that, but it didn't go as far as five billion because it was unwilling, but rather because it didn't seem wise to give me five billion based on the collateral that I was able to put up.”⁵⁹⁹

652. Additionally, the Claimants complain that the haircuts applied by the Bank of Spain were “excessive” or “high” and that at a minimum, Spain has offered no evidence allowing the Claimants and the Tribunal “to assess the correctness of any of [the] steps taken to calculate the haircuts”.⁶⁰⁰
653. Spain's discretion in applying the relevant haircuts is restrained by principles established by the Governing Council of the ECB, which in particular require that (a) “haircuts applied on assets pledged as ELA collateral should not be less conservative than haircuts applied to equivalent assets pledged as collateral for monetary policy operations” and (b) “where applicable, haircuts should generally increase with increasing residual maturity and declining liquidity and credit quality”.⁶⁰¹ At the May Hearing, the Claimants' expert Prof. Goldstein confirmed that pursuant to these principles “assets must be pledged as collateral after applying haircuts that should be at least as high as those applied in monetary policy”.⁶⁰² It is not within the remit of this Tribunal to assess whether specific haircuts were too high as the Claimants and their experts assert.⁶⁰³ Rather, for purposes of its FET inquiry, the Tribunal must evaluate whether Spain abused its discretion and whether the process was subject to fundamental flaws such as to make it unfair or inequitable in the meaning of Article IV of the Treaty. In the record before it, the Tribunal finds no evidence suggesting that the

⁵⁹⁹ **Exh. R-0094**, Parliamentary Inquiry Committee on Spain's financial crisis and the financial aid programme, Special Session No. 41, Testimony by Mr. Emilio Saracho Rodríguez de Torres, 12 July 2018, p. 62.

⁶⁰⁰ Reply, para. 658.

⁶⁰¹ **Exh. RWS-4-011**, ECB, Extract from the Governing Council meeting, 17 May 2017.

⁶⁰² May Hearing Tr. [English version], 22 May 2021, 1054:4-8.

⁶⁰³ See, e.g., CER-6, para. 18; CER-5, para. 6.72.

Bank of Spain abused its discretion in applying the haircuts, or that the process was otherwise flawed or in breach of the applicable ECB principles.

654. More generally, the Tribunal considers that the Bank of Spain's conduct in dealing with Banco Popular's requests was rather proactive, especially in the early phases, conducting dry run exercises and simulations beyond the requirements of the ELA agreement. In the crucial days immediately before and after the ELA requests, email exchanges took place late at night and during weekends. Possible inaccuracies or ambiguities, such as the expressions in the letters from the Bank of Spain to the ECB just discussed, must be viewed in the context of the pressure and the need for urgent action in extremely short time. In sum, the Claimants have not shown any arbitrary conduct, evident negligence, or lack of transparency, let alone a "complete" lack of transparency and candor, in the Bank of Spain's handling of Banco Popular's ELA requests. In fact, as Banco Popular's last Chairman later acknowledged, "I think [t]he [Bank of Spain] did exactly what any custodian would have done. It was prudent and it did what it could".⁶⁰⁴
655. Finally, the Claimants' argument that the Bank of Spain "abruptly" suspended the ELA similarly lacks merits.
656. To recall, on 6 June 2017 at 17:00, the Board of Directors of Banco Popular determined that "despite access to the urgent liquidity provision mechanism" Banco Popular was "failing or likely to fail".⁶⁰⁵ Three hours later, at 20:02, the Bank of Spain received from the ECB a copy of a letter from Banco Popular to the ECB, together with a copy of the minutes of the meeting of Banco Popular's Board of Directors held earlier that day,⁶⁰⁶ advising the ECB of "the written decision of the Board of Directors confirming the assessment that Banco Popular was failing or likely to fail".⁶⁰⁷ On that same day, the ECB informed the SRB of its preliminary assessment that Banco Popular was at risk of

⁶⁰⁴ **Exh. R-0094**, Parliamentary Inquiry Committee on Spain's financial crisis and the financial aid programme, Special Session No. 41, Testimony by Mr. Emilio Saracho Rodríguez de Torres, 12 July 2018, p. 62.

⁶⁰⁵ **Exh. C-229**, Banco Popular, Minutes of the Board of Directors, 6 June 2017, p. 3.

⁶⁰⁶ **Exh. R-0264**, Bank of Spain, Information Systems Certificate, 25 February 2020.

⁶⁰⁷ **Exh. C-118**, Letter from Banco Popular Español to the ECB, 6 June 2017.

FOLTF,⁶⁰⁸ which the ECB later confirmed after the completion of its formal consultation process.⁶⁰⁹

657. In light of these events, it is unsurprising that the Bank of Spain postponed work on additional potential collateral to the following morning.⁶¹⁰ At this point in time, it was evident that even Banco Popular's Board of Directors realized that Banco Popular's liquidity crisis had become existential and could not be overcome by additional liquidity assistance. It was that determination itself that in fact pre-empted any (further) disbursement of ELA.
658. On 7 June 2017, Banco Popular itself requested the termination of the ELA process, as reflected in recitals XI-XIII of the ELA Termination Agreement.⁶¹¹ This was the logical consequence of its determination the night before that it was FOLTF and brought the ELA process to an end. Under the circumstances, the Tribunal fails to see how the Bank of Spain can be blamed for "cutting-off" the process and how Spain's failure to provide Banco Popular with more ELA after both Banco Popular and the ECB had concluded that the bank was FOLTF could breach the Treaty.
659. In summary, the Respondent did not breach Article IV of the Treaty through its conduct in connection with Banco Popular's requests of ELA.

⁶⁰⁸ **Exh. R-0092**, ECB, FOLTF Assessment of Spanish Banco Popular, 6 June 2017. See also **Exh. C-52**, SRB, Decision of the SRB at its executive meeting of 7 June 2017 regarding the adoption of a resolution plan in respect of Banco Popular Español, S.A., No. SRB/EES/2017/08, 7 June 2017, p. 8.

⁶⁰⁹ **Exh. C-52**, SRB, Decision of the SRB at its executive meeting of 7 June 2017 regarding the adoption of a resolution plan in respect of Banco Popular Español, S.A., No. SRB/EES/2017/08 of 7 June 2017, p. 8. See also **R-0092**, ECB, FOLTF Assessment of Spanish Banco Popular, 6 June 2017, para. 14.

⁶¹⁰ RWS-3, para. 59; RWS-9, para. 67.

⁶¹¹ **Exh. R-0260**, Termination Agreement for Emergency Liquidity Provision Contracts and Pledge Agreements on Non-Mortgage Loans and Credits, 7 June 2017, Recitals XI-XIII. **Exh. R-0454**, Email from [REDACTED] to [REDACTED], 7 June 2017 at 09:35 am.

e. Sale of Banco Popular to Santander

i. The Claimants' position

660. The Claimants argue that the sale of Banco Popular to Santander was carried out in violation of the FET standard.⁶¹² First, Spain failed to consider alternative solutions that could have saved Banco Popular from failing, for instance, a capital increase or other resolution tools.⁶¹³ The Claimants maintain that the possibility of a private sale of the bank, which Banco Popular's management had explored in early 2017, had attracted significant interest from potential acquirers, such as Barclays, Deutsche Bank, Cerberus, Altamira, Allianz, Credit Mutuel, PIMCO, Mexican investors and the Luksic family. In addition, Banco Popular was implementing three measures to improve its liquidity ratio: (i) offloading its non-performing assets ("NPA"s); (ii) selling non-core assets; and (iii) carrying out a capital raise. The Spanish authorities failed to take these initiatives into account and instead decided to put Banco Popular into resolution.
661. Second, the Claimants maintain that Spain brokered "a backdoor" deal with Santander.⁶¹⁴ Being interested in purchasing Banco Popular since December 2016, Santander obtained information about Banco Popular's state of affairs in May 2017 through the virtual data room that Banco Popular had opened in the context of a potential private sale. In the Claimants' view, Santander thereby benefitted from an unfair advantage and was in a position to prepare for the resolution of Banco Popular before the Claimants or anyone else could.⁶¹⁵ The Claimants also contend that the Respondent's privilege log makes it clear that there was back-channeling between Santander and Spain.⁶¹⁶

⁶¹² SoC, paras. 339-378; Reply, paras. 668-679; C-PHB1, paras. 148-188; C-PHB2, paras. 55-71.

⁶¹³ SoC, paras. 339-378; Reply, paras. 185, 200, 680(a); C-PHB1, paras. 155-171; C-PHB2, para. 65.

⁶¹⁴ See, e.g., C-PHB2, paras. 69-70.

⁶¹⁵ SoC, para. 348.

⁶¹⁶ C-PHB1 para. 187, referring to **Exh. C-366**, J. Zuloaga, *Botín contradice la declaración de Guindos en la Audiencia Nacional*, *El Confidencial*, 9 October 2020, p. 2-3; **Exh. C-367**, *OK Diario*, *Ana Botín reconoce que el Popular era solvente cuando fue intervenido, aunque sufría déficit de provisiones*, 9 October 2020, p. 2. Respondent's Privilege Log - ECB Documents, Entry Nos. 1-6.

662. Third, the auction was flawed as it (i) involved only two bidders, (ii) was carried out overnight, and (iii) the sale price was set at € 1.⁶¹⁷
663. Finally, the Respondent failed to inform the Claimants about the planned resolution of Banco Popular, which deprived them of the opportunity to bid for the bank and save it with their means.⁶¹⁸

ii. ***The Respondent's position***

664. Spain disputes that the sale of Banco Popular to Santander was in breach of the FET standard.⁶¹⁹
665. First, Banco Popular was put in resolution by the EU authorities in accordance with the applicable EU regulations.⁶²⁰ Such decision was justified because Banco Popular was FOLTF,⁶²¹ as acknowledged by the bank itself on 6 June 2017.⁶²² Having analyzed different tools that could improve Banco Popular's affairs, the SRB decided that the sale-of-business was the most appropriate one in light of the bank's liquidity shortage.⁶²³
666. Second, contrary to the Claimants' suggestions, the EU authorities did consider alternative solutions to save Banco Popular.⁶²⁴ The Respondent also underscores that the private sales initiatives were unsuccessful, as is clear from Banco Popular's own

⁶¹⁷ Reply, paras. 676-679; C-PHB1, paras. 172-188; C-PHB2, paras. 61-71.

⁶¹⁸ SoC, paras. 348, 353, 375-376; C-PHB1, paras. 149-154.

⁶¹⁹ SoD, paras. 880-957; Rejoinder, paras. 487-592; R-PHB1, paras. 178-201; R-PHB2, paras. 109-130.

⁶²⁰ Rejoinder, para. 1228 referring to **Exh. RML-061**, European Banking Authority, *Guidelines on the interpretation of the different circumstances when an institution shall be considered as failing or likely to fail under Article 32(6) of Directive 2014/59/EU*, Final Report, EBA/GL/2015/07, 26 May 2015, p. 12. See also R-PHB1, para. 186.

⁶²¹ Rejoinder, para. 1442, referring to **Exh. R-0092**, ECB, FOLTF Assessment of Banco Popular Español, 6 June 2017 (non-confidential version), pp. 4-5.

⁶²² Rejoinder, paras. 1239-1240, referring to **Exh. R-0092**, ECB, FOLTF Assessment of Banco Popular Español, 6 June 2017 (non-confidential version), pp. 17-19; **Exh. R-0180**, Banco Popular, Partial Minutes of the meeting of the Board of Directors of Banco Popular Español, S.A., 6 June 2017, p. 3.

⁶²³ R-PHB2, paras. 114, 124.

⁶²⁴ SoD, para. 882.

statement of 10 April 2017.⁶²⁵ Specifically, Banco Popular and/or its shareholders failed to (i) attract any buyers; (ii) sell WiZink and TotalBank to increase liquidity;⁶²⁶ (iii) determine how much capital should be raised to solve Banco Popular's problems;⁶²⁷ and (iv) reach binding arrangements with potential investors. In any event, the Claimants do not explain how Spain could have assisted the bank with the private sale.⁶²⁸

667. Third, Spain disputes having brokered any deal with Santander. It highlights that the FROB reached Santander and other banks only when the SRB instructed it to do so.⁶²⁹ Moreover, the Claimants' suggestion that Spain decided to deliberately damage the bank is implausible, because the potential failure of Banco Popular created a very serious risk of contagion to the financial sector.⁶³⁰

668. Fourth, the Respondent disputes that the resolution of Banco Popular was procedurally deficient: (i) the SRB and the FROB considered 35 potential buyers and approached five Spanish banks;⁶³¹ (ii) the auction was carried out overnight to ensure the continuous operation of Banco Popular; (iii) the € 1 sale price was appropriate, because Banco Popular had a negative value. In any event, if a bidder believed that Banco Popular was worth more, it could have bid more than € 1.⁶³²

669. Finally, Spain stresses that the resolution of Banco Popular was positively evaluated in 2017. According to the Respondent's witness Mr. Ponce, even Banco Popular's CEO Mr. Emilio Saracho thought that "it was a miracle that the resolution was able to go through".⁶³³

⁶²⁵ SoD, paras. 846-857; Rejoinder, paras. 1216-1220; R-PHB1, paras. 60-82, 116-120; R-PHB2, paras. 75-77.

⁶²⁶ R-PHB1 paras. 62-65.

⁶²⁷ R-PHB1 paras. 66-76.

⁶²⁸ R-PHB1 paras. 71-74.

⁶²⁹ SoD, para. 851.

⁶³⁰ SoD, para. 928.

⁶³¹ Namely Santander, BBVA, Bankia, Sabadell and Caixa. See SoD, para. 435.

⁶³² SoD, paras. 880-957; Rejoinder, paras. 487-592; R-PHB1, paras. 178-201; R-PHB2, paras. 109-130.

⁶³³ R-PHB1, para. 200.

iii. Discussion

670. In their latest submissions, the Claimants have clarified that they do “not seek to hold Spain responsible for the SRB’s resolution to sell [Banco Popular]” and asserted that “[w]hile the FROB’s role in that decision is an important factual element of the case which Respondent is simply unable to dispute, it does not form part of Claimants’ case on liability”.⁶³⁴ In other words, while the Claimants do not “contest the resolution decision” as such, they seek to hold Spain liable for “precipitating the resolution” and “carr[ying] it out” “badly”.⁶³⁵ Indeed, the responsibility of resolving Banco Popular lay with the SRB, a point which was accepted by the Claimants’ expert de la Mano at the hearing.⁶³⁶ Being an act of the EU authorities, the resolution itself falls outside of the Tribunal’s jurisdiction.
671. The Claimants’ case on FET appears to center around their contention that Spain “reached a predetermined decision to sell [Banco Popular] to Santander in resolution rather than address the liquidity crisis”⁶³⁷ and “orchestrated a non-competitive fire sale that could not have fetched a fair-market value price for [Banco Popular]”.⁶³⁸ The Claimants have advanced a number of arguments in support of their theory, which the Tribunal addresses in turn.
672. First, the Claimants take issue with the selection of the so-called “sale of business tool” and contend that “from the very beginning, Respondent pushed the SRB to utilize the

⁶³⁴ Reply, para. 451.

