International Centre for Settlement of Investment Disputes

Case No. ARB/24/8

Ricardo Filomeno Duarte Ventura Leitão Machado
(Portugal)

Claimant

c.

Republic of Angola

Respondent

CLAIMANT'S RESPONSE TO RULE 41 OBJECTION

30 January 2024

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List of defined terms

Aenergy	Aenergy, S.A.
Angola	The Republic of Angola
BIT	Bilateral investment treaty between the Republic of Portugal and the Republic of Angola, dated 22 February 2008, entered into force on 24 April 2020, and amended on 16 July 2021, with the amendment entering into force on 22 December 2021 (**Exhibit CLA-25**)[1]
Contracts	Thirteen contracts awarded by MINEA to Aenergy for the supply of power generation equipment, turbines, generators, transformers, rotors, other accessory equipment, consumables and spare parts for a total of USD 1,148,531,741
Credit Facility	Loan Agreement between Angola and GE Capital for the financing of the Contracts signed on 21 August 2017 (**Exhibit R-0001** [excerpt])
Four Turbines	Four GE TM2500 GEN8 turbines, with manufacturer codes MNG #7266027, #7267025, #7267575, and #7267577, and related equipment
FET	Fair and equitable treatment
FPS	Full protection and security
GE	General Electric Company
GE Capital	GE Capital EFS Financing Inc.
GE GPP	GE Global Parts & Products GmbH
GE PP	GE Packaged Power, Inc.
ICSID	International Centre for Settlement of Investment Disputes

[1] The Claimant hereby submits its own unofficial English translation of the BIT, which it considers more accurate than the Respondent's English translation submitted as **Exhibit RL-0010**.

ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done at Washington, 18 March 1965
IGAPE	*Instituto de Gestão de Activos e Participações do Estado* - Angola's Institute for the Management of the State's Assets and Shares
Lubango Power Plant	Thermal power plant located in the city of Lubango, Huíla Province, Angola
Malembo Power Plant	Thermal power plant located in the city of Malembo, Cabinda Province, Angola
MINEA	Ministry of Energy and Water of Angola
MINFIN	Ministry of Finance of Angola
Notice of Dispute	Notice of Dispute submitted by Mr Machado to Angola on 9 June 2022 (**Exhibit C-26**)
Ondjiva Power Plant	Thermal power plant located in the city of Ondjiva, Cunene Province, Angola
Parties	Claimant and Respondent
PIP	Public Investment Program
PRODEL	*Empresa Pública de Produção de Eletricidade*
Provincial Court of Luanda	Provincial Court of Luanda, Angola, Civil and Administrative Chamber, Second Division
Respondent	The Republic of Angola
Respondent's Rule 41 Submission	Respondent's Submission on Manifest Lack of Legal Merit under Rule 41 submitted on 15 November 2024
Supply Contracts	Four contracts signed between Aenergy and GE GPP, and GE PP on 29 June 2016, 30 June 2016, 30 March 2017 and 2 June 2017, for the sale of equipment and services

I. Introduction

1. Mr Machado's case, as set out in the Request for Arbitration, is based on certain facts that occurred in 2022, *i.e.*, after the entry into force of the bilateral investment treaty between the Republic of Portugal and the Republic of Angola (the "**BIT**") on 22 December 2021. The Respondent has filed a Rule 41 submission (the "**Respondent's Rule 41 Submission**") requesting that the Arbitral Tribunal dismiss the Claimant's case for manifest lack of jurisdiction *ratione temporis*.

2. However, the Respondent does not respond to the Claimant's case or to the facts presented by the Claimant in support thereof but to an alternative set of facts that do not underlie the Claimant's claims. The Respondent's Rule 41 Submission is a textbook example of a straw man fallacy. In addition, the alternative facts alleged by the Respondent remain unsubstantiated.

3. In the Request for Arbitration, the Claimant alleged that, during 2022, Angola took a series of actions that breached Mr Machado's rights under the BIT. Specifically, the Claimant argued that, in 2022, Angola removed four of Aenergy's GE TM2500 GEN8 turbines, with manufacturer codes MNG #7266027, #7267025, #7267575, and #7267577, and related equipment (the "**Four Turbines**") from judicial custody by installing them in Angolan state-owned power plants and connected them to the national power grid. These actions were all taken while Angola's Institute for the Management of the State's Assets and Shares ("**IGAPE**") and the Provincial Court of Luanda, Civil and Administrative Chamber, Second Division (the "**Provincial Court of Luanda**"), both responsible for the custody of the turbines,[2] enabled or participated in such misappropriation or, at the very least, turned a blind eye and aided the Respondent by failing to take any action or even to respond to Aenergy's repeated requests for information. These facts alleged by the Claimant are sufficiently substantiated.

4. The Claimant has been transparent in its Request for Arbitration –and in the present submission– in that it does not know –and cannot know– when exactly the Four Turbines were installed and connected to the power grid and thus removed from IGAPE's custody. Only Angola is privy to this information, and it has, to this date, steadfastly refused to answer any questions regarding the whereabouts of the Four Turbines.