⁶³⁵ C-PHB2, para. 57 (“Claimants have *never* sought in this Arbitration to hold any European agency liable or hold Respondent liable for any European act or breach of European law. [...] Respondent is therefore correct when it states: ‘Claimants have made little effort to contest the propriety of the overall resolution decision.’” Indeed, Claimants have not made *any* effort to contest the resolution decision, because that is separate and apart from Respondent’s conduct and responsibility in precipitating the resolution and how it so badly carried it out”, internal footnote omitted, emphasis in the original).

⁶³⁶ See, e.g., May Hearing Tr. [English version], 22 May 2021, 864:13-866:18 (de la Mano).

⁶³⁷ C-PHB1, para. 149.

⁶³⁸ C-PHB1, para. 149. See also C-PHB2, paras. 58-59 (where the Claimants argue that Spain “played the leading role in crafting and pushing for [Banco Popular’s] sale by resolution”, in particular because “it was the FROB which conceived of, pushed for and then implemented the destructive sale process”).

sale-of-business tool, without any analysis or consideration of other tools” that would have been available.⁶³⁹

673. It is common ground that the resolution of a bank such as Banco Popular is governed by the SRM Regulation.⁶⁴⁰ Article 18(6) of the SRM Regulation provides that the SRB “shall adopt a resolution scheme” if certain conditions are met.⁶⁴¹ Pursuant to the same provision, “[t]he resolution scheme shall: (a) place the entity under resolution” and “(b) determine the application of the resolution tools to the institution under resolution referred to in Article 22(2), in particular any exclusions from the application of the bail-in in accordance with Article 27(5) and (14)”.

674. Article 22(2) of the SRM Regulation, entitled “[g]eneral principles of resolution tools”, lists the following resolution tools:

“(a) the sale of business tool;

(b) the bridge institution tool;

(c) the asset separation tool;

(d) the bail-in tool.”

675. The SRB decided in favor of the sale of business tool on 24 May 2017 at an Extended Executive Session. The record shows that SRB did consider other resolution tools and discarded them. Such consideration is recorded in Article 5(3) of its 7 June 2017 decision, in which the SRB specifically discussed the bail-in and bridge institution tools and set out in reasons for discarding these solutions.⁶⁴²

⁶³⁹ C-PHB1, para. 162.

⁶⁴⁰ See **Exh. C-20**, Regulation (EU) No. 806/2014 of the European Parliament and of the Council (2014) OJ L225/1.

⁶⁴¹ Notably: “(a) the entity is failing or is likely to fail; (b) having regard to timing and other relevant circumstances, there is no reasonable prospect that any alternative private sector measures, including measures by an IPS, or supervisory action, including early intervention measures or the write-down or conversion of relevant capital instruments in accordance with Article 21, taken in respect of the entity, would prevent its failure within a reasonable timeframe; (c) a resolution action is necessary in the public interest pursuant to paragraph 5”. See **Exh. C-20**, Regulation (EU) No. 806/2014 of the European Parliament and of the Council (2014) OJ L225/1, Article 18(1).

⁶⁴² **Exh. C-52**, SRB, Decision of the SRB at its executive meeting of 7 June 2017 regarding the adoption of a resolution plan in respect of Banco Popular Español, S.A., No. SRB/EES/2017/08, 7 June 2017, Article 5(3) (“The SRB considers that the application of

676. Similarly, Mr. Ponce, the then Chairman of the FROB, testified that the SRB had made its decision independently, based on an “analysis of each resolution tool, and [...] discussion [of] the effects that would flow from the application of the sale of business tool as opposed to the bail-in tool”, which allowed the SRB to conclude that the sale-of-business tool would “best preserve financial stability”.⁶⁴³ Mr. Ponce confirmed that the “FROB did not press for the SRB to decide on a particular tool”.⁶⁴⁴
677. In the Tribunal’s view, nothing in the record contradicts the documentary and testimonial evidence just referred to. There is no indication that the FROB “pushed” the SRB to select one tool over another. It also bears noting in this connection that the record shows that, in addition to the resolution tools envisaged in Article 22 of the SRM Regulation, both the ECB and the SRB looked for private sector solutions that could prevent the bank’s failure and concluded that there were none.⁶⁴⁵

other resolution tools set out in Article 22(2) of the SRMR would not meet the resolution objectives to the same extent in the case at stake. In particular: a) With regard to the bail in tool of Article 27(1)(a)SRMR (even if combined with the asset separation tool) it cannot be ensured that it would immediately and effectively address the liquidity situation of the Institution, hence, restoring it to financial soundness and long-term viability. Given the specific circumstances of the case, the sale of business tool would meet the resolution objectives more effectively than the bail-in tool of Article 27(1)(a) SRMR; b) With regard to the bridge institution tool (even if combined with the asset separation tool), given that the bridge institution aims to maintain access to critical functions and sell the Institution within a timeframe of, in principle, two years, and to the extent that the sale of business tool achieves the same result within a short timeframe, the sale of business tool is considered to achieve the resolution objectives more effectively than the bridge institution tool”).

⁶⁴³ RWS-6, paras. 44-45; See also May Hearing Tr. [English version], 20 May 2021, 639:8-9 (Ponce), according to whom “what we [the FROB] did was simply agree with the proposal [of the sale of business tool] made by the SRB”.

⁶⁴⁴ RWS-6, paras. 44-45.

⁶⁴⁵ **Exh. R-0092**, ECB, FOLTF Assessment of Banco Popular Español, 6 June 2017 (non-confidential version), para. 18 (“As an alternative measure to ensure the capacity to meet all liabilities as they fall due, the Supervised Entity is currently trying to implement a corporate transaction, i.e. its sale to a stronger competitor. However, considering the most recent and so far on-going deterioration of its liquidity position, taking into account that there is no evidence of the capacity of the Supervised Entity to turn around its liquidity situation in the near future, together with the fact that negotiations have so far not yet led to a positive outcome, a confirmation of such a private transaction is not foreseeable in a timeframe that allows the Supervised Entity to be able to pay its debts or other liabilities as they fall due.”); **Exh. C-52**, Decision of the SRB in its Executive Session concerning the adoption of a resolution scheme in respect of Banco Popular Español, S.A., addressed to the FROB

678. The Claimants' arguments regarding the involvement of advisory firm Jefferies-Arcano in this matter are equally inconclusive. On 30 May 2017, the FROB retained Jefferies-Arcano to provide "advice to the FROB in the preparation and, where appropriate, execution of the resolution" of Banco Popular.⁶⁴⁶ It is true that the firm's purported analysis of other tools may have been meaningless, as the SRB had already decided in favour of the sale of business tool one week earlier. However, this fact in and of itself does not prove that the FROB influenced or pressured the SRB to choose a given tool, let alone that the SRB's choice in that regard was arbitrary.
679. Furthermore, the Claimants take issue with Spain's organization of the "sham auction with only one possible bidder",⁶⁴⁷ namely Santander. For them, the auction was flawed because (i) "instead of reaching out to foreign banks and financial institutions, Respondent narrowed the search to only five Spanish banks - Santander, Bankia, Sabadell, CaixaBank, and BBVA",⁶⁴⁸ (ii) "instead of giving bidders a meaningful due diligence period, Respondent provided an impossibly small window that effectively eliminated all bidders except the one bidder who had concluded its diligence in the private sale process",⁶⁴⁹ (iii) "[i]nstead of seeking the highest sale price, Respondent signaled to Santander that an offer of a mere Euro would suffice to seal the deal",⁶⁵⁰ (iv) "there also is strong reason to suspect that there was backchannelling between

(SRB/EES/2017/08), 7 June 2017, Article 3.2 ("[t]here is no reasonable prospect that any alternative private sector measures could prevent the failure of the institution. The lack of such measures can be inferred, in particular, from... (b) The private sales process has not led to a positive outcome within a timeframe that would allow the Institution to be able to pay its debts or other liabilities as they fall due..."). See also, on this point, the CJEU decision that found that "the SRB explained, in Article 5.3 of the resolution scheme, why the application of the other resolution tools provided for in Article 22 of [the SRM Regulation] would not meet the objectives of the resolution to the same extent". **Exh. RL-0423**, *del Valle*, para. 274.

⁶⁴⁶ **Exh. C-129**, FROB, Contratos Adjudicados Durante El Año 2017, translated at **Exh. C-129 ENG**. See also See **Exh. C-339**, FROB, Minutes No. 15/2017 of Governing Commission Meeting, 30 May 2017, FROB, Minutes No. 15/2017 of Governing Commission Meeting, 30 May 2017, translated at **Exh. C-339 ENG**, p. 3.

⁶⁴⁷ Reply, para. 22.

⁶⁴⁸ C-PHB1, para. 178.

⁶⁴⁹ C-PHB1, para. 182.

⁶⁵⁰ C-PHB1, para. 185.

Respondent and Santander, and [...] Santander knew it would be the winning 'bidder.'"⁶⁵¹

680. To assess this criticism, it is necessary to place the events relating to the auction in the broader factual matrix.

681. First, in early 2017, Banco Popular's management explored the possibility of a *private* sale of the bank. However, that process did not result in any offers being made for a positive value. Indeed, Banco Popular's advisors had approached five large domestic banking groups, namely Santander, Bankia, Sabadell, Caixa and BBVA.⁶⁵² Four of the targeted banks expressed interest and were given access to the virtual data room, but only two ended up submitting letters of interest and none of them submitted actual offers.⁶⁵³ In light of the outcome of the private sales process, there was thus nothing irrational or arbitrary in the SRB's decision of 3 June 2017 to direct the FROB to "contact the five parties which ha[d] been invited to present non-binding offers in the context of the private sale process".⁶⁵⁴ In addition, nothing in the record suggests that a foreign bank ever manifested an interest in purchasing Banco Popular. The argument that Spain should have "reached out" to foreign financial institutions thus lacks factual support.

⁶⁵¹ C-PHB1, para. 186.

⁶⁵² **Exh. C-73**, Jefferies International Ltd., et al., Presentation, Hippocrates Resolution Process Considerations, 1 June 2017, p. 4 and Appendix, pp. 1-11.

⁶⁵³ **Exh. C-73**, Jefferies International Ltd., et al., Presentation, Hippocrates Resolution Process Considerations, 1 June 2017, p. 4 and Appendix, pp. 1-11 16-25.

⁶⁵⁴ See **Exh. C-138**, SRB, Decision of the Executive Session of the Board concerning the marketing of Banco Popular Español, S.A. (No. SRB/EES/2017/06), 3 June 2017, Article 2, in which the SRB directed the FROB to "contact the five parties which ha[d] been invited to present non-binding offers in the context of the private sale process" and gave reasons for that choice ("Contacting these five parties is justified on the basis of financial stability grounds and the substantial risk that marketing to a wider circle of potential purchasers and the disclosure of risks and valuations or the identification of critical and non-critical functions in respect of the [b]ank may result in additional uncertainty and in a loss of market confidence. Moreover, contacting a wider number of purchasers might increase the probability of leakage and thus, the risk that the [b]ank may enter resolution within an extremely short timeframe. Further, due to the urgency and the very limited time that is expected to be available for the marketing procedure, inviting a larger number of participants would increase the complexity of the process. Moreover, based on the information received from the [b]ank, it is doubtful whether bidders that have not shown interest so far in the private sales process would submit offers").

682. Still in connection with the SRB's choice to direct the FROB to contact only "the five parties which ha[d] been invited to present non-binding offers in the context of the private sale process",⁶⁵⁵ the Tribunal notes that such decision reflects the conclusion reached by Lazard, i.e. Banco Popular's own advisor during the private sale process. Lazard had "assess[ed] the potential interest in [a private sale of Banco Popular] of a large universe of candidates around the world, not only national and international banks as well as investment firms with track record of investing in regulated financial institutions".⁶⁵⁶ Specifically, it had "carried out a sounding of the interest of 35 potential bidders (5 national entities, 25 international banks and 4 investment firms), at the highest levels of the institutions supported by its worldwide network".⁶⁵⁷ However, none of those international banks and investment firms had shown any interest in purchasing Banco Popular.⁶⁵⁸ In Lazard's own words, "the most interested parties in Banco Popular would be BBVA and Banco Santander, as they would be able to extract more synergies out of the potential integration".⁶⁵⁹ A similar conclusion was also reached by Deutsche Bank in a report prepared for Banco Popular in December 2016.⁶⁶⁰
683. Second, the minimum auction price of € 1 cannot be viewed in isolation. It must be assessed in light of Banco Popular's value at that time. In the independent valuation report prepared upon the instruction of the SRB, Deloitte had given a "best estimate" equal to *negative* € 2 billion.⁶⁶¹ Moreover, immediately after Santander completed the purchase, it had to inject € 13 billion to stabilize Banco Popular. In any event, the € 1

⁶⁵⁵ **Exh. C-138**, SRB, Decision of the Executive Session of the Board concerning the marketing of Banco Popular Español, S.A. (No. SRB/EES/2017/06), 3 June 2017, Article 2.

⁶⁵⁶ **Exh. C-73**, Jefferies International Ltd., et al., Presentation, Hippocrates Resolution Process Considerations, 1 June 2017, p. 4.

⁶⁵⁷ **Exh. C-73**, Jefferies International Ltd., et al., Presentation, Hippocrates Resolution Process Considerations, 1 June 2017, p. 4.

⁶⁵⁸ **Exh. C-73**, Jefferies International Ltd., et al., Presentation, Hippocrates Resolution Process Considerations, 1 June 2017, p. 4.

⁶⁵⁹ **Exh. C-73**, Jefferies International Ltd., et al., Presentation, Hippocrates Resolution Process Considerations, 1 June 2017, Appendix, p. 2 .

⁶⁶⁰ **Exh. C-287**, Deutsche Bank, Presentation titled "Discussion materials", 12 December 2016, p. 7 [p. 12 of the PDF].

⁶⁶¹ See **Exh. C-128**, Deloitte & SRB, Hippocrates Provisional Valuation Report, 6 June 2017, p. 1. Deloitte also assessed whether the shareholders and creditors of Banco Popular would receive better treatment if Banco Popular entered into insolvency proceedings and concluded that shareholders and subordinated creditors would achieve no recovery in a liquidation scenario. See *ibid.*, pp. 13-15 and executive summary, pp. 1-9.

price was set as a minimum and the auction was a “blind” one, i.e. bidders were not allowed to see one another’s bids. Consequently, a bidder believing that Banco Popular was worth more could have bid more. The fact is that there were no such bidders.

684. Third, the urgency with which the auction was carried out appears unsurprising. To start with, the relevant text of the SRM recommends a time frame to complete a resolution no longer than 32 hours.⁶⁶² Moreover, a speedy action was necessary in the circumstances in light of the precipitating events linked to Banco Popular’s liquidity crisis. Further, given the significant amount of information about Banco Popular that potential bidders would have needed to process, it was understandable that only Santander—which had already conducted a due diligence in early May 2017—decided to participate in the auction.

685. In addition, in light of the urgency caused by the liquidity crisis and the need to avoid further money outflows, an operation such as the resolution of a bank must by nature be subject to confidentiality. Indeed, pursuant to the Bank Resolution and Recovery Directive (the “BRRD”), resolution authorities are required to take steps to ensure confidentiality before the relevant decision is taken.⁶⁶³ Hence, one understands that the Claimants were not notified of the forthcoming resolution decision.

686. Finally, regarding the alleged “back-channeling” or “backdoor” communications between Spain and Santander, the Claimants point in particular to Spain’s privilege log, which includes [REDACTED]. In light of Spain’s refusal to produce these communications, they request that the Tribunal “should draw the adverse inference that these communications discussed opportunities for Santander to acquire [Banco Popular] via resolution, including the terms that Santander was prepared to accept”.⁶⁶⁴ The Tribunal

⁶⁶² **Exh. RML-068**, European Commission, Memo on the Single Resolution Mechanism and Banking Union, 15 April 2014, available at http://Europa.eu/rapid/press-release_MEMO-14-295_en.htm?locale=en (“All this is foreseen to happen within very tight deadlines, in total 32 hours, in order to allow resolving an ailing bank over the weekend”).

⁶⁶³ **Exh. RL-0139**, European Commission, European Parliament Directive establishing a framework for the restructuring and resolution of credit institutions and investment service companies and amending Council Directive 82/891/EEC and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No. 1093/2010 and (EU) No. 648/2012 of the European Parliament and the Council, 15 May 2014 (“BRRD”), para. 86.

⁶⁶⁴ C-PHB1, para. 153.

will address the Claimants' numerous requests for adverse inferences in the following section. As will be explained below, the Respondent has provided satisfactory explanations for its failure to produce a number of ECB- and SRB-related documents, including the emails at issue here, as a result of those institutions' objections to disclosure on grounds of confidentiality, privilege or institutional sensitivity or secrecy. This notwithstanding, the Tribunal notes that in any event, the emails at issue here, which the Respondent's privilege log describes as ' [REDACTED]

[REDACTED],⁶⁶⁵ were sent from [REDACTED] (and not vice versa) and there is no indication in the privilege log or elsewhere in the record that the Bank of Spain replied to them. The Tribunal does not find it exceptional or surprising that a Spanish bank communicates with the Bank of Spain or the ECB in the context of the ECB's ongoing supervision. It thus considers the Claimants' allegation that these emails constitute "backchannel" or "backdoor" communications unfounded. Finally, even if in these emails Santander expressed an interest in acquiring Banco Popular via resolution, that purported expression of interest would in itself not constitute evidence that Spain carried out the resolution in an improper manner.

687. In sum, the Claimants have not succeeded in establishing that the "Respondent engineered [Banco Popular's] resolution and the sham auction that resulted in the fire sale to Banco Santander".⁶⁶⁶ To the contrary, having regard to the entirety of the evidence, it appears clear that Banco Popular was placed under resolution because it was unable to pledge sufficient collateral and, accordingly, obtain additional ELA and because it was determined to be FOLTF.⁶⁶⁷ Under the circumstances, proceeding with the resolution pursuant to Santander's offer was almost inevitable in order to ensure the continuity of the critical functions of Banco Popular, avoid the risk of contagion to other financial institutions and businesses, and protect the stability of the financial system.

f. The Claimants' requests for adverse inferences

688. In this section, the Tribunal addresses the Claimants' request for adverse inferences. In their submissions, the Claimants have put forward numerous, far-reaching requests

⁶⁶⁵ Respondent's Privilege Log - ECB Documents, Entry Nos. 1, 2, 3 and 5 (describing four emails from Santander to Bank of Spain). See also Entry Nos. 4 and 6 (describing two emails from Santander to the ECB, with copy to the Bank of Spain).

⁶⁶⁶ Reply, section IV.B.2(e) (heading).

⁶⁶⁷ See *supra* sect. VI.B.2.d.iii.

for adverse inferences. In particular, Annex B to their Reply is entirely devoted to those requests and spans over 55 pages. In that Annex, the Claimants have made request for adverse inference in connection with each of the document production requests with which, in their view, the Respondent has not complied. In respect of some of the document production requests, the Claimants have gone as far as making no less than fourteen different adverse inference requests.

689. Although the BIT and the UNCITRAL Rules are silent on the drawing of adverse inferences, the Tribunal considers that it is empowered to draw adverse inferences from a party's non-compliance with a document production order. As set forth in Article 9(6) of the IBA Rules on the Taking of Evidence, from which the Tribunal may take guidance,⁶⁶⁸ "[i]f a Party fails *without satisfactory explanation* to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party".⁶⁶⁹ Therefore, the first condition for an adverse inference is that the party ordered to produce has failed to provide a satisfactory explanation for not producing a document.

690. In addition to that requirement, drawing an adverse inference is subject to a number of conditions. In this connection, the Claimants rely on the conditions or factors put forward by Jeremy Sharpe as guidance (to which the Claimants refer as the "Sharpe test").⁶⁷⁰ Indeed, Sharpe observes that, before drawing adverse inferences, "arbitrators must satisfy themselves of the appropriateness of doing so in the circumstances of each case".⁶⁷¹ To that end, he proposes the following requirements for adverse inferences, whereby the third one is particularly relevant to the present dispute:

"(1) the party seeking the adverse inference must produce all available evidence corroborating the inference sought;

(2) the requested evidence must be accessible to the inference opponent;

⁶⁶⁸ See PO1, para. 24.

⁶⁶⁹ IBA Rules, Article 9(6) (emphasis added).

⁶⁷⁰ Reply, Annex B, para. 6 ("The 'Sharpe test' is the most comprehensive and widely accepted test on adverse inferences in arbitration, and it provides five elements for tribunals to consider in finding adverse inferences").

⁶⁷¹ **Exh. CL-316**, J. K. Sharpe, *Drawing Adverse Inferences from the Non-production of Evidence*, in LCIA Arbitration International, Vol. 22 No. 4 (2006), p. 551.

(3) the inference sought must be *reasonable, consistent with facts in the record* and logically related to the likely nature of the evidence withheld;

(4) the party seeking the adverse inference must produce *prima facie* evidence; and

(5) the inference opponent must know, or have reason to know, of its obligation to produce evidence rebutting the adverse inference sought.”⁶⁷²

691. Accordingly, the Tribunal will review the Claimants’ requests for adverse inferences bearing particularly in mind that an adverse inference must be consistent with the evidence on record and taking into account the Respondent’s alleged reasons for non-production.

692. First, the Claimants make several requests which relate to the so-called “Withheld Documents”.⁶⁷³ To recall, the Tribunal held on several occasions that these documents form part of the file in the *Audiencia Nacional* criminal proceedings and are therefore subject to secrecy under Spanish criminal law. Further, in PO5, the Tribunal rejected document production requests in connection with the Withheld Documents, because contrary to Article 3.3(c) of the IBA Rules, the Claimants had not sufficiently established that the documents sought were not in their possession or control.⁶⁷⁴ Therefore, the Claimants may not seek adverse inferences based on the Withheld Documents, as the Respondent did not breach any document production order in that connection. For the same reason, there is no ground to “adjust” the standard of proof and/or “shift” the burden of proof to the Respondent on account of the Claimants’ inability to rely on the Withheld Documents.

⁶⁷² **Exh. CL-316**, J. K. Sharpe, *Drawing Adverse Inferences from the Non-production of Evidence*, in LCIA Arbitration International, Vol. 22 No. 4 (2006), p. 551 (emphasis added).

⁶⁷³ See Reply, Annex B, Adverse inferences Requested in Relation to Document Requests 37, 44, 47, 52, 53 and 54.

⁶⁷⁴ PO5, Annex A, *sub* requests corresponding to the Withheld Documents. The Tribunal also recalls that, on 14 September 2020, it granted the Claimants’ request for assistance in obtaining the Withheld Documents from the *Audiencia Nacional* and, on 29 September 2020, through the PCA, it delivered a letter to the *Audiencia Nacional* regarding the Withheld Documents. On 16 November 2020, the *Audiencia Nacional* denied the Tribunal’s request for the production and use of the so-called Withheld Documents in this arbitration. On 8 December 2020, the Tribunal informed the Parties that it had taken due note of the *Audiencia Nacional*’s decision of 16 November 2020 and advised that, in light of the Court’s ruling, the Tribunal was not minded to make any further document production orders at that juncture. The Tribunal also informed the Parties that it considered that the Claimants had not provided sufficient reasons why the Tribunal should reconsider its previous decisions in Procedural Order No. 5.

693. A second category of requests for adverse inferences concern the ECB- and SRB-related documents, which triggered numerous procedural exchanges in the course of the arbitration. As explained in the following paragraphs, the Tribunal considers that the Respondent has provided “satisfactory explanation” for not producing these documents.

694. Starting from the ECB-related documents, on 1 July 2020 after the issuance of PO5, the Respondent, through the Bank of Spain, wrote to the ECB requesting the ECB’s authorization to produce documents “that reflect confidential ECB information or are otherwise in the possession or under the control of the ECB that are responsive to the [relevant document production] requests”.⁶⁷⁵

695. On 22 July 2020, the ECB informed the Respondent that it had reviewed a first batch of responsive documents and concluded that it could not authorize the Respondent’s request that the documents be disclosed. The ECB stated as follows:

“Following a thorough assessment of the first batch of requested documents, confidential ECB documents related to supervision, we would like to inform you that these documents are part of the administrative supervisory files relating to the ECB’s supervisory activities and in accordance with the requirements established by Decision ECB/2004/3, we regret to inform you that access to the identified documents cannot be granted (either in full or in part) since the documents and their contents are covered by a general presumption of non-accessibility under Decision ECB/2004/3, namely Article 4(1)(c) (“the confidentiality of information that is protected as such under Union law”), and for some documents in conjunction with the ninth indent of Article 4(1)(a) of Decision ECB/2004/3 (“the purpose of supervisory inspections”) and the first indent of Article 4(2) of Decision ECB/2004/3 (“the commercial interests of a natural or legal person”).”⁶⁷⁶

696. The ECB explained in particular that disclosure of the requested documents “would adversely affect the public interest in the smooth functioning of the system of prudential supervision”,⁶⁷⁷ and “[was] likely to adversely affect the trust that supervised entities have that the supervisor will treat information confidentially”.⁶⁷⁸ The ECB also provided

⁶⁷⁵ **Exh. R-0352**, Annex 1 to Respondent’s letter to the Court, 15 July 2020.

⁶⁷⁶ **Exh. R-0328**, ECB’s Letter to Bank of Spain, 28 July 2020, p. 2.

⁶⁷⁷ **Exh. R-0328**, ECB’s Letter to Bank of Spain, 28 July 2020, p. 2.

⁶⁷⁸ **Exh. R-0328**, ECB’s Letter to Bank of Spain, 28 July 2020, p. 3 (“This trust is essential to guaranteeing the exchange of information between the supervised entities and the supervisory authority, which is in turn crucial for effective supervision. Moreover, disclosing this information could undermine the supervisory methodology and strategy employed by the competent authorities”).

individual comments to the various document production requests in an annex to its letter to the Kingdom of Spain.⁶⁷⁹ For instance, in connection with the emails from Santander to the Bank of Spain with which the Claimants have taken particular issue,⁶⁸⁰ the ECB refused to authorize their disclosure on the basis that “[t]hese documents are part of the administrative supervisory file related to the ongoing supervision of Banco Santander (Santander)” and covered by the “[g]eneral presumption of non-accessibility under Article 4(1)(c) [...] in conjunction with, Article 4(2), first indent, of Decision ECB/2004/3 [...]”.⁶⁸¹

698. On 25 August 2020, following the Tribunal’s decision not to reconsider its ruling in PO5, the Respondent followed up with the ECB and requested the ECB’s authorization to submit a “privilege log” as required under PO5.⁶⁸²
699. On 1 December 2020, the ECB informed the Respondent of its decision to refuse permission to disclose the second batch of ECB-related documents.⁶⁸³ Specifically, the ECB explained that a number of requested documents “reflect[ed] exchange of views and information between the ECB and an NCB (Banco de España) in the context of and in preparation for the Governing Council’s non-objection procedure as regards the provision of [ELA]”.⁶⁸⁴ In the ECB’s view, disclosure of these documents “would seriously undermine the preservation of a ‘space to think’ for the free and constructive exchange of views and information within the Eurosystem which is of essence for the ECB’s ability to effectively discharge its monetary policy tasks, and thus undermine the scope for the opinion-building process in formulating and adopting similar decisions in the future”.⁶⁸⁵ The ECB also stressed that it was “crucial” for the national central banks, the national competent authorities, and the ECB to be able to deliberate “candidly”, without fearing the risk that documents pertaining to such internal deliberations might be disclosed.⁶⁸⁶ While the ECB denied its authorization to disclose the requested documents, it agreed to the production of the privilege log in the arbitration.⁶⁸⁷

⁶⁷⁹ **Exh. R-0328**, ECB’s Letter to Bank of Spain, 28 July 2020, p. 4.

⁶⁸⁰ See *supra* para. 396.

⁶⁸¹ **Exh. R-0328**, ECB’s Letter to Bank of Spain, 28 July 2020, p. 4 .

⁶⁸² **Exh. R-0332**, Letter from Bank of Spain to the ECB, 25 August 2020.

⁶⁸³ **Exh. R-0443**, Letter from ECB to the Bank of Spain, 1 December 2020.

⁶⁸⁴ **Exh. R-0443**, Letter from ECB to the Bank of Spain, 1 December 2020, p. 2.

⁶⁸⁵ **Exh. R-0443**, Letter from ECB to the Bank of Spain, 1 December 2020, pp. 2-3.

⁶⁸⁶ **Exh. R-0443**, Letter from ECB to the Bank of Spain, 1 December 2020, p. 3.

⁶⁸⁷ **Exh. R-0443**, Letter from ECB to the Bank of Spain, 1 December 2020, p. 7.