5. By submitting a Rule 41 procedure, Angola has taken upon itself the burden of proving its *ratione temporis* jurisdictional objection in a clear and obvious manner. However, it has utterly failed to make sufficiently substantiated factual allegations to even validly dispute the Claimant's factual allegations. The Respondent has supported its Rule 41 Submission essentially by quoting, out-of-context, certain

[2] The Provincial Court of Luanda ordered the preventive seizure of the Four Turbines and appointed IGAPE as the trustee of the seized assets.

statements previously made by Aenergy in different and distinct legal proceedings, but it has not provided any evidence, or even specific allegations, that the Four Turbines were installed between 2019 and 2021. This is astounding, considering that Angola has full and specific knowledge of all particulars of the taking of the Four Turbines.

6. As for Anergy's statements made in the other proceedings, the Respondent does not even put forward a legal theory on how these statements might impact the present arbitration. Evidently, Mr Machado cannot be bound by, or estopped from making factual allegations different from, the factual allegations made by Aenergy in different proceedings, in different *fora*, with a different cause of action, under a different applicable law, involving different parties and based on different facts. This is all the more so, considering that the courts that decided Aenergy's claims have not made any findings with *res iudicata* effect but have declined to proceed on the grounds of *forum non conveniens*.

7. The remainder of the Respondent's Rule 41 Submission examines whether Angola's actions, as alleged by the Claimant, in fact constitute violations of the BIT. However, this is to be decided at the merits stage of the arbitration. The Respondent has put forward the sole objection that the Tribunal manifestly lacks *jurisdiction*; it has not submitted that the Claimant's claims manifestly lack *substantive* merit. Thus, for the purposes of the Respondent's Rule 41 Submission, all that matters is that the Claimant has made substantiated allegations of facts which, *as per the Claimant*, occurred after the entry into force of the BIT, thus awarding the Tribunal *ratione temporis* jurisdiction.

8. This submission is structured as follows: it first lays out the standard that must be met under Rule 41 (section II). It then sets out the relevant background to the dispute and the facts relevant to the Claimant's case (section III). It goes on to explain why the Claimant's claims are sufficiently substantiated and not without any foundation (section IV) and why the Tribunal has *ratione temporis* jurisdiction, and consequently, the Respondent's Rule 41 Submission must fail (section V). Next, for the sake of completeness, it addresses the remainder of the Respondent's arguments on the merits, although irrelevant to its Rule 41 Submission (section VI). Thereafter, it deals with the Respondent's allegations on the circumstances leading to the termination of the Contracts, which are irrelevant, and, in any case, incorrect (section VII). After a brief summary of the Claimant's position (section VIII), the submission sets out the reasons for the Claimant's request for a cost decision (section IX), followed by the Claimant's request for relief (section X).

II. The relevant test under Rule 41

9. The aim of Rule 41 is "*to enhance procedural efficiency and prevent the abusive use of the ICSID system by allowing the tribunal 'the early dismissal of* ***patently***

***unmeritorious** claims*".[3] As such, the party relying on Rule 41 has the burden of proving that the claim is patently unmeritorious.[4]

10. The legal standard to be applied by the Tribunal is not disputed. The Respondent acknowledges the applicability of the standard articulated by the tribunals in *Trans-Global v. Jordan*, *Mainstream Renewable and others v. Germany*, *AHG Industry v. Iraq* and *Brandes Investment Partners v. Venezuela*,[5] which expressly recognise that the standard is "*high*".[6]

11. Other tribunals have similarly stressed that the standard is "*exacting*",[7] capturing "*fundamentally defective*" claims.[8] This is because a tribunal's decision to accept an application for summary dismissal has *res judicata* effect and inevitably limits the parties' opportunity to present their case. Therefore, the test that must be met by an applicant under Rule 41 is "*very demanding and rigorous*".[9] Indeed, according to International Centre for Settlement of Investment Disputes ("**ICSID**")'s own overview of Rule 41, tribunals "*have **uniformly** employed a **high standard** for determining whether a claim manifestly lacks legal merit*".[10]

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[3] Respondent's Rule 41 Submission, ¶106, p. 31 (emphasis added).

[4] **CLA-7**, *AFC Investment Solutions S.L. v. Republic of Colombia*, ICSID Case No. ARB/20/16, Award on Respondent's Preliminary Objection Under Rule 41(5) of the ICSID Arbitration Rules (with informal English translation), 24 February 2022, ¶169, p. 123.

[5] Respondent's Rule 41 Submission, ¶¶109-111, 113-114, pp. 31-33.

[6] **RL-0003**, *Trans-Global Petroleum, Inc v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Tribunal's Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008, ¶88, p. 28 ("*The Tribunal considers that these legal materials confirm that the ordinary meaning of the word requires the respondent to establish its objection clearly and obviously, with relative ease and despatch. **The standard is thus set high***" (emphasis added)); **RL-0006**, *Mainstream Renewable Power Ltd and others v. Federal Republic of Germany*, ICSID Case No. ARB/21/21, Decision on Respondent's Application under ICSID Arbitration Rule 41(5), 18 January 2022, ¶86, p. 25 ("*This Tribunal does not understand there to be any real issue between the Parties as to the **high standard legal standard** imposed by ICSID Arbitration Rule 41(5)*" (emphasis added)); **RL-0005**, *AHG Industry GmbH&Co.KG v. Republic of Iraq*, ICSID Case No. ARB/20/21, Award on the Respondent's Application Under ICSID Rule 41(5), 30 September 2022, ¶57, p. 15 ("*It is on the basis of this **high standard** that the Tribunal has reviewed and determined the Respondent's objections based on ICSID Rule 41(5)*" (emphasis added)); **RL-0007**, *Brandes Investment Partners v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules, 2 February 2009, ¶63, p. 9 (citing ¶88 of the decision in *Trans-Global v. Jordan*, with approval).