700. Under the circumstances, the Tribunal is satisfied with the Respondent's explanations that it was unable to produce the ECB-related documents as it was prevented from doing so by the decision of the ECB on grounds of confidentiality, privilege or institutional sensitivity or secrecy. As is clear from the exchanges reviewed above, following the issuance of PO5, the Respondent undertook reasonable steps to obtain the authorization of the ECB to produce the documents. In addition, pursuant to PO5, Spain submitted a 53-page privilege log describing the documents that it was unable to produce due to the confidentiality protections. Therefore, the Tribunal concludes that there is no basis to draw any negative inference against Spain in connection with its failure to produce the ECB-related documents.
701. Similar considerations apply to the SRB-related documents. On 3 July 2020, following the issuance of PO5, the Respondent, through the FROB, requested the SRB to authorize the disclosure of the SRB-related documents whose production the Tribunal had ordered in PO5.⁶⁸⁸ On 17 July 2020, the Chair of the SRB requested the Respondent "not to share within the context of the arbitration proceedings confidential documents received or issued by the SRB or that otherwise reflect confidential SRB information, without the SRB's explicit authorization".⁶⁸⁹ Further to additional correspondence between the SRB and the FROB in the subsequent months,⁶⁹⁰ on 7 January 2021 the SRB informed the Respondent that it objected to the disclosure of the requested documents as they were "either: (i) subject to on-going litigation before the EU Courts to determine the extent to which they may be disclosed or made publically available (i.e. *sub judice*); or (ii) part of the SRB's administrative file related to the resolution of [Banco Popular] which is subject to a presumption of non-accessibility in conjunction with limitations regarding their disclosure provided by Article 4(2), first indent and Article 4(3), second sub-paragraph of Regulation (EC) No 1049/2001".⁶⁹¹ Notwithstanding this, the SRB agreed to the submission of the Respondent's privilege log in the arbitration as required by PO5.⁶⁹²

⁶⁸⁸ **Exh. R-0330**, Letter from FROB to the SRB, 3 July 2020.

⁶⁸⁹ **Exh. R-0325**, Letter from the SRB to FROB, 17 July 2020, p. 3.

⁶⁹⁰ See **Exh. R-0396**, Letter from the SRB to FROB, 7 January 2020, p. 1 (in which the SRB refers to "previous correspondence" from the FROB in connection with the disclosure of specific documents and the submission of a privilege log).

⁶⁹¹ **Exh. R-0396**, Letter from the SRB to FROB, 7 January 2020, p. 2.

⁶⁹² **Exh. R-0396**, Letter from the SRB to FROB, 7 January 2020, pp. 3-4. See also **Exh. R-0394**, Annex attached to the Letter from the SRB to FROB, 7 January 2020.

702. Even though it reaches this conclusion somewhat more hesitantly than in connection with the ECB-related documents, the Tribunal is satisfied with the Respondent's explanations that it was unable to produce the SRB-related documents as it could not obtain the SRB's authorization and is bound to comply with the SRB's decision. As is clear from the exchanges reviewed above, following the issuance of PO5, the Respondent undertook reasonable steps to obtain the authorization of the SRB to produce the documents. In addition, pursuant to PO5, Spain submitted a privilege log describing the documents that it was unable to produce due to the confidentiality protections. Therefore, the Tribunal concludes that there is no basis to draw negative inferences against Spain in connection with its failure to produce the SRB-related documents.
703. In sum, the Tribunal concludes that both with regard to the ECB- and the SRB-related documents, the Respondent has provided "satisfactory explanation[s] [for its] fail[ure] to produce [the responsive documents] ordered to be produced by the Arbitral Tribunal" in accordance with Article 9(6) of the IBA Rules on the Taking of Evidence.
704. Third, the remaining requests for adverse inferences fail on their merits, as they are contradicted by evidence in the record, including documentary evidence. It would thus not be reasonable or appropriate to draw any inference based on non-production.
705. More specifically, numerous requests concern the resolution of Banco Popular. For instance, the Claimants request the Tribunal to draw the adverse inference that the "Respondent initiated the planning of the resolution of Banco Popular before receiving instructions to that effect from the SRB and actively supported and drove the resolution process".⁶⁹³ However, that inference conflicts with evidence on record which shows that the first preparatory steps towards the potential resolution of Banco Popular were taken at the EU level by the ECB, SRB and the EU Commission. Among other evidence, this fact is established by the SRB's resolution decision, which, under the heading "Procedure", states that the first step of the resolution process was taken on 2 May 2017 when "the ECB organized a meeting of the institution-specific crisis management group to discuss the situation of the [i]nstitution".⁶⁹⁴

⁶⁹³ See Reply, Annex B, pp. 5-6, 11-14, 16-18, 29-39, 42-44, 47-48, 50-55; Reply, para. 186.

⁶⁹⁴ **Exh. C-52**, SRB, Decision of the SRB in its Executive Session of 7 June 2017 concerning the adoption of a resolution scheme in respect of Banco Popular Español, S.A., No. SRB/EES/2017/08, 7 June 2017, p. 7.

706. Still regarding the resolution, the Claimants seek a number of adverse inferences whereby “Jefferies-Arcano was instructed by [the] FROB only to invite the five Spanish banks that had demonstrated interest in [Banco Popular]’s private sale process” and not “any other non-Spanish bank” or “any existing shareholder group of [Banco Popular]”.⁶⁹⁵ This inference is refuted by the record, for instance by Exhibit C-138, which confirms that the decision to invite only five Spanish banks was taken by the SRB at its session of 3 June 2017. As discussed *supra* at paras. 681-682, at that session the SRB approved “the immediate launching of the marketing of the bank by [the] FROB” and directed the FROB to “contact the five parties which ha[d] been invited to present non-binding offers in the context of the private sale process”.⁶⁹⁶ That document also gives the reasons for this limitation to the five largest Spanish banks, lying essentially in concerns to preserve the confidentiality of the process, to avoid the leakage and thus loss of confidence which could jeopardize the sale and cause the resolution of Banco Popular.⁶⁹⁷ Still in connection with the role of Jefferies-Arcano, the Claimants have sought an adverse inference in connection with their document production request no. 73 to the effect that “prospective buyers [were] alerted that it was going to be an expedited process, with a limited number of participants, and that prospective buyers could bid as low as € 1 to acquire [Banco Popular]”.⁶⁹⁸ Contrary to

⁶⁹⁵ Reply, Annex B, pp. 40-42.

⁶⁹⁶ See **Exh. C-138**, SRB, Decision of the Executive Session of the Board concerning the marketing of Banco Popular Español, S.A. (No. SRB/EES/2017/06), 3 June 2017, Articles 1 and 2.

⁶⁹⁷ See **Exh. C-138**, SRB, Decision of the Executive Session of the Board concerning the marketing of Banco Popular Español, S.A. (No. SRB/EES/2017/06), 3 June 2017, Article 2 (“Contacting these five parties is justified on the basis of financial stability grounds and the substantial risk that marketing to a wider circle of potential purchasers and the disclosure of risks and valuations or the identification of critical and non-critical functions in respect of the [b]ank may result in additional uncertainty and in a loss of market confidence. Moreover, contacting a wider number of purchasers might increase the probability of leakage and thus, the risk that the [b]ank may enter resolution within an extremely short timeframe[...]. Moreover, based on the information received from the [b]ank, it is doubtful whether bidders that have not shown interest so far in the private sales process would submit offers. Pursuant to Article 24(3) SRMR, the SRB will strive to balance the marketing requirements with the need to achieve the resolution objectives. In particular, the SRB will partially deviate from the marketing requirements, due to the urgency of the circumstances and, in particular due to the material threat to financial stability which would arise from the failure of the [b]ank and the fact that complying with the need to contact a broader range of purchasers would undermine the effectiveness of the sale of business tool”).

⁶⁹⁸ Reply, Annex B, pp. 39-40.

the Claimants' argument, the Respondent produced Exhibit R-174, p. 3, in response to document production request no. 73. In that connection, the Claimants complained that Exh. R-174 was "incomplete".⁶⁹⁹ Having reviewed the document and the Respondent's explanations that the "[t]he last page of exhibit R-0174 is blank because of the manner in which that document was scanned",⁷⁰⁰ the Tribunal concludes that nothing in the document suggests that the document is incomplete. The Claimants' adverse inference request must therefore be denied.

707. Further, the Claimants request adverse inferences regarding the Respondent's alleged role in Bankia's decision to withdraw from the auction.⁷⁰¹ However, the reasons for Bankia's withdrawal from the auction process are well documented in the evidence on record and are linked to Bankia's restructuring.⁷⁰² The same is true with respect to the Claimants' request about the Respondent's alleged role in BBVA's non-participation in the bidding process.⁷⁰³
708. Finally, several of the Claimants' requests ask the Tribunal to infer that Banco Popular had "sufficient collateral" to secure € 9.5 billion in ELA. However, as discussed above in connection with Spain's refusal to grant more ELA, the documents in the record establish that Banco Popular failed to provide to the Bank of Spain the requisite collateral to support the amount of additional ELA requested.⁷⁰⁴ These requests for adverse inferences are thus unfounded.
709. In summary, the Claimants' requests for adverse inferences and related requests to lower the standard or shift the burden of proof must be denied, either because Spain has shown that there was a valid reason for not producing certain documents or because the requests cannot be reconciled with the evidentiary record.

⁶⁹⁹ Claimants' Responses to Respondent's Objections to Claimants' Requests for Document Production, Request No. 73.

⁷⁰⁰ Rejoinder, Annex B, p. 51.

⁷⁰¹ See Reply, Annex B, pp. 34-35, 42-43.

⁷⁰² See **Exh. R-0174**, Letter from Jefferies-Arcano to FROB, 5 September 2017, Appendix I, p. 1 (emphasis added); **Exh. C-183**, European Commission, Restructuring and Recapitalisation of the BFA Group, Annex – Term Sheet (Case SA.35253 Restructuring of BFA/Bankia), 28 November 2012, Part 7.1, para. 78.

⁷⁰³ See **Exh. R-0377**, testimony of BBVA's CEO, Mr. Torres Vila, before the Inquiry Committee of the Congress of Deputies, which contradicts the Claimants' adverse inferences requests in connection with BBVA (see Reply, Annex B, pp. 43-44, 48).

⁷⁰⁴ See *supra* para. 359.

g. Concluding remarks on FET

710. In conclusion, the Claimants have not established that Spain's measures breached Article IV of the Treaty, as they have not demonstrated that the Respondent's acts or omissions were arbitrary, grossly unfair, unjust or idiosyncratic, discriminatory, completely lacking in transparency and candor in an administrative process, lacking due process "leading to an outcome which offends judicial propriety", or amounting to a "manifest failure" of natural justice in judicial proceedings.⁷⁰⁵
711. Furthermore, even if the Tribunal were minded to apply a more generous FET standard as advocated by the Claimants through the Treaty's MFN clause, the outcome would not be different, because Spain's conduct would not run afoul of that standard either.
712. The difference between the standard which the Tribunal applied in its analysis above based on the formulation adopted in *Waste Management*, an award primarily relied upon by the Claimants as a "particularly influential" and "seminal" case,⁷⁰⁶ and the "highest" FET standard to which the Claimants argue to be entitled are not significant and limited to the following aspects.
713. First, the Claimants contend that FET prohibits conduct that is lacking in transparency,⁷⁰⁷ rather than *completely* lacking in transparency, as the standard in *Waste Management* requires. As explained in the preceding sections, none of Spain's actions or inactions breached the requirement of transparency, whether completely or otherwise.
714. Additionally, the Claimants emphasize the stability and predictability of the legal framework, which is not referred to expressly by *Waste Management*.⁷⁰⁸ The Claimants' arguments on this subject may be summarized as follows: (i) this sub-element of FET requires that "business may be conducted in a normal framework free of interference from government regulations which are not underpinned by appropriate public policy

⁷⁰⁵ See *supra* paras. 515-517.

⁷⁰⁶ See Reply, para. 489 ("The formulation announced by the Waste Management tribunal has been particularly influential, as a number of other tribunals have since applied its formulation of the international minimum standard") and para. 490 ("seminal quote"). See also C-PHB1, para. 14 (relying on *Waste Management*).

⁷⁰⁷ See SoC, paras. 373-378 ; Reply, paras. 523-532.

⁷⁰⁸ SoC, paras. 364-372; Reply; paras. 533-536.

objectives”;⁷⁰⁹ (ii) “[t]he state breaches the obligation to provide a stable and predictable framework if it acts with ‘evident negligence’ or ‘serious administrative negligence and inconsistency’ in handling matters affecting protected investors”;⁷¹⁰ (iii) “[t]he requirement to provide a stable and predictable framework prohibits the state from deviating from the fundamental principles of its regulatory framework”⁷¹¹; (iv) in this case Spain’s conduct “eviscerated the fundamental principles of the banking framework”.⁷¹² The Claimants further specify that they “do not argue that the Spanish regulatory framework should have been ‘frozen’ in time, but rather that Respondent should have respected the legal framework in its dealings with [Banco Popular]”.⁷¹³

715. In this case, the Claimants have not come close to showing that Spain “eviscerated the fundamental principles of the banking framework” through its conduct⁷¹⁴ or failed to respect the “legal framework in its dealings with [Banco Popular]”.⁷¹⁵ As the Tribunal’s analysis has made clear, Spain acted within the boundaries of the discretion which the EU and Spanish legal framework allowed. Irrespective of the fact that a mere violation of domestic law would not be sufficient to trigger international responsibility, the Claimants have been unable to point to instances in which Spain violated its own laws, let alone “eviscerated the fundamental principles” of the law.

716. Finally, in their latest submissions, the Claimants have emphasized Spain’s alleged breach of legitimate expectations. Specifically, while the SoC only contained a few incidental mentions of the investors’ alleged expectations, either without substantiation or in the context of other sub-elements of FET,⁷¹⁶ references to expectations began to

⁷⁰⁹ Reply, para. 533.

⁷¹⁰ Reply, para. 533.

⁷¹¹ SoC, paras. 365-367, discussing in particular **Exh. CL-49**, *Teco Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/17, Award, 19 December 2013, para. 682, whereby “both the regulatory framework and the minimum standard of treatment in international law oblige[] the [regulator] to act in a manner that [is] consistent with the fundamental principles [under state] law”.

⁷¹² SoC, para. 368.

⁷¹³ Reply, para. 535.

⁷¹⁴ SoC, para. 368.

⁷¹⁵ Reply, para. 535.

⁷¹⁶ See SoC, paras. 91 (arguing that Spain “bolstered Claimants’ expectations that they had made a solid investment in Spain” because then-Governor of the Bank of Spain Mr. Linde thanked Messrs. del Valle, Jaime Ruiz Sacristán and Antonio del Valle Perochena “for the Mexican investors’ important investment in Banco Popular, and assured them that Banco Popular was in good financial condition and run by good management”), 339-340 (referring

appear more prominently in the Reply and the post-hearing submissions, in particular in connection with Spain's deposit withdrawals⁷¹⁷ and failure to grant the ELA.⁷¹⁸

717. For legitimate expectations to be protected under an (autonomous) FET standard, they must be "legitimate and reasonable at the time when the investor makes the investment"⁷¹⁹ and based on a "promise of the administration on which the Claimants rely".⁷²⁰ Here, the Claimants have not proven that Spain created any legitimate expectations leading them to invest in Banco Popular and that it later frustrated. With regard to the deposit withdrawals, the Claimants have not sufficiently explained what the source of such expectations would be. With respect to the ELA, as discussed above, there is no right to receive ELA and its grant is discretionary and subject to strict conditions (in particular the pledging of sufficient collateral). The Bank of Spain never represented anything to the contrary to the Claimants, let alone before they made their investments. The Claimants' case on legitimate expectations would thus equally fail under an autonomous FET standard.

718. In summary, whatever FET standard is applied the outcome is the same.

to the investors' alleged expectations in the context of the non-discrimination standard), 366 and 370 (referring to the alleged expectation to be treated "competently and professionally"), 374 and 377 (in the context of transparency).

⁷¹⁷ See, e.g., C-PHB1, para. 68 ("Respondent violated Claimants' legitimate expectation that the government would at the very least not take affirmative steps to harm [Banco Popular]'s liquidity situation, particularly given Respondent's awareness of [Banco Popular]'s solvency but vulnerable liquidity position and its obligation to maintain financial stability"). See also Reply, para. 584.

⁷¹⁸ See Reply, para. 633 ("Respondent abused the responsibility and discretion it holds to provide ELA; generated valid and founded expectations that ELA would be forthcoming; only to stop that lifeline when [Banco Popular] depended on it, without prior notice, on vague grounds that have been flatly proven a lie by its own documents"), para. 635 ("[t]hrough [the] repeated interactions [between Bank of Spain and Banco Popular], Respondent led [Banco Popular] to believe that liquidity assistance would be forthcoming, as and when requested. *This was an entirely reasonable and legitimate expectation*", emphasis added).

⁷¹⁹ See **Exh. CL-15**, *Duke Energy Electroquil Partners & Electroquil S.A., et al. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 340.

⁷²⁰ See **Exh. CL-55**, *PSEG Global Inc. and Konya Ilgin Elektrik Uretim Ve Ticaret Ltd. Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 17 January 2007, para. 241.

C. NATIONAL TREATMENT

1. The Claimants' position

719. The Claimants argue that Spain denied them national treatment in violation of Article III of the Treaty.
720. With regard to the applicable standard, the Claimants submit that, to establish a breach of Article III, an investor must prove that its investment (i) was in "like" circumstances to another investment, and (ii) received less favorable treatment than that other investment.⁷²¹ For the Claimants, two investors are in like circumstances if they operate in the same sector.⁷²² Hence, Spanish banks that received the Respondent's support are appropriate comparators.⁷²³
721. On the facts, the Claimants argue that at least three Spanish banks, i.e. Catalunya Banc, Banco Mare Nostrum ("BMN") and Liberbank, received more favorable treatment than Banco Popular, presumably, so the Claimants suggest, because Spain "held a significant ownership interest in each of the banks".⁷²⁴
722. Catalunya Banc,⁷²⁵ the Claimants argue, was a medium-sized bank with about € 75 billion in assets that faced challenges similar to Banco Popular, i.e. substantial NPAs and a weak regulatory capital ratio. Yet, in the Claimants' view, Spain treated that bank differently:
- a. It allotted five years to find a buyer for Catalunya Banc and only three days to Banco Popular;

⁷²¹ SoC, para. 381.

⁷²² SoC, para. 382, referring to **Exh. CL-63**, OECD, *National Treatment for Foreign-Controlled Enterprises (2017)*, p. 5; **Exh. CL-64**, *S.D. Myers v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, p. 62-63, para. 250; **Exh. CL-59**, *Pope & Talbot v. Government of Canada*, UNCITRAL, Award, para. 78.

⁷²³ Reply, para. 687; C-PHB2, para. 88.

⁷²⁴ SoC, paras. 379-392; Reply, paras. 686-731; C-PHB1, paras. 194-211; C-PHB2, paras. 88-93.

⁷²⁵ See SoC, paras. 302-307, 389; Reply, paras. 703-710; C-PHB1, para. 207; C-PHB2, paras. 93. In addition to Catalunya Banc, the Claimants also argue that Spain treated Catalan Banks generally more favorably, as the Respondent supported them with positive public statements. See SoC, paras. 317-318; Reply, paras. 728-731; C-PHB1, paras. 208-209.

- b. It sold Catalunya Banc in two parts (the good bank and the bad assets), which it did not do with respect to Banco Popular; and
 - c. It approached 81 domestic and international investors during the sale of Catalunya Banc and just five Spanish banks in case of Banco Popular.⁷²⁶
723. As a result of such differential treatment, Catalunya Banc was sold for € 4.7 billion “in a deal that allowed investors to retain their ownership rights”,⁷²⁷ while Banco Popular was sold for € 1 and the Claimants lost their entire shareholding.⁷²⁸
724. The Claimants contend that, despite the difference in legal regime and economic circumstances, the measures that Spain adopted in relation to Catalunya Banc could also have been introduced with respect to Banco Popular in 2017.⁷²⁹
725. With regard to BMN,⁷³⁰ the Claimants submit that the FROB facilitated BMN's merger with Bankia, even though BMN's NPLs had lower coverage ratios than the NPSs of Banco Popular, which was put into resolution. Furthermore, BMN's shareholders received shares in Bankia as compensation, while the Claimants received nothing. Finally, the FROB contributed € 915 million in convertible preferred stock to the creation of BMN and subsequently further € 730 million. By contrast, no such support was accorded to Banco Popular.
726. Finally, the Claimants argue in respect of Liberbank, that Spain imposed a short sales ban on that bank's shares in June 2017,⁷³¹ while it never implemented such a measure to support Banco Popular.⁷³²

2. The Respondent's position

727. On the legal standard, Spain argues that to establish a violation of Article III(1), the Claimants must prove that (i) the treatment granted to the Claimants' investments is less favorable than that granted to other investors or investments *in similar*

⁷²⁶ SoC, paras. 302-397; Reply, paras. 703-710.

⁷²⁷ SoC, para. 389, discussing **Exh. C-178**, Catalunya Banc/BBVA State Aid Decision, p. 11, 12, paras. 52, 56.

⁷²⁸ SoC, para. 389.

⁷²⁹ Reply, para. 708. See also C-PHB1, para. 207; C-PHB2, para. 93.

⁷³⁰ SoC, paras. 308-310, 390; Reply, paras. 711-720; C-PHB1, para. 207; C-PHB2, para. 90.

⁷³¹ SoC, paras. 311-316, 391; Reply, paras. 721-727; C-PHB1, para. 249; C-PHB2, para. 91.

⁷³² SoC, paras. 311-316; Reply, paras. 721-727; C-PHB1, paras. 196-206; C-PHB2, para. 91.

circumstances; (ii) the resulting difference in treatment is linked to the Claimants' Mexican nationality; and (iii) there was no reasonable justification for the differential treatment.⁷³³ Spain adds that the existence of "similar circumstances" must be assessed "with respect to the particular measures in question".⁷³⁴ On this basis, the appropriate comparator in the present arbitration are Banco Popular's other shareholders, not other Spanish banks.⁷³⁵

728. On the facts, the Respondent asserts that Spain "applied the same measures to each and every one of Banco Popular's investors, whether they were nationals or foreign shareholders".⁷³⁶ On the assumption that the Spanish banks were deemed to be appropriate comparators to Banco Popular, which the Respondent denies, Spain has advanced the following arguments.

729. First, Spain's treatment of Catalunya Banc cannot be compared to the treatment of Banco Popular because (i) Catalunya Banc was supervised by the FROB, rather than the ECB; (ii) the sale of Catalunya Banc was the final step in a series of integrated measures adopted by the FROB; and (iii) Catalunya Banc was a solvent and liquid bank, unlike Banco Popular.⁷³⁷

730. In any event, the Respondent submits that the measures applied to Catalunya Banc could not be adopted for Banco Popular. Unlike Banco Popular, Catalunya Banc was operating normally, which enabled the FROB to implement a more organized sale process and invite a larger number of potential buyers over a longer period. Further, the investors of Catalunya Banc suffered as much as the Claimants did. Spain submits that Catalunya Banc's original shareholders "lost the entirety of their shares and the entirety of their investment" because they "witnessed a substantial reduction in the value of their participation when [the] FROB contributed €1,750 million and acquired 89.74% of the bank's shares" and "lost the remainder of their equity participation when

⁷³³ SoD, para. 959.

⁷³⁴ SoD, para. 961, referring to **Exh. RL-0164**, *Mercer International v. Government of Canada*, ICSID Case No. ARB(AF)/12/3, Award, 6 March 2018, paras. 7.20-7.21; **Exh. RL-0196**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, para. 8.42; **Exh. RL-0192**, *Renée Rose Levy De Levi v Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014, para. 396.

⁷³⁵ SoD, para. 967; R-PHB1 para. 227.

⁷³⁶ SoD, para. 968.

⁷³⁷ SoD, paras. 971-983; Rejoinder, paras. 1272-1282; R-PHB1, paras. 228-230; R-PHB2, paras. 138-142.

[the] FROB converted €1,250 million preferred shares into shares and then reduced Catalunya Banc's capital".⁷³⁸ Third, the ban on state aid introduced by way of the BRRD in 2017, which applied to Banco Popular and not to Catalunya Banc, prevented Spain from adopting similar measures in case of Banco Popular.⁷³⁹

731. Similarly, in Spain's view, BMN cannot be compared to Banco Popular.⁷⁴⁰ When BMN merged with Bankia, both banks had been operating normally and had sufficient liquidity to continue doing so.⁷⁴¹ By contrast, Banco Popular could no longer operate because of the liquidity shortage. In any event, the measures adopted with respect to BMN could not apply to Banco Popular, as the FROB's capital injections were made before state aid was prohibited.⁷⁴² Finally, Spain highlights that, like the Claimants, the investors of BMN lost all or most of their investments.⁷⁴³
732. Finally, Spain contends that the situation of Liberbank is not comparable to Banco Popular's⁷⁴⁴ for a number of reasons:
- a. Banco Popular experienced serious, publicly known problems whereas Liberbank did not show any considerable weakness;⁷⁴⁵
 - b. Unlike Banco Popular, Liberbank's credit rating had been stable since 2015 and the share price enjoyed an upward trend since 2016;⁷⁴⁶
 - c. The sudden fall in Liberbank's share price was not due to its deteriorating financial situation, contrary to the evolution of the share price of Banco Popular which had

⁷³⁸ SoD, para. 982, referring to **Exh. R-0099**, FROB Resolution dated 26 December 2012, by which it was resolved to implement operations for decreasing and increasing the capital of Catalunya Banc, S.A., p. 88030; **Exh. R-0100**, FROB Resolution dated 7 June 2013, providing for the implementation of actions to manage hybrid capital instruments and subordinated debt in enforcing Catalunya Banc Resolution Plan, p. 44095. See also R-PHB1 para. 229.

⁷³⁹ Rejoinder, para. 1295.

⁷⁴⁰ SoD, paras. 984-999; Rejoinder, paras. 1283-1297; R-PHB1, paras. 228-230; R-PHB2, para. 138-140.

⁷⁴¹ SoD, para. 992.

⁷⁴² Rejoinder, para. 1295.

⁷⁴³ SoD, para. 987, 997.

⁷⁴⁴ SoD, paras. 1000-1007; Rejoinder, paras. 1309-1337; R-PHB1, para. 232; R-PHB2, paras. 134-137.

⁷⁴⁵ SoD, para. 1005.

⁷⁴⁶ Rejoinder, para. 1321.

decreased gradually over a decade because of the bank's continuous financial difficulties;⁷⁴⁷ and

d. Unlike Banco Popular, Liberbank did not experience any major deposit withdrawals.⁷⁴⁸

3. Analysis

733. Article III of the Treaty provides as follows:

"Each Contracting Party shall give in its territory to the investments of investors of the other Contracting Party treatment that shall be no less favourable than that given in similar circumstances to the investments of its own investors or to the investments of investors of any third State, whichever is more favourable to the investor."

734. In examining whether Spain breached Article III, the Tribunal must first determine whether the investments of the Mexican investors and the investments of Spanish investors were accorded different treatment "in similar circumstances". In this connection, the Tribunal notes that, under the text of Article III, the "similarity of circumstances" is not a factor that relates to the investments taken in isolation, but rather refers to the *treatment* accorded to those investments. Indeed, as noted by an author, "[t]he appropriate comparison will often be between the like-circumstanced *treatment* accorded the investments (or investors), rather than between the like-circumstanced investments (or investors) themselves".⁷⁴⁹

⁷⁴⁷ Rejoinder, para. 1323.

⁷⁴⁸ Rejoinder, para. 1333.

⁷⁴⁹ See Andrea K. Bjorklund, *The National Treatment Obligation, in Arbitration under International Investment Agreements. A Guide to the Key Issues* (K. Yannaca-Small, ed., 2nd ed., 2018, pp. 532 ff., at 541 ("Most of the attention is on the entity or entities to which the tribunal is comparing the foreign investment (or investor). Yet this focus can obscure an important nuance in the like circumstances analysis. The appropriate comparison will often be between the like-circumstanced *treatment* accorded the investments (or investors), rather than between the like-circumstanced investments (or investors) themselves. This emphasis explains the approach many tribunals take when they are identifying the appropriate comparators and is also consistent with the statutory language in many investment agreements. NAFTA Article 1102, for example, provides that: 'Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, *in like circumstances*, to its own investors...'. The like circumstances qualification appears to modify the word 'treatment', rather than investor'. There is thus textual encouragement for tribunals to be sure that their comparative analysis takes into account the regulatory context, as well as any market-based competition, in determining the identity of those in

735. Second, in the event that circumstances were similar, the Tribunal must ascertain whether the treatment accorded to the Mexican investors was less favorable than the treatment accorded to domestic investors. Third, in the case of treatment that is less favorable, the Tribunal must determine whether any differentiation in treatment was justified.⁷⁵⁰ Even though national treatment (“NT”) clauses in investment treaties (including Article III) do not explicitly say so, it is widely accepted – and rightly so - that tribunals adjudicating a NT claim must also ascertain whether any difference in treatment is justified.
736. The Tribunal starts with the first step in the analysis, i.e. the identification of the treatment given to the relevant investments “in similar circumstances”. The Tribunal agrees with the tribunal in *Pope & Talbot* that “[b]y their very nature, ‘circumstances’ are context dependent and have no unalterable meaning across the spectrum of fact situations”.⁷⁵¹ Furthermore, as noted in *Apotex*, the determination of whether a given claimant is in similar circumstances “involves a highly fact-specific inquiry”, which requires a tribunal to look at a number of factors, including “whether those which are said to be comparators” “are subject to a comparable legal regime or regulatory requirements, as the Claimants and their investments”.⁷⁵² In the Tribunal’s view, “similar” does not mean “identical”. This entails that the assessment of “similar circumstances” must look beyond mere business sectors at the actual fact situation in which a business finds itself and at the regulatory environment surrounding the activity in question.⁷⁵³ In this latter respect, two or more financial institutions may be part of the same business sector, but the measures at issue may have been taken at different times and hence be subject to different regulations. The examination of similar

like circumstances with the foreign claimant.” Emphasis in the original, internal footnotes omitted).