[7] **RL-0008**, *The Bank of Nova Scotia v. Peru*, ICSID Case No. ARB/22/30, Decision on Respondent's Rule 41 Application, 31 May 2024, ¶106, p. 27.

[8] **RL-0009**, *Lotus Holding Anonim Şirketi v. Republic of Turkmenistan*, ICSID Case No. ARB/17/30, Award, 6 April 2020, ¶159, p. 40.

[9] **CLA-8**, *PNG Sustainable Development Program Ltd. v. Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on Respondent's Objections under Rule 41(5), 28 October 2014, ¶¶88-90, 94, pp. 27-29. *See also* **CLA-9**, *Watkins Holdings S.à.r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Decision on the Claimants' Preliminary Objections Pursuant to ICSID Arbitration Rule 41(5), 22 January 2024, ¶65, p. 14; **RL-0007**, *Brandes Investment Partners v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules, 2 February 2009, ¶62, p. 9.

[10] **CLA-10**, Manifest Lack of Legal Merit, ICSID Convention Arbitration (2022 Rules), p. 1 (emphasis added).

12. Since the Respondent's Rule 41 Submission concerns the Tribunal's supposed lack of jurisdiction *ratione temporis*, it is worth noting that, as stated by an ICSID tribunal, "*the very demanding standard of proof outlined above applies no less to jurisdictional than other matters*".[11]

13. The applicable legal standard is two-pronged. As further described below, it requires (i) that the claims are without legal merit and (ii) that they are manifestly so.

A. Lack of legal merit

14. Firstly, an assessment of "*legal merit*" is not an assessment of the factual basis of the dispute. At such an early stage of the proceedings, tribunals have not received sufficient information to decide disputed facts.[12] Thus, arbitral tribunals are to accept the factual premises as alleged by claimants,[13] unless these factual premises are "*plainly without any foundation*"[14] or "*incredible, frivolous, vexatious or inaccurate or made in bad faith*".[15] The Respondent agrees with this.[16]

15. Therefore, Angola has to show that the Tribunal has no jurisdiction *ratione temporis* to hear Mr Machado's claims, and it has to do so based on Mr Machado's factual allegations, unless these are plainly without any foundation or incredible, frivolous, vexatious or inaccurate or made in bad faith.

16. Some tribunals have considered a further question, which presents an additional hurdle for the Respondent. That is, the propriety of summary dismissal:[17]

> *"*[T]*his is not the same question as the standard to be applied by a tribunal in deciding whether or not the legal demerits of a claim are 'manifest'* […] *It is, rather, the question: when can a tribunal properly be satisfied that it is in possession of sufficient materials to decide the matter summarily? Here, a* ***balance*** *evidently has to be struck between* ***the right***

[11] **CLA-8**, *PNG Sustainable Development Program Ltd. v. Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on Respondent's Objections under Rule 41(5), 28 October 2014, ¶91, p. 28.
[12] Respondent's Rule 41 Submission, ¶¶112-113, p. 32.
[13] **RL-0007**, *Brandes Investment Partners v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules, 2 February 2009, ¶61, p. 9.
[14] **CLA-11**, *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Republic of Hungary*, ICSID Case No. ARB/12/2, Decision on Respondent's Objection Under ICSID Arbitration Rule 41(5), 11 March 2013, ¶26, p. 7; **CLA-12**, *Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait*, ICSID Case No. ARB/18/2, Award on the Respondent's Application under Rule 41(5) of the ICSID Arbitration Rules, 1 November 2019, ¶33, p. 14.
[15] **RL-0003**, *Trans-Global Petroleum, Inc v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Tribunal's Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008, ¶96, p. 30. *See also* **CLA-7**, *AFC Investment Solutions S.L. v. Republic of Colombia*, ICSID Case No. ARB/20/16, Award on Respondent's Preliminary Objection Under Rule 41(5) of the ICSID Arbitration Rules (with informal English translation), 24 February 2022, ¶174, p. 123.
[16] Respondent's Rule 41 Submission, ¶¶ 113-114, pp. 32-33.
[17] **RL-0004**, *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, 1 December 2010, ¶34, p. 9 (emphasis added).

> *(however qualified) given to the objecting party under Rule 41(5)* ***to have a patently unmeritorious claim disposed of before unnecessary trouble and expense is incurred in defending it, and the duty of the tribunal to meet the requirements of due process****".*

17. In order to strike the balance between a respondent's right to have an unmeritorious claim dismissed and the requirements of due process, the tribunals in *Global Trading v. Ukraine* and *AHG Industry v. Iraq* asked themselves whether they had considered all relevant materials before reaching a decision, and what other materials could be brought by the claimants if the questions at issue were to be left to a later stage in the proceedings.[18]

18. Thus, the fact that the Claimant will be able to introduce, at a later stage, further factual evidence in support of the legal merit of its claim tilts the balance even more in favour of dismissing the Respondent's Rule 41 Submission. As discussed in section IV.A.2 below, there are certain factual issues material to this dispute of which only the Respondent has knowledge and evidence. Mr Machado will only be able to gain access to such information and evidence if produced by the Respondent at a later stage of the proceedings, be it voluntarily or following a document production order.