⁷⁵⁰ E.g., **Exh. CL-65**, *Archer Daniels Midland Co. v. United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award, 21 November 2007, para. 196; **Exh. CL-35**, *Bayindir Insaat Turizm Ticaret ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 399. See also Dolzer, Schreuer, Kriebaum, *Principles of International Investment Law* (3rd ed. 2022), p. 259.

⁷⁵¹ **Exh. CL-59**, *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits Phase II, 10 April 2001, para. 75.

⁷⁵² **Exh. RL-0196**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, para. 8.15 (internal footnote omitted).

⁷⁵³ **Exh. CL-292**, *Grand River Ltd. v. United States of America*, UNCITRAL, Award, 12 January 2011, para. 166.

circumstances must thus proceed from a careful review of the specific regulatory framework under which the treatment at issue was carried out.

737. In this case, taking all these factors into account, the Tribunal is of the view that the closest comparator to the treatment of the Claimants' investment is the treatment accorded to the investments of other investors of Spanish nationality *in Banco Popular*, because these investments were subject to the same legal regime or regulatory requirements as the Claimants' investments and the same measures in the same time frame. This being so, the Claimants have not alleged that their investments were treated less favorably than those of Spanish investors in Banco Popular. They have not made this allegation for the good reason that the measures of which they complain applied to all of the shareholders, regardless of their nationality. For this reason, the Tribunal's NT inquiry could thus stop here.
738. That said, even if the Tribunal were to examine the comparators which the Claimants have offered in support of their NT claim, these would not be "in similar circumstances" to the Claimants or Banco Popular (in relation to Catalunya Banc and BNM), or the difference in treatment would be justified under the circumstances (in case of Liberbank).
739. First, Catalunya Banc and BNM were in situations markedly different from the one of Banco Popular, which makes a comparison between the treatment they enjoyed and the treatment enjoyed by the Claimants inapposite.
740. Specifically, with regard to Catalunya Banc, the Claimants focus on the sale of that bank and contend that the process for the sale of Catalunya Banc was more favorable than the one of Banco Popular. However, the sale of Catalunya Banc was part of a series of measures which the FROB adopted from 2010 onwards, which involved capital injections, conversion into shares and the sale of such shares.⁷⁵⁴ These options were available to the FROB as part of the regulatory framework in force at that time which allowed larger use of public funds to rescue banks in financial difficulties following

⁷⁵⁴ See **Exh. R-0031**, FROB's Governing Committee approves the recapitalisation of credit institutions, 30 September 2011 (erroneously dated 30 September 2001); **Exh. R-0099**, FROB Resolution of 26 December 2012 providing for the capital increase and decrease transactions in connection with Catalunya Banc S.A.; **Exh. R-0100**, FROB Resolution of 7 June 2013 providing for the implementation of actions to manage hybrid capital instruments and subordinated debt in enforcing Catalunya Banc Resolution Plan, p. 44095.

the financial crisis of 2007. Specifically, under Law 9/2012, the FROB was required to disinvest the instruments to which it had subscribed within five years, through a process ensuring competitiveness under EU and Spanish law and maximum recovery of the public funds injected by the FROB in the restructuring of the bank.⁷⁵⁵ That framework changed significantly in 2014-2015 with the adoption of the BRRD,⁷⁵⁶ which was part of the EU and Member States' efforts to avoid taxpayer funded bail-outs. It was that new framework which applied to the crisis and subsequent resolution of Banco Popular resolution, and which restricted the FROB from taking the same type of measures it had implemented in connection with Catalunya Banc. The temporal and regulatory differences impacting the treatment given to Catalunya Banc and Banco Popular do not allow a comparison for purposes of Article III.

741. In addition, the measures concerning Catalunya Banc were carried out in different factual circumstances than those surrounding the resolution of Banco Popular. As the competent authorities noted at the relevant time in 2013, Catalunya Banc had "healthy levels of solvency" and a "business plan that allow[ed] it to operate on a completely normal footing with its depositors and customers" (translation of the Tribunal),⁷⁵⁷ which allowed the FROB to implement an ordinary sale process. That situation is entirely different from the emergency resolution of Banco Popular, in which on the day prior to the sale, the bank stated that it would be "unable to attend its customers' deposits" the following day⁷⁵⁸ and was declared FOLTF.

742. The same is true for BNM. The Claimants contend that "[f]or BMN, the FROB helped it pursue a 27 June 2017 merger with Bankia, [...] in which shareholders of BMN were compensated with a fair exchange of shares in Bankia".⁷⁵⁹ However, the BNM-Bankia

⁷⁵⁵ **Exh. R-0213**, Law 9/2012, 14 November 2012, on the restructuring and resolution of credit institutions, Article 31.4.

⁷⁵⁶ See **Exh. RL-0139**, BRRD, 15 May 2014 . The BRRD was implemented in Spain in June 2015. See **Exh. R-0214**, Law 11/2015 on the recovery and resolution of financial institutions and investment service companies, Official State Gazette No. 146, 18 June 2015.

⁷⁵⁷ **Exh. R-0106**, FROB press release, 4 March 2013 ("La entidad [Catalunya Banc] fue recapitalizada en el mes de diciembre, mantiene unos niveles holgados de solvencia y dispone de un plan de negocio que le permite operar con absoluta normalidad con sus depositantes y clientes").

⁷⁵⁸ **Exh. C-116**, Letter of Banco Popular to the ECB, 6 June 2017, p. 2. of the pdf.

⁷⁵⁹ Reply, para. 711. In their discussion of BNM, the Claimants also contend that "there was a range of tools that could have been used to assist and ultimately save [Banco Popular], including the ELA that the [Bank of Spain] confirmed would allow [Banco Popular] to

merger was part of a complex and multistep restructuring process that began in 2010 when the FROB injected capital into both Bankia and BNM,⁷⁶⁰ at a time where the pre-BRRD framework permitted such recourse to public funds to bail out banks.⁷⁶¹ As noted above,⁷⁶² the BRRD was adopted in May 2014 and implemented in Spain in June 2015, i.e. five years after the FROB made the first capital injection in BMN. Once again, BNM's different circumstances rule out a comparison for purposes of Article III.

743. Regarding Liberbank, the Tribunal agrees with the Claimants that, in the abstract, such entity could serve as a comparator to Banco Popular, as both banks were subject to the same legal framework regarding restrictions to short sales, i.e. the measure that in the Claimants' submission should have applied to Banco Popular. However, as the Tribunal has explained above in the context of FET, there were sufficient reasons for the CNMV to impose a short sale ban on Liberbank and not on Banco Popular shares. Any difference in treatment between the two banks was thus not unjustified under the circumstances. Hence, the NT claim in connection with Spain's treatment of Liberbank fails for the same reasons as the FET/non-discrimination claim, as it is premised on the same facts.

744. In conclusion, Spain did not breach the NT standard in Article III of the Treaty.

overcome its liquidity crisis [...]". See Reply, para. 714. However, Spain never granted ELA to BNM, which makes that alleged comparison in treatment between the two banks irrelevant.

⁷⁶⁰ See in particular **Exh. R-0109**, FROB Resolution, 27 May 2013, by which it was resolved to implement plans to manage hybrid capital instruments and subordinated debt instruments pursuant to Banco Mare Nostrum, S.A.'s Resolution Plan; **Exh. R-0113**, FROB Resolution, 18 April 2013, providing for actions for recapitalisation and management of hybrid instruments and subordinated debt at BFA-Bankia; **Exh. R-0112**, FROB Resolution, 26 December 2012, providing for the capital increase and decrease and treasury bill swap transactions in enforcing BFA-Bankia Restructuring Plan; **Exh. R-0114**, FROB Resolution, 26 December 2012, ruling the issuance by Bankia, S.A. of debt instruments convertible into ordinary shares of the entity.

⁷⁶¹ See **Exh. R-0213**, Law 9/2012, 14 November 2012, on the restructuring and resolution of credit institutions.

⁷⁶² See *supra* para. 450 and fn. 756.

D. EXPROPRIATION

1. The Claimants' position

745. The Claimants contend that the Respondent expropriated their investment in Banco Popular. Although in one passage of their SoC the Claimants alleged that "Respondent's acts *directly and indirectly* expropriated"⁷⁶³ the Claimants' investments in Banco Popular, they have not substantiated their case on *direct* expropriation. In fact, in their subsequent memorials, the Claimants have exclusively focused on "indirect" or "creeping expropriation".⁷⁶⁴

746. The Claimants argue that an indirect or creeping expropriation is a covert or incidental interference with an investment that deprive the owner, wholly or partially, of the use or expected economic benefit of its property.⁷⁶⁵ Even if a single act is not expropriatory, several acts taken together may amount to an expropriation.⁷⁶⁶ According to the Claimants, the following measures indirectly expropriated the Claimants' investment in Banco Popular: (i) the deposit withdrawals; (ii) the public statements by Spanish officials and Spain's failure to restore depositors' confidence in Banco Popular; (iii) the Respondent's unlawful suspension of the ELA; and (iv) the FROB's handling of the sale of the bank to Santander.⁷⁶⁷

747. The Claimants further contend that the expropriation of their shareholding in Banco Popular was unlawful, as it failed to comply with the requirements of Article V(1).⁷⁶⁸ First, the Claimants received no compensation.⁷⁶⁹ In the Claimants' view, compensation is payable regardless of whether a contested measure is taken for a

⁷⁶³ SoC, para. 396 (emphasis added).

⁷⁶⁴ Neither the Reply nor the Claimants' post-hearing submissions any longer refer to "direct expropriation".

⁷⁶⁵ SoC, para. 395, referring to **Exh. CL-58**, *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para. 103.

⁷⁶⁶ SoC, para. 395, referring to **Exh. CL-69**, *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 February 2000, para. 76; **Exh. CL-10**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, paras. 7.5.31-34.

⁷⁶⁷ SoC, paras. 393-404; Reply, paras. 773-786; C-PHB1, paras. 212-224; C-PHB2, paras. 94-97.

⁷⁶⁸ SoC, paras. 401-404; Reply, paras. 778-786.

⁷⁶⁹ SoC, para. 402; Reply, para. 783.

public purpose.⁷⁷⁰ Second, they were not given notice nor opportunity to be heard,⁷⁷¹ as they learned that Banco Popular was sold to Santander once the FROB had cancelled their shares.⁷⁷² Third, putting Banco Popular in resolution was disproportionate and lacked any public purpose. Spain could have used other tools to prevent Banco Popular from failing, for instance, issuing positive public statements, granting ELA or declaring a ban on short sales.⁷⁷³ Fourth, the resolution of Banco Popular was carried out in a discriminatory manner, without developing a “competitive process” as required under Spanish law.⁷⁷⁴

748. Finally, the Claimants submit that Spain cannot invoke its police powers or any other public policy exceptions, because its unlawful acts and omissions were arbitrary, discriminatory and disproportionate.⁷⁷⁵

2. The Respondent's position

749. Spain disputes having expropriated the Claimants' investment. It contends that the Claimants' shareholding in Banco Popular lost its value due to the bank's deteriorating financial position and mismanagement.⁷⁷⁶

⁷⁷⁰ Reply, paras. 740-742, referring to **Exh. CL-296**, *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Award, 1 March 2012, para. 305; **Exh. CL-69**: *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 February 2000, paras. 71-72; **Exh. RL-0190**, *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1 and ARB/09/20, Award, 16 May, 2012, para. 205; **Exh. CL-311**, *Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, BSSEMG Investors LLC and David Fischer v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, paras. 184-85; **Exh. CL-312**, *Southern Pacific Properties (SPP) v. Egypt*, Award, 20 May 1992, para. 158.

⁷⁷¹ SoC, para. 403; Reply, para. 780; C-PHB1, para. 220.

⁷⁷² Reply, para. 779.

⁷⁷³ C-PHB1, para. 218.

⁷⁷⁴ C-PHB1, para. 219.

⁷⁷⁵ Reply, para. 538, referring to **Exh. CL-277**, *Unglaube v. Costa Rica*, ICSID Case No. ARB/08/1 and ICSID Case No. ARB/09/20, Award, 16 May 2012, para. 258, cited in SoD, para. 803(g).

⁷⁷⁶ SoD, paras. 1018-1078; Rejoinder, paras. 1342-1380; R-PHB1, paras. 233-246; R-PHB2, paras. 143-155.

750. According to Spain, an indirect expropriation is a substantial deprivation of an investment, rather than a simple interference with property rights.⁷⁷⁷ Furthermore, to be considered part of a “creeping expropriation”, an act must be expropriatory “either individually or in close combination with another action”.⁷⁷⁸ Additionally, no compensation is payable if an expropriatory measure is adopted for a public purpose.⁷⁷⁹
751. In the Respondent’s view, none of the acts and omissions cited by the Claimants were expropriatory.⁷⁸⁰ First, most deposit withdrawals were by private entities and individuals rather than public bodies.⁷⁸¹ Second, Spain’s public statements, whether examined individually or in the aggregate, did not seek to expropriate or undermine the value of the Claimants’ shareholding in Banco Popular.⁷⁸² Third, Spain provided Banco Popular with € 3.8 billion of ELA, in addition to the amount of € 23.2 billion of monetary operations liquidity assistance which it had provided earlier. In any event, the refusal to grant € 9.5 billion of ELA was justified because Banco Popular did not pledge sufficient security.⁷⁸³ Finally, the bank was put in resolution by the EU authorities. Spain could not override their decision pursuant to the SRM Regulation. In any event, the FROB acted reasonably in handling the resolution of Banco Popular.⁷⁸⁴
752. Spain further claims that the resolution of Banco Popular did not involve a taking of the Claimants’ property and was, in any event, a valid exercise of police powers, for which no compensation is required. As an alternative to insolvency proceedings,⁷⁸⁵ the resolution of the bank did not involve a taking of the Claimants’ property. In Spain’s

⁷⁷⁷ Rejoinder, para. 1345; SoD, paras. 1018-1021.

⁷⁷⁸ Rejoinder, para. 1345; SoD, para. 1028, referring to **Exh. RL-0205**, *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana*, Ad hoc (UNCITRAL), Award on Jurisdiction and Liability, 27 October 1989, paras. 79-81.

⁷⁷⁹ Rejoinder, para. 1345; SoD, para. 1028, referring to **Exh. RL-0205**, *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana*, UNCITRAL, Award on Jurisdiction and Liability, 27 October 1989, paras. 79-81.

⁷⁸⁰ SoD, paras. 1018-1078; Rejoinder, paras. 1342-1380; R-PHB1, paras. 233-246; R-PHB2, paras. 143-155.

⁷⁸¹ SoD, para. 1031.

⁷⁸² SoD, para. 1033; R-PHB2, para. 148.

⁷⁸³ SoD, paras. 1035-1036; R-PHB2, para. 149.

⁷⁸⁴ Rejoinder, paras. 1365-1371; R-PHB2, para. 150.

⁷⁸⁵ SoD, para. 1043, referring to **Exh. RL-0139**, BRRD, paras. 4-5.

view, if putting a company into insolvency proceedings is not regarded expropriatory,⁷⁸⁶ the resolution of a financial institution should not be deemed an expropriation either.⁷⁸⁷

753. In Spain's alternative submission, the resolution of Banco Popular was a legitimate exercise of Spain's police powers,⁷⁸⁸ because the bank was FOLTF. If the SRB had not proceeded as it did, Banco Popular would have "collapsed the next morning in a disorderly fashion", which would have caused contagion to the Spanish banking sector.⁷⁸⁹

3. Analysis

754. Article V(1) of the Treaty provides as follows:

"1. Neither of the Contracting Parties shall, directly or indirectly, expropriate or nationalize an investment through measures equivalent to expropriation or nationalization ("expropriation"), unless it is: (a) for reasons of public interest; (b) on a non-discriminatory basis; (c) in accordance with the rule of law; and (d) upon payment of indemnification in accordance with paragraph 2 below".

⁷⁸⁶ SoD, para. 1049, referring to **Exh. RL-0207**, *Case of Luordo v. Italy*, European Court of Human Rights (First Section), Application No. 32190/96, Judgment, 17 July 2003, para. 67.

⁷⁸⁷ SoD, paras. 1059-1063, referring to **Exh. RL-0214**, Judgments in Joined Cases *Ledra Advertising v. Commission and ECB*, C-8/15 P, *Eleftheriou and Others v. Commission and ECB*, C-9/15 P, and *Theophilou v. Commission and ECB*, C-10/15 P, Court of Justice of the European Union, 20 September 2016; **Exh. RL-0215**, *Dr. K. Chrysostomides & Co. LLC and Others v. Council of the European Union and Others*, Case T-680/13, General Court (Fourth Chamber, Extended Composition) dated 13 July 2018, para. 252; **Exh. RL-0216**, *Eleni Pavlikka Bourdouvali and Others v. Council of the European Union and Others*, Case T-786/14, General Court (Fourth Chamber, Extended Composition), 13 July 2018; **Exh. RL-0193**, *Marfin Investment Group v. The Republic of Cyprus*, ICSID Case No. ARB/13/27, Award 26 July 2018, para. 825.

⁷⁸⁸ SoD, paras. 1053-1057, referring to **Exh. RL-0213**, *Sedco Inc v. National Iranian Oil Co. et al., Iran-U.S. Claims Tribunal Case No. 129* (Chamber Three), Award No. ITL 55-129-3, 28 October 1985, Iran-US CTR (1985), p. 20; **Exh. RL-0078**, *Chemtura Corporation v Government of Canada*, UNCITRAL Rules, Award, 2 August 2010, para. 266; **Exh. CL-48**, *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, paras. 262-278; **Exh. RL-0192**, *Renée Rose Levy De Levi v Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014, paras. 475-478 (citing **Exh. RL-0009**, *S Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v The Argentine Republic*, ICSID Case No. ARB/03/19 and *AWG Group v The Argentine Republic*, UNCITRAL, Decision on Liability, 30 July 2010, para. 139).

⁷⁸⁹ SoD, para. 1057.

755. Since the Claimants only briefly mentioned direct expropriation in their SoC and then pleaded exclusively indirect expropriation, the Tribunal understands that they have abandoned their claim that Spain *directly* expropriated their investments. Even if the Tribunal's understanding were incorrect, such claims has not been sufficiently pled, let alone established, the Claimants not having shown that Spain carried out a formal taking of the Claimants' investments, as the notion of direct expropriation normally requires.

756. As a result, the Tribunal will review the Claimants' case of *indirect* or creeping expropriation. In their C-PHB1, the Claimants summarized their claim as follows:

"Respondent's government withdrawals, harmful public statements, failure to make positive public statements during [Banco Popular's] escalating liquidity crisis, and abrupt suspension of ELA constituted a creeping expropriation that crystallized when [Banco Popular] was forcibly sold to Santander in a sham, prearranged auction that wiped out the value of Claimants' investments."⁷⁹⁰

757. It is clear from this quotation and from other submissions that the Claimants' position is that Spain's acts and omissions "progressively harmed Banco Popular" and "crystallized" in the "forced" sale to Santander.⁷⁹¹ For the Claimants, the acts which cumulatively amounted to an expropriation are the deposit withdrawals,⁷⁹² Spain's public statements and "failure to act to restore confidence" of depositors,⁷⁹³ the decision "to withdraw the ELA that Banco Popular requested and was eligible for",⁷⁹⁴ the resolution and alleged "orchestration of the sale process" and the "sham, non-competitive auction of the bank" that resulted in Santander's acquisition for € 1.⁷⁹⁵

758. Hence, the measures alleged to constitute a creeping expropriation are those also invoked in support of a breach of FET. This being so, the Tribunal's analysis may be relatively brief, as it has already examined each of these acts in the context of FET and found that none of them was illegitimate, unreasonable or otherwise contrary to FET. It is true that, in a creeping expropriation, the single acts composing the expropriation do not need to be expropriatory in themselves, because it is their combination that results in an expropriation. However, in the Tribunal's opinion, a combination of legitimate acts cannot, without more, amount to an expropriation. Here, the Tribunal has held in its

⁷⁹⁰ C-PHB1, para. 212.

⁷⁹¹ SoC, paras. 396, 398.

⁷⁹² SoC, para. 397.

⁷⁹³ SoC, para. 397.

⁷⁹⁴ SoC, para. 400.

⁷⁹⁵ SoC, paras. 398-399.

analysis of FET that none of the acts complained of could be validly challenged. It is thus difficult to see how the sum of these acts could constitute a “measure equivalent to expropriation” within the meaning of Article V of the Treaty.

759. More specifically, in connection to the deposit withdrawals, in its FET analysis the Tribunal concluded that neither the Ministry of Economy, nor the Bank of Spain, nor any other organ of the Respondent had an obligation to take specific steps to prevent Spain’s agencies, municipalities, and state-owned entities from withdrawing their funds from their Banco Popular accounts, which withdrawals conformed to the terms of the deposit agreements.
760. Further, although some of the statements or non-statements by Spanish officials may have been ambivalent, none of them was “inflammatory”, “alarming” or otherwise inappropriate. The Tribunal has already distinguished the statements at issue in this arbitration from those that other tribunals found relevant for a finding of expropriation,⁷⁹⁶ and explained how Spain’s statements are by no means comparable, whether in tone or substance. Moreover, the Tribunal has observed that the (non-)statements fell into the time frame when (i) Banco Popular released the results of an internal audit of its credit portfolio identifying certain issues related to the capital raise of 2016, which concluded that Banco Popular’s 2016 financial statements would not need to be “re-drafted”, but proper amendments would be included in the financial statements for the first semester of 2017;⁷⁹⁷ (ii) international rating agencies, including S&P and Moody’s, downgraded Banco Popular;⁷⁹⁸ (iii) Banco Popular announced that no dividends would be paid to shareholders and that it needed to pursue a capital increase, private sale, or merger;⁷⁹⁹ (iv) lower than expected quarterly results were published, showing a loss of

⁷⁹⁶ See *supra* 562-563.

⁷⁹⁷ **Exh. C-69**, Comisión Nacional Del Mercado De Valores, Relevant Fact by Banco Popular Español, S.A. (Register No. 250244), 3 April 2017.

⁷⁹⁸ **Exh. C-71**, Comisión Nacional Del Mercado De Valores, Relevant Fact by Banco Popular Español, S.A. (Register No. 250535), 7 April 2017; **Exh R-0158**, Moody’s, “Moody’s downgrades Banco Popular’s senior unsecured debt ratings to B1 and deposit ratings to Ba3; outlook negative”, 21 April 2017, available at https://www.moody.com/research/Moodys-downgrades-Banco-Populars-senior-unsecured-debt-ratings-to-B1--PR_365395; **Exh. C-77**, Comisión Nacional Del Mercado De Valores, Relevant Fact by Banco Popular Español, S.A., 21 April 2017.

⁷⁹⁹ **Exh. R-0092**, ECB, FOLTF Assessment of Banco Popular Español, 6 June 2017, para. 7(b) and footnote 3.

€ 137 million;⁸⁰⁰ and (v) news were released about the “[u]rgent sale of Banco Popular due to bankruptcy risk”.⁸⁰¹ All of these elements must be taken into account when looking at the declining share price of Banco Popular on which the Claimants rely to argue that there was a “substantial deprivation” of their investments.

761. With respect to the ELA, the Tribunal concluded that Spain did not abuse the discretion it enjoyed under Spanish and EU law in refusing to grant further ELA, in addition to the € 3.8 billion in ELA which it *did* in fact grant Banco Popular (even though Banco Popular had no right to receive those funds). The Bank of Spain approved ELA disbursements of up to € 9.5 billion on the condition that Banco Popular would provide sufficient collateral to secure further ELA disbursements, which Banco Popular failed to do. The Tribunal cannot but reject the notion that a State could be held liable for expropriating an investment as a result of its refusal to provide funding to a bank in financial difficulties *when the legal conditions for such funding have not been met*.
762. Finally, in respect of the resolution, there are multiple reasons why it does not give rise to an expropriation under the BIT. The first reason is that the ECB and SRB, not Spain, were responsible for finding that Banco Popular was FOLTF and for placing it under resolution.
763. A further reason lies in the fact that the resolution was a valid exercise of police powers for which no compensation is required. Indeed, the applicable legal framework, which centers primarily around the BRRD, envisages the resolution of a bank as an alternative to insolvency proceedings and provides that the resolution authority may only order the resolution if it finds that the affected bank is FOLTF.⁸⁰² In other words, the resolution regime established by the BRRD allows the resolution authority to use administrative

⁸⁰⁰ **Exh. C-79**, Comisión Nacional Del Mercado De Valores, Interim Financial Report Publications - Banco Popular; **Exh. C-5**, Banco Popular Español, S.A., Quarterly Report, First Quarter 2017, p. 6; SoD, 428, referring to **Exh. R-0092**, ECB, FOLTF Assessment of Banco Popular Español, dated 6 June 2017, para. 7, nn. 5, 6; **Exh. R-0160**, FINANCIAL TIMES, T. Buck, *Spain's Banco Popular reports €137m first-quarter loss*, 5 May 2017; **Exh. R-0161**, FINANCIAL TIMES, T. Buck, “Banco Popular reports Q1 loss; sets aside € 496m for real estate losses”, 5 May 2017. See also Rejoinder, para. 219, referring to **Exh. C-5**, Banco Popular Español, S.A., Quarterly Report, First Quarter 2017, p. 6.

⁸⁰¹ **Exh. C-80**, A. Marco, *Saracho encarga la venta urgente del Popular a JP Morgan y Lazard por riesgo de quiebra*, El Confidencial, 11 May 2017, translated at **Exh. C-80 ENG**; **Exh. C-81**, Banco Popular, Informe Complementario para el Consejo de 6 de junio, 6 June 2017, p. 2, translated at **Exh. C-81 ENG**.

⁸⁰² See **Exh. RL-0139**, BRRD, Article 32(1).

measures to restructure a failing bank in a more rapid manner than in an insolvency proceeding. The resolution notably allows to preserve the bank's critical functions and ensure that depositors maintain access to their funds without disruption, while averting the threat to financial stability and the risk of contagion to other banks.

764. Under the circumstances, the resolution, coupled with the sale of business tool, constituted an exercise of regulatory powers for a legitimate and urgent purpose. If an administrative action like the resolution of Banco Popular could, without more, be deemed a "measure equivalent to an expropriation", then the complex legal framework on the recovery and resolution of credit institutions would be undermined and resolution authorities would be precluded or severely limited in the exercise of their powers. In the Tribunal's view, nothing in the Treaty suggests any such unreasonable outcome.
765. Finally, to the extent that the Claimants allege that the resolution was the result of a scheme "orchestrated" to allow Santander to take over Banco Popular, the Tribunal has already concluded that such theory lacks evidentiary support. In addition, the Claimants have not established that Spain acted inappropriately in organizing and carrying out the auction that led to Santander's acquisition of Banco Popular.
766. In conclusion, none of the acts of which the Claimants complain is expropriatory in nature and/or capable of constituting an element of a creeping expropriation. Hence, whether considered in isolation or combination, the impugned measures do not constitute "measures equivalent to expropriation" within the meaning of Article V of the Treaty. The expropriation claim is accordingly dismissed.

E. CONCLUSION ON LIABILITY

767. For the reasons explained in the foregoing sections, the Tribunal concludes that the Respondent has not breached the Treaty standards invoked by the Claimants. As a consequence, it dispenses with addressing *quantum*.

VII. COSTS

A. THE CLAIMANTS' POSITION

768. The Claimants request that the costs they have incurred be borne entirely by the Respondent.⁸⁰³ According to their costs submission, the Claimants incurred costs in an amount of € 13,616,154.30, excluding the advances paid towards the Tribunal fees and expenses and the PCA administrative fees.⁸⁰⁴
769. For the Claimants, while Article 42(1) of the UNCITRAL Rules establishes that the costs of the arbitration shall in principle be borne by the unsuccessful party, the Tribunal may consider the circumstances of the case and particularly the parties' procedural conduct.⁸⁰⁵
770. The Claimants argue that the Respondent should bear all costs because it has engaged in dilatory and obstructive conduct that interfered with the Claimants' rights and significantly and unnecessarily increased their costs.⁸⁰⁶
771. They note that the Respondent attempted to disqualify Arbitrator Park based on meritless allegations related to prior appointments by the Claimants' counsel. Furthermore, due to a supposed one-minute delay in the transmission of the Claimant's Statement of Claim, Spain requested to terminate the proceedings. Regarding the document production phase, the Respondent refused to produce documents ordered by the Tribunal, "continuing to rely on a justification the Tribunal rejected on multiple occasions, leading to extensive and unnecessary delays of the disclosure process". Lastly, on several occasions between May and June 2020 the Respondent requested the suspension of the proceedings "due to the passing of Mr. Ruiz Sacristan as his heirs sorted through difficult administrative issues".⁸⁰⁷
772. As a consequence of the Respondent's "dilatory tactics", the Claimants submit that they were forced to incur significant additional costs, and that the proceedings were unnecessarily prolonged.⁸⁰⁸

⁸⁰³ C-Costs Submission, para. 2.