B. Manifestness

19. Secondly, in order to prove that the claims are "*manifestly*" without legal merit, the Respondent must establish its objections "*clearly and obviously*".[19] Given the sophistication of investment arbitration proceedings, this exercise may not be simple. It could require, for example, successive rounds of written or oral submissions. However, it should not be difficult.[20]

20. The Respondent notes that, in *AHG Industry v. Iraq*, the arbitral tribunal found that it manifestly lacked jurisdiction because the Iraq-Germany BIT had not entered into force, and because all the other grounds alleged by the claimant to uphold jurisdiction were manifestly meritless.[21]

21. Whilst the tribunal found in favour of the Republic of Iraq, *AGH Industry v. Iraq* can be distinguished from the present case. In *AGH Industry v. Iraq*, the tribunal did *not* have to analyse whether the facts giving rise to the dispute occurred before

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[18] **RL-0004**, *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, 1 December 2010, ¶34, p. 9; **RL-0005**, *AHG Industry GmbH&Co.KG v. Republic of Iraq*, ICSID Case No. ARB/20/21, Award on the Respondent's Application Under ICSID Rule 41(5), 30 September 2022, ¶228, pp. 72-73.

[19] **RL-0003**, *Trans-Global Petroleum, Inc v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Tribunal's Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008, ¶88, p. 28.

[20] Respondent's Rule 41 Submission, ¶¶108-110, pp. 31-32; **RL-0003**, *Trans-Global Petroleum, Inc v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Tribunal's Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules, 12 May 2008, ¶88, p. 28.

[21] Respondent's Rule 41 Submission, ¶109, p. 31-32.

or after the BIT entered into force, nor did it need to discuss the potential legal implications of such findings. At the time of the dispute, Germany had not ratified the Germany-Iraq BIT, so the treaty had *never* entered into force. It was therefore evident that there was no consent to arbitration, unlike in the present case.[22]

III. The Claimant's case

22. As per the standard set out in the preceding section, the Tribunal ought to ascertain the legal merit of the Claimant's position on jurisdiction on the basis of the facts *as alleged by the Claimant*, unless such facts alleged by the Claimant are plainly without any foundation.

23. Mr Machado has alleged certain facts, falling within a certain time period, which, in his view, constitute breaches by the Respondent of standards of protection under the BIT. However, the Respondent has put forward other alleged facts, falling within a different time period, which, in the Respondent's view, could also constitute breaches of the BIT but do not fall under its temporal scope, namely, certain actions supposedly carried out by Angola before the entry into force of the BIT, on 22 December 2021. The Respondent has created a strawman to attempt to knock down but has failed to enfeeble the Claimant's actual case.

24. Thus, it is essential that the Tribunal distinguish between the facts that form the basis of Mr Machado's claims and the facts that merely provide context, are inaccurate or are otherwise irrelevant.

25. In this regard, it should be stressed that if the different –earlier– facts alleged by the Respondent were to lead to disprove the facts actually alleged by Mr Machado or otherwise lead to the conclusion that there was no breach of treaty standards, this would bring about a dismissal of the Claimant's claims *on the merits*, *e.g.*, the Tribunal would eventually find that the facts alleged by Mr Machado were not proven and/or do not constitute an expropriation under the BIT. However, such a finding would *not* result in the Tribunal lacking jurisdiction *ratione temporis*. Notably, the Respondent has based its Rule 41 Submission solely on the Tribunal's supposed manifest lack of jurisdiction *ratione temporis*. Accordingly, any finding at this stage regarding the legal merit of the Claimant's claims *on the merits* cannot support the Respondent's Rule 41 Submission.

A. The background to the relevant facts

26. The facts described in this section are provided as background. Mr Machado does not assert that any of these facts constitute breaches of the BIT.

[22] **RL-0005**, *AHG Industry GmbH&Co.KG v. Republic of Iraq*, ICSID Case No. ARB/20/21, Award on the Respondent's Application Under ICSID Rule 41(5), 30 September 2022, ¶¶68-77, pp. 20-22.

1. 2016-2019: the early years of the investment and the termination of the Contracts by Angola

27. In 2016 and 2017, Angola faced significant challenges in its national energy supply as its generation capacity struggled to meet growing demand. In response, Angola sought to modernise and diversify its energy sector.

28. As part of this new initiative, by way of the Public Procurement Law of Angola, Ministry of Energy and Water of Angola ("**MINEA**") hired Aenergy, the Claimant's company, in its capacity as General Electric ("**GE**")'s exclusive distributor in Angola of power generation equipment (turbines, generators, transformers, rotors, other accessory equipment, consumables and spare parts), essentially but not exclusively manufactured by GE, and related services.

29. In 2017, thirteen contracts (the "**Contracts**") were signed between Angola and Aenergy, for a total of USD 1,148,531,741, which Angola financed by means of a loan agreement (the "**Credit Facility**") provided by GE Capital EFS Financing Inc. ("**GE Capital**").[23] The scope of these Contracts included, among other goods and services, the supply and installation by Aenergy of eight GE TM2500 turbines, distributed among several projects in Angola.

30. Although the initial execution of the Contracts went smoothly, from December 2018 Angola and Aenergy's relationship rapidly deteriorated. A series of irregularities involving the CEO of GE Power Angola, Wilson da Costa, drove the Respondent to terminate the Contracts unilaterally.[24]

31. To provide some context, in 2017, Aenergy had purchased from GE six more turbines than Angola had requested (a total of fourteen), supported by Aenergy's exclusive distributorship agreement for GE power generation equipment in Angola. This acquisition was aligned with Aenergy's and GE's broader commercial objectives within the Angolan market, since MINEA had adopted a long-term plan to reform and modernise its energy market. Therefore, Aenergy sought to secure additional turbines to stay ahead of potential future projects in Angola, expecting to be able to sell them to MINEA later. The risk was reasonable given Angola's growing needs in the energy market and the very favourable conditions stipulated in the supply contracts with GE ("**Supply Contracts**").