⁸⁰⁴ C-Costs Submission, para. 1 (i.e., € 14,296,154.30 minus € 680,000.00 paid towards the advances on the arbitration costs as of 18 February 2022).

⁸⁰⁵ C-Costs Submission, para. 2.

⁸⁰⁶ C-Costs Submission, para. 2.

⁸⁰⁷ C-Costs Submission, para. 3.

⁸⁰⁸ C-Costs Submission, para. 3.

B. THE RESPONDENT'S POSITION

773. The Respondent seeks an award on costs, pursuant to Article 42 of the UNICTRAL Rules, ordering that the Claimants bear the costs of the arbitration, as well as the Respondent's costs for legal representation. According to its costs submission, Spain incurred cost in an amount of € 12,021,894.08, excluding the advances paid towards the Tribunal costs and fees and the PCA administrative fees.⁸⁰⁹
774. The Respondent submits that, pursuant to Article 42(1) of the UNCITRAL Rules, the Tribunal enjoys broad discretion to allocate costs between the Parties, both in terms of procedural costs as well as costs incurred by the parties.⁸¹⁰ Furthermore, it notes that the Treaty is silent on how to allocate costs.⁸¹¹
775. Spain argues that among other factors, arbitral tribunals typically allocate costs based on the extent to which a party has succeeded in its claims and arguments. In this regard, it submits that during the course of these proceedings it has extensively proven that "(i) the Tribunal lacks jurisdiction over the claims of the Claimants, (ii) it has not breached the BIT in any way and (iii) the Claimants are not entitled to any right to compensation".⁸¹² As a consequence, the Respondent maintains that it should never have been charged with the burden and costs of defending itself, and therefore asks the Tribunal to exercise its broad discretion to award costs in its favor.⁸¹³
776. Furthermore, the Respondent asserts that in the event that Spain were to prevail in the arbitration, "it is entitled to its costs on a full indemnity basis", in which case the Claimants should be ordered "to pay the amount of € 12,701,894.08 plus a reasonable rate of interest from the date on which these costs are incurred until the date of their actual payment".⁸¹⁴
777. In the alternative that the Tribunal were to uphold the claims, the Respondent argues that it should not be ordered to bear the Claimants' costs, since the case involved "a

⁸⁰⁹ R-Costs Submission, para. 1 (i.e. € 12,701,894.08 minus € 680,000 advanced towards the arbitration costs as of 18 February 2022).

⁸¹⁰ R-Costs Submission, paras. 2-3.

⁸¹¹ R-Costs Submission, para. 2.

⁸¹² R-Costs Submission, para. 4.

⁸¹³ R-Costs Submission, para. 5.

⁸¹⁴ R-Costs Submission, paras. 5, 14.

number of challenging procedural and legal issues, which the Respondent addressed with professional and effective advocacy”.⁸¹⁵

778. Finally, it submits that should the Tribunal order the Respondent to pay the costs incurred by Claimants, only those costs that are reasonable and incurred in connection with the arbitration can be charged, in accordance with Article 40(e) and Article 42 of the UNCITRAL Rules. Accordingly, the Respondent reserved its right to request the Tribunal’s leave to file a submission regarding Claimants’ Statement of Costs and its justification and reasonability.⁸¹⁶

C. DISCUSSION

1. The Costs of the Arbitration pursuant to Article 40 of the UNCITRAL Rules

779. Article 40(1) of the UNCITRAL Rules provides for the Tribunal’s power to fix the costs as follows:

“The arbitral tribunal shall fix the costs of arbitration in the final award and, if it deems appropriate, in another decision.”

780. Article 40(2) of the UNCITRAL Rules specifies the categories of expenses that qualify as “costs of arbitration” in the following terms:

“The term ‘costs’ includes only:

(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41;

(b) The reasonable travel and other expenses incurred by the arbitrators;

(c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;

(d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;

(e) The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;

(f) Any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-General of the PCA.”

781. Thus, Article 40(2) recognizes broadly three categories of costs and expenses: (i) “Tribunal Costs” comprising of the fees and expenses of the Arbitral Tribunal and the

⁸¹⁵ R-Costs Submission, para. 6.

⁸¹⁶ R-Costs Submission, para. 7.

Secretary; (ii) "Party Costs" comprising of the legal fees and other costs incurred by the Parties; and (iii) "Administrative Costs" comprising here of the fees and expenses of the PCA, including with regard to hearing and other expenses.

2. Cost Advances

782. At the beginning of the arbitration, the Parties paid a first advance of € 150,000 each, i.e., a total of € 300,000, in accordance with paragraph 51 of the TOA. In April 2021, the Parties paid a second advance of € 180,000 each, i.e., a total of € 360,000. In August 2021, the Parties paid a third advance of € 200,000 each, i.e., a total of € 400,000. In November 2021 and January 2022, respectively, the Parties paid a fourth advance of € 150,000 each, i.e., a total of € 300,000. Lastly, in January and February 2023, respectively, the Parties paid a fifth and final advance of € 75,000 each, i.e., a total of € 150,000. Thus, the total of the advance paid by the Parties amounts to € 1,510,000 (i.e., € 755,000 each).

3. Tribunal and Administrative Costs

783. Throughout the proceedings, the Members of the Tribunal collectively spent a total of 1,596.4 hours as follows: Prof. Park 354,5 hours; Mr. Mourre 420,9 hours; and Prof. Kaufmann-Kohler, 821 hours. In the TOA, it was agreed that the Tribunal's time would be compensated at an hourly rate of € 550 exclusive of VAT, where applicable.

784. For his part, the Secretary of the Tribunal has spent a total of 748,50 hours. In the TOA, it was agreed that the Secretary would be compensated at an hourly rate of € 300 exclusive of VAT, where applicable.

785. Therefore, the total fees of the Tribunal and the Secretary (excluding VAT) amount to € 1,102,575.00.

786. The Tribunal and the Secretary have incurred expenses in the amount of € 5,820.13.

787. Additionally, the PCA fees for the administration of the case and its registry services amount to € 131,679.00.

788. Other costs, relating in particular to the hearings expenses, IT costs, catering, court reporting services, interpretation, telecommunication, courier fees, bank charges, printing and supplies, as well as the translation of the Award, amount to € 194,605.74.

789. Thus, the total costs of the proceedings amount to € **1,434,679.87**, detailed as follows:

Tribunal and Secretary fees	€	1,102,575.00
Tribunal and Secretary expenses	€	5,820.13
PCA fees	€	131,679.00
Administrative Costs	€	194,605.74
Total Costs	€	1,434,679.87

790. Hence, subject to any further work that may have to be performed in connection with potential requests for redactions in accordance with section 39 of the TOA, the total costs of the proceedings amount to € 1,434,679.87. In conformity with Article 43(5) UNCITRAL Rules, the PCA will provide the Parties with a statement of account once the 30-day time period under Arts. 37 to 39 has elapsed unused, or the work in connection with a post-award remedy under Arts. 37 to 39 has been completed, or the work in connection with potential requests for redactions has been completed, whichever occurs later. Any arbitration costs in connection with potential requests for redactions will be shared equally between the Parties and each Party will bear its own legal fees in that connection. The PCA will reimburse the Parties any unexpended balance. Since the Parties deposited the total amount of € 1,510,000, the current balance amounts to € 75,320.13.

4. Allocation of the Costs of the Arbitration

791. Article 42 of the UNCITRAL Rules sets out the standard on the basis of which the Tribunal must determine the allocation of the above categories of costs:

“1. The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs.”

792. Thus, the first sentence of Article 42(1) of the UNCITRAL Rules provides that the unsuccessful party shall “in principle”⁸¹⁷ bear all of the costs of the arbitration. The

⁸¹⁷ See the English version of the first sentence of Article 42(1) of the UNCITRAL Rules, which provides: “[t]he costs of the arbitration shall *in principle* be borne by the unsuccessful party or parties” (emphasis added), while the Spanish version reads: “[l]as costas del arbitraje serán a cargo de la parte vencida o las partes vencidas”, without including the equivalent of the words “in principle”.

second sentence of Article 42(1) grants the Tribunal the authority to apportion costs among the Parties if, in light of the “circumstances of the case”, it decides that such apportionment is “reasonable”.

793. The Tribunal starts with the outcome of the arbitration. The Claimants have largely prevailed on jurisdiction and admissibility, as the majority of Spain’s objections have been rejected. However, the Respondent has prevailed on liability and is thus ultimately the prevailing Party.

794. Therefore, considering only the outcome of the claims and defenses, the Tribunal would determine that the Claimants should bear the entirety of the costs of the proceedings and 70% of the Respondent’s legal fees and other expenses.

795. This being so, in line with the second sentence of Article 42(1), the Tribunal has further reviewed whether other circumstances, in particular a Party’s procedural conduct, would warrant a different apportionment of costs. In doing so, it has come to the conclusion that, while both Parties have generally conducted these proceedings in a professional and cost-effective manner, on some occasions the Respondent has unnecessarily added to the costs of the arbitration. For instance, on 12 September 2019, the Respondent requested that the arbitration be terminated as a result of the Claimants’ *one-minute* delay in filing their Statement of Claim.⁸¹⁸ In addition, the Respondent made numerous requests concerning the succession of Mr. Ruiz Sacristán, including by suggesting that the arbitration may need to be suspended,⁸¹⁹ even though the Claimants had provided sufficient clarifications regarding the administrative difficulties Mr. Ruiz Sacristán’s heirs were facing in sorting out his succession. Taking that conduct into account, the Tribunal comes to the conclusion that the Claimants should bear 60% (rather than 70%) of the Respondent’s legal fees and expenses, the allocation of arbitration costs set out in the preceding paragraph remaining unchanged. Consequently, the Claimants shall pay to the Respondent €

⁸¹⁸ See Respondent’s “Motion for the Justification of the Claimants’ late submission of the Statement of Claim and, if not duly justified, the termination of the arbitral proceedings” of 12 September 2019; Claimants’ comments, 18 September 2019; Tribunal’s letter, 23 September 2019, p. 2 (denying the Respondent’s request and reminding the Parties “in assessing the costs of the proceedings, it would take into account the procedural conduct of the Parties, and in particular whether such conduct delayed the proceedings or increased costs unnecessarily”).

⁸¹⁹ See the Respondent’s communication of 26 May 2020 and its letter of 1 June 2020 (referring *inter alia* to section (2) of article 1072c of the Dutch Code of Civil Procedure).

7,213,136.44 in terms of legal fees and expenses and € 717,339.93 in terms of arbitration costs, which had been advanced by the Parties in equal shares.

796. In accordance with Article 40(2)(e) UNCITRAL Rules, the Tribunal has reviewed the amounts of the costs claimed by each Party. Both sides have incurred costs which are certainly considerable. However, these proceedings were highly complex and involved a multitude of Claimants, numerous facts, many procedural questions, as well as difficult legal, regulatory, and quantum issues, with the result that the costs incurred appear commensurate with the complexity of the dispute and the high stakes involved. The Tribunal further notes that both sides have incurred costs that are broadly within the same range.
797. The Respondent has further sought interest on the costs awarded. Such request was made as early as in the Statement of Defense⁸²⁰ and repeated in the Respondent's following submissions. The Claimants have not taken issue with the principle that the Tribunal may award interest on the costs awarded. The Tribunal considers that, in order to account for the time value of money, the Claimants should pay interest on the costs awarded. Recent investment treaty tribunals have also awarded interest on costs.⁸²¹
798. The next question is at what rate interest should accrue. The Respondent has made no submissions in this regard. In the context of interest on the principal amounts claimed, the Parties proposed interest rates varied between 0.85% (so the Respondent) to 8% (so the Claimants). On this basis, the Tribunal considers that the interest on the costs awarded shall be computed at a reasonable rate used in the financial markets, for which it uses the 3-month EURIBOR, compounded annually, and being specified that interest shall start to run 30 days after the issuance of this award.
799. Finally, the Claimants make no mention in the cost submissions of any internal arrangements for a scenario in which jurisdiction would be upheld only in respect of some of them or only some of them would succeed on the merits. This being so, as the Claimants have brought their claims in an aggregate form, the Tribunal considers that it is appropriate to leave it to the Claimants to make any relevant determination on the

⁸²⁰ SoD, para. 1196(d).

⁸²¹ See, e.g., *Deutsche Telekom AG v. India*, Final Award, 27 May 2020, para. 356; *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Award, 5 November 2021, para. 610.

apportionment of costs among themselves in accordance with their internal arrangements, if any, or otherwise.

VIII. DECISION

800. For the reasons set forth above, the Tribunal makes the following decision:

- a. Subject to sub-paragraphs (b), (c), and (d) below, the Tribunal has jurisdiction over the present dispute between each of the Claimants and the Kingdom of Spain and the claims are admissible;
- b. The Tribunal lacks jurisdiction over disputes between the Kingdom of Spain and Alejandra Rojas Velasco, Georgina Rojas Velasco, Isabel Rojas Velasco and María Rojas Velasco;
- c. The Tribunal lacks jurisdiction over disputes arising out of deposit withdrawals that do not concern acts or omissions taken by the Respondent in the exercise of sovereign powers;
- d. The Tribunal lacks jurisdiction over disputes arising out of the public deposit withdrawals that occurred in 2015 and 2016 to the extent that such withdrawals predated the Claimants' investments;
- e. The Respondent did not breach Articles III, IV and V of the Treaty;
- f. The Claimants shall pay to the Kingdom of Spain the amount of € 717,339.93 as reimbursement of the costs of the arbitration, together with interest at 3-month EURIBOR, compounded annually, starting to run 30 days after the issuance of this award and until payment in full;
- g. The Claimants shall pay to the Kingdom of Spain the amount of € 7,213,136.44 as contribution to the legal fees and other expenses incurred in connection with this arbitration, together with interest at 3-month EURIBOR, compounded annually, starting to run 30 days after the issuance of this award until payment in full;
- h. All other claims and requests are dismissed.

Seat of arbitration: The Hague, The Netherlands

Date: 13 March 2023



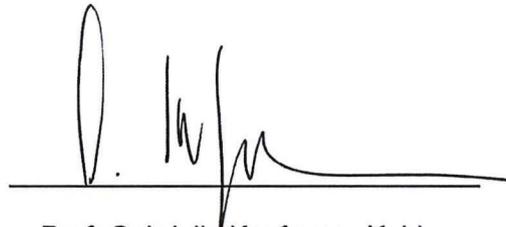
Prof. William W. Park

Co-arbitrator



Mr. Alexis Mourre

Co-arbitrator



Prof. Gabrielle Kaufmann-Kohler

President