32. However, GE falsely led Angola to believe that Aenergy had used the Credit Facility to finance twelve turbines, instead of the contractually agreed eight. Under

[23] **C-6**, Presidential Order No. 161/17 authorizing funding of USD 1,100,000,000 for the 13 Contracts between Aenergy and Angola (with informal translation into English), 5 July 2017.
[24] **C-11**, Presidential Order No. 155/19 on the unilateral termination of the 13 Contracts between Aenergy and Angola (with informal translation into English), 23 August 2019, p.4; **C-12**, MINEA's Unilateral Termination Decision (with informal translation into English), 30 September 2019, ¶8, p. 11.

this false premise of wrongdoing by Aenergy, Angola terminated the Contracts.[25] However, it was not Aenergy who had engaged in wrongdoing but GE. In fact, GE's Mr da Costa, who was the main point of contact with Angola for the duration of this project, was later accused and recently convicted in a U.S. federal court of fraud and identity theft for forging documents on Angolan government letterhead.[26] The forged documents falsely indicated the Angolan government's approval to purchase four additional turbines manufactured by GE, for a total of twelve.[27] This misrepresentation by Mr da Costa allowed GE Capital to meet its internal credit requirements and move forward with the funding to Angola. These four additional turbines are the subject of the current dispute.

2. 2019-2022: the Four Turbines were held in preventive seizure

33. In November 2019, Angola filed a request before the Provincial Court of Luanda, alleging that Aenergy had committed misconduct in connection with the Credit Facility provided by GE Capital. Although Aenergy had never been a party to the Credit Facility,[28] Angola requested the preventive seizure of Aenergy's Four Turbines on the grounds that it was their rightful owner.[29]

34. In December 2019, the Provincial Court of Luanda granted Angola's request for preventive seizure and appointed IGAPE as the trustee.[30] As per the court's orders, IGAPE's role was to preserve and safeguard the Four Turbines on behalf of the Provincial Court of Luanda until a final decision was rendered in the main proceedings,[31] which Angola initiated in March 2020.[32]

35. At the end of 2020, Aenergy discovered that, instead of being kept in IGAPE's premises, the turbines were stored at the premises of *Empresa Pública de Produção*

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[25] **C-11**, Presidential Order No. 155/19 on the unilateral termination of the 13 Contracts between Aenergy and Angola (with informal translation into English), 23 August 2019, p.4; **C-12**, MINEA's Unilateral Termination Decision (with informal translation into English), 30 September 2019, ¶¶6-8, pp. 10-11.

[26] **C-13**, SDNY Grand Jury Indictment against Wilson da Costa, 17 January 2023; **C-28**, *"Former GE Exec Guilty Of Faking Docs In $1.1B Power Deal"*, Law360, 18 November 2024.

[27] Aenergy actively cooperated with U.S. prosecutors by providing key documentation relevant to the case. Additionally, two of its former executives served as critical witnesses for the U.S. Government during Mr da Costa's trial.

[28] **R-0001**, Facility Agreement (extract), 21 August 2017.

[29] **C-15**, Request for preventive seizure of Aenergy's Four Turbines (with informal translation into English), 4 October 2019. As Angola has recently explained, the right affirmed in this request is a right to acquire the turbines as opposed to a right of ownership of the turbines. *See* **C-16**, Angola's response to Mr Machado's notification for the amicable settlement of the dispute (with informal translation into English), 8 December 2022, ¶24, p. 13.

[30] **C-17**, Ruling of the Provincial Court of Luanda on the preventive seizure of Aenergy's Four Turbines (with informal translation into English), 5 December 2019, ¶6, p. 31.

[31] **C-17**, Ruling of the Provincial Court of Luanda on the preventive seizure of Aenergy's Four Turbines (with informal translation into English), 5 December 2019, ¶6, p. 31; **C-18**, Order of the Provincial Court of Luanda for the preventive seizure of Aenergy's Four Turbines (with informal translation into English), 6 December 2019.

[32] **C-19**, Angola's lawsuit against Aenergy, filed in the Provincial Court of Luanda (with informal translation into English), 2 March 2020.

de Eletricidade ("**PRODEL**"),[33] a public company supervised by MINEA. At that time and based on circumstantial evidence, Aenergy also suspected that PRODEL might have intended to install the turbines in state-owned power plants, although Aenergy could not confirm whether they were installed.[34]

36. In the meantime, the main proceedings initiated by Angola showed no progress, and by 2022, the Provincial Court of Luanda had yet to take any action.

B. The facts that constitute breaches of the BIT as per the Claimant's case

37. The facts described in the foregoing subsection were the subject of certain court proceedings in the U.S. not involving Mr Machado as a party, but Angola and Aenergy, among other parties. In those court proceedings Aenergy maintained that the order of preventive seizure issued by the Provincial Court of Luanda was illegal.

38. Unlike Aenergy's case before the U.S. courts, Mr Machado does not invoke here any illegality of the order of preventive seizure. The Claimant's claims are based on a *de facto* expropriation by the Respondent's acts carried out subsequently, from 2022 onwards. It was in that period that the Four Turbines were installed by Angola in state-owned power plants, and thus removed from judicial custody, aided and abetted by Angola's public authorities, which failed to comply with their custodial duties (IGAPE) and to exercise their judicial authority (the Provincial Court of Luanda). Beyond their dereliction of duties, these public authorities engaged in concealment by disregarding Aenergy's repeated requests for information on the turbines' whereabouts, status, and maintenance conditions.

39. These latter facts, on which Mr Machado's claims are based, are set out in the present section.

1. 2022: Angola installed and deployed the Four Turbines in its power plants

40. A preventive seizure is a precautionary measure intended to protect assets and ensure their availability for execution, should the court ultimately order realisation. The trustee, serving as the custodian of these assets, plays a crucial role in safeguarding them by preventing any loss, unauthorised disposal, or destruction. However, during 2022, Angola installed the Four Turbines in state-owned power

[33] **C-29**, Letter on the transportation of the Four Turbines and Google Earth images, 30 November 2020, p. 5.
[34] *See* ¶¶176-178 below.

plants, while IGAPE failed to fulfil its court mandated duty[35] and the Provincial Court of Luanda abdicated its judicial custodial authority.

41. As explained above, Aenergy purchased six extra turbines from GE, which were not within the scope of the Contracts.[36] All six turbines, which include the Four Turbines, are the property of Aenergy and have been seized by Angola.[37] The Claimant believes that all six turbines have been installed in three state-owned power plants located in the provinces of Lubango, Cunene and Cabinda in 2022.[38] The Claimant ignores the precise moment the Four Turbines were installed in Angola's state-owned power plants, or which turbines were installed in which power plant.

42. Since the Four Turbines were preventively seized, the Claimant has had no physical access to them and no means of accurately ascertaining their whereabouts. However, the Claimant has obtained fragmentary information that strongly indicates that the Four Turbines were installed and connected to the power grid during the spring and summer of 2022:

    (i) The authorisation to initiate the emergency contracting procedure for the provision of services related to the installation and deployment of the Four Turbines approved in October 2021,[39] with the expenses associated with these contracts to be covered by internal resources of PRODEL.[40]

    (ii) Presidential Order No. 60/22, issued on 16 March 2022, which amended the authorisation to initiate the emergency contracting procedure by revoking the use of PRODEL's own resources for the payment of the turbines' installation. Instead, it mandated the use of the central Angolan State's ordinary resources and integrated these projects into the 2022 Public Investment Program ("**PIP**").[41] This modification altered the financing method and thus enabled

[35] Under Angolan law, IGAPE's duties are to safeguard the seized assets, to immediately notify the depositor when it becomes aware of any danger threatening the asset, to manage it with the diligence and zeal of a good family man while bearing the obligation to provide proper accountability for them. **CLA-13**, Civil Procedure Code of Angola, 28 December 1961, article 843(1); **CLA-14**, Civil Code of Angola, 25 November 1966, article 1187.
[36] *See* ¶31 above.
[37] The other two turbines were seized in a different proceeding.
[38] *See* **C-21**, Presidential Order No. 177/21 authorising the opening of a public procurement procedure for various works at thermoelectric power plants (with informal translation into English), 26 October 2021, pp. 3-4; **C-30**, Press release announcing the installation of two turbines in the Malembo Power Plant (with informal translation into English), 15 August 2022; **C-31**, Extract from GRD website indicating installation of two turbines in the Odjiva Power Plant, 1 May 2022. *See also*, ¶¶43-46 below.
[39] **C-21**, Presidential Order No. 177/21 authorising the opening of a public procurement procedure for various works at thermoelectric power plants (with informal translation into English), 26 October 2021.
[40] **C-21**, Presidential Order No. 177/21 authorising the opening of a public procurement procedure for various works at thermoelectric power plants (with informal translation into English), 26 October 2021, ¶3, p. 4.
[41] **C-22**, Presidential Order No. 60/22 for the execution of projects with ordinary resources of the Angolan State and their inclusion in the Public Investment Program "PIP" (with informal translation into English), 16 March 2022.

the execution of the corresponding contracts, which could not be executed without budgeting the associated expenses.

(iii) MINEA's press release referencing the Minister's visit to inspect the Ondjiva thermal power plant in Cunene (the "**Ondjiva Power Plant**"), comprised of two 25 MW turbines on 18 March 2022.[42]

(iv) Information published on the website of GRD Services, the company in charge of the installation, regarding the installation of two TM25000 GEN8 turbines at the Ondjiva Power Plant, indicating May 2022 as the installation date.[43]

(v) A press release published in August 2022 in CIAM, an Angolan government press institution, regarding the installation of two TM25000 GEN8 turbines at the Malembo thermal power plant in Cabinda (the "**Malembo Power Plant**"), indicating that they had arrived a week earlier.[44]

43. Based on this fragmentary information, Mr Machado reasonably assumes that the Four Turbines were installed in 2022, namely:

(i) Two of them, in May 2022, in the Ondjiva Power Plant, as follows from:

(a) MINEA's announcement, of 18 March 2022, of the installation of two 25 MW GE TM2500 GEN8 turbines (with the same specifications as the Four Turbines) in the Ondjiva Power Plant.[45] Specifically, the public authorities announced that "*PRODEL's thermal power plant, made up of two 25 MW turbines each,* […] ***after being complete, will mean*** *that the towns of Ondjiva, Santa Clara and Namacunde will no longer be dependent on the supply contract with neighbour Namibia*".[46] This shows that, on 18 March 2022, the installation of these two turbines was planned but not yet completed.

[42] **C-20**, MINEA's assessment of installation works in the Ondjiva Power Plant (with informal translation into English), 18 March 2022.
[43] **C-31**, Extract from GRD website indicating installation of two turbines in the Odjiva Power Plant, 1 May 2022.
[44] **C-30**, Press release announcing the installation of two turbines in the Malembo Power Plant (with informal translation into English), 15 August 2022.
[45] **C-20**, MINEA's assessment of installation works in the Ondjiva Power Plant (with informal translation into English), 18 March 2022.
[46] **C-20**, MINEA's assessment of installation works in the Ondjiva Power Plant (with informal translation into English), 18 March 2022, p. 4 (emphasis added).

(b) The statement by GRD Services, the company in charge of the installation, that the installation of the turbines in the Ondjiva Power Plant was completed in May 2022.[47]

(ii) The other two turbines, in August 2022, in the Malembo Power Plant, as follows from the press release published on 15 August 2022 by CIAM, an Angolan government press institution, regarding the installation of two TM25000 GEN8 turbines at the Malembo Power Plant, stating that they had arrived a week earlier.[48]

44. Before gaining access to the information described above, in November 2020 the Claimant had discovered, through satellite images from Google Earth, that Angola had been pursuing preparatory works for the installation of two turbines in a power plant in Lubango (the "**Lubango Power Plant**").[49] Angola had built concrete platforms where the Claimant reasonably believed that Angola might install two turbines. However, the Claimant does not know whether any turbines were ultimately installed in that power plant.

45. As mentioned,[50] in October 2021, Presidential Order no. 177/21 had been issued, which mandated, among other things, the opening of an emergency contracting procedure for the installation of turbines with the same specifications as the Four Turbines in the Ondjiva Power Plant, the Malembo Power Plant and the Lubango Power Plant, and authorised the corresponding expenditures.[51] This alone, renders it highly likely that the installation of the turbines in all three power plants took place during 2022, considering the time needed to carry out the contracting procedure, the award of the contract and the actual execution of the works. As explained above, this is indeed confirmed for the Ondjiva Power Plant and the Malembo Power Plant but can also be reasonably assumed for the Lubango Power Plant, on which the Claimant has no further evidence in its possession.

46. Additionally, Presidential Order no. 60/22, of March 2022, stipulated that all expenditures related to the works authorised in Presidential Order no. 177/21 were to be financed using state resources and incorporated into the PIP.[52] This adjustment restructured the financing method and thus enabled the execution of the installation contracts by the relevant contracting entity, which had been contingent on the

[47] **C-31**, Extract from GRD website indicating installation of two turbines in the Odjiva Power Plant, 1 May 2022.
[48] **C-30**, Press release announcing the installation of two turbines in the Malembo Power Plant (with informal translation into English), 15 August 2022, p. 6.
[49] *See* **C-29**, Letter on the transportation of the Four Turbines and Google Earth images, 30 November 2020, Exhibit D, p. 7.
[50] *See* ¶42(i) above.
[51] **C-21**, Presidential Order No. 177/21 authorising the opening of a public procurement procedure for various works at thermoelectric power plants (with informal translation into English), 26 October 2021.
[52] **C-22**, Presidential Order No. 60/22 for the execution of projects with ordinary resources of the Angolan State and their inclusion in the Public Investment Program "PIP" (with informal translation into English), 16 March 2022.

proper budgeting and allocation of the associated expenses. The respective contracts for the installation of the Four Turbines in state-owned power plants could not be executed before, nor could the services and their corresponding payments been completed at that time. Further proof of this is the wording of the decree itself: it does not refer to services already performed, and payments were contemplated as public investments for 2022.

47. Furthermore, between 5 December 2019 (the date the Four Turbines were seized) and 26 October 2021 (the date of Presidential Order No. 177/2021, which authorised the initiation of an emergency procedure for their installation, later supplemented by Presidential Order No. 60/2022 on 16 March 2022), no contracting procedure had been initiated in Angola for the installation of TM2500 turbines matching the specifications of the Four Turbines. Additionally, no information regarding the Four Turbines surfaced in the public domain during this period.

48. Moreover, under Angolan procurement law, the installation of the Four Turbines would be considered both formally and materially illegal if not preceded by a presidential authorisation, including the explicit allocation of financial resources. The completion of such authorisation was only granted on 16 March 2022, through Presidential Order No. 60/2022, which revoked the financing envisaged in the previous presidential order. It should be stressed that any prior actions related to the Four Turbines, including their installation, went completely unnoticed for Aenergy. No communication was directed at Aenergy, who only became aware of their likely use by Angola through these presidential orders (which by their nature are not specifically directed at Aenergy).

49. Neither presidential order acknowledged that the Four Turbines were Aenergy's property, nor that they were under preventive seizure by the Provincial Court of Luanda. The presidential orders did not indicate that the installation had been preceded by any judicial authorisation either. All these actions were carried out as if the Four Turbines were the property of the Angolan State.

2. 2022 to date: Angola concealed and keeps on concealing the taking of the Four Turbines

50. After Aenergy became aware of MINEA's announcement regarding the installation of several TM2500 GE turbines with the same specifications as the Four Turbines, and of the decrees regarding the contracts for their deployment in Angola's power plants, the suspicion that the turbines had been or were about to be installed thickened.

51. Faced with this situation, on 22 April 2022, Aenergy filed its first two requests for information regarding the "*current whereabouts of the seized assets, their storage conditions and their state of conservation and maintenance*" with the Provincial

Court of Luanda, as well as with the chairman of IGAPE's board of directors.[53] Neither has provided an answer until the present day. Subsequently, on 24 May 2022, Aenergy submitted another request for information to the Provincial Court of Luanda, which also went unanswered.[54] Close to three years later, all three requests remain unanswered.

52. As a consequence of the Angolan authorities' opaqueness, Mr Machado is unable to obtain any explanations for the fact that the Four Turbines have been installed and are being used by PRODEL, instead of being under the control of the trustee, in perfect conditions of preservation and maintenance.

53. On 9 June 2022, Mr Machado presented Angola with its notice of dispute under the Angola-Portugal BIT ("**Notice of Dispute**"). In the Notice of Dispute, Mr Machado once again highlighted the lack of explanations about the current whereabouts of the Four Turbines.[55]

54. In response, Angola indicated that "*due to the social function that* [the turbines] *may perform*" they must not "*remain inactive*".[56] According to the Respondent, this "*contributes to avoid* […] *decay*".[57] Angola stated that, for that reason, it had decided "*to deploy the turbines in a power producing plant*",[58] while failing to specify, once more, where they were located, when they had been installed or in which condition they were.

55. As a consequence, the Claimant was left with no option but to commence this arbitration to seek a prompt, adequate and effective compensation for the unlawful expropriation of its turbines.

IV. The facts on which the Claimant's claims are premised are not plainly without any foundation or incredible, frivolous, vexatious or inaccurate or made in bad faith

56. As explained above,[59] the Claimant bases his claims for breaches of the BIT on actions taken by Angola in 2022, namely the installation of the Four Turbines in

[53] **C-23**, Aenergy's request to the Provincial Court of Luanda (with informal translation into English), 22 April 2022, ¶4, p. 4; **C-24**, Letter from Aenergy to IGAPE (with informal translation into English), 22 April 2022.
[54] **C-25**, Aenergy's request to the Provincial Court of Luanda (with informal translation into English), 24 May 2022.
[55] **C-26**, Notification from Mr Machado to Angola for the amicable settlement of the dispute (with informal translation into English), 9 June 2022, p. 44.
[56] **C-16**, Angola's response to Mr Machado's notification for the amicable settlement of the dispute (with informal translation into English), 8 December 2022, ¶25, p. 13.
[57] **C-16**, Angola's response to Mr Machado's notification for the amicable settlement of the dispute (with informal translation into English), 8 December 2022, ¶25, p. 13.
[58] **C-16**, Angola's response to Mr Machado's notification for the amicable settlement of the dispute (with informal translation into English), 8 December 2022, ¶26, p. 13.
[59] *See* section III.B above.

state-owned power plants and their connection to the power grid, as well as IGAPE's and the Provincial Court of Luanda's acts and omissions in that period.

57. Angola has challenged the Claimant's account of these actions as follows:

(i) It asserts that the installation of the Four Turbines already occurred in 2021.

(ii) It contends that the Claimant has "*fabricated*" and/or "*manipulated*" IGAPE's and the Provincial Court of Luanda's acts and omissions.

58. We will first address the timing of the installation of the Four Turbines, to show that the Claimant's factual allegations in this regard fail, by a long stretch, to meet the test of being plainly without any foundation or incredible, frivolous, vexatious or inaccurate or made in bad faith (section IV.A).

59. Thereafter, we will deal with the charge of fabrication/manipulation of IGAPE's and the Provincial Court of Luanda's acts and omissions (section IV.B).

A. The Claimant's factual allegations on the timing of the installation of the Four Turbines are sufficiently substantiated

1. Mr Machado ignores the exact moment the Four Turbines were installed in the Respondent's plants, but he makes a substantiated allegation that this occurred after entry into force of the BIT

60. As explained before,[60] the Claimant ignores the precise moment when the Four Turbines were installed in Angola's state-owned power plants, or which turbines were installed in which power plant. Since the moment the Four Turbines were preventively seized, the Claimant has had no physical access to them and no sure means of ascertaining their whereabouts.

61. It is the Respondent who has this information, given that its own public authorities had custody over the Four Turbines following their preventive seizure and, thus, at the time of their installation. Moreover, the Four Turbines were installed in Angola's own state-owned power plants.[61]

62. The Claimant has made repeated requests for information about the whereabouts of the Four Turbines.[62] However, Angola's authorities have remained silent and have

[60] *See* ¶¶41-42 above.
[61] **C-31**, Extract from GRD website indicating installation of two turbines in the Odjiva Power Plant, 1 May 2022; **C-30**, Press release announcing the installation of two turbines in the Malembo Power Plant (with informal translation into English), 15 August 2022.
[62] **C-23**, Aenergy's request to the Provincial Court of Luanda (with informal translation into English), 22 April 2022; **C-24**, Letter from Aenergy to IGAPE (with informal translation into English), 22 April 2022;

failed to disclose any information pertaining to the Claimant's requests. Strikingly, the Respondent maintains its silence in the present arbitration and still does not clarify when and where the Four Turbines were installed.

63. Instead of shedding light on this issue, in its Rule 41 Submission the Respondent alleges, without any specificity or proof, that the installation occurred between 2019 and 2021.[63] The Respondent's attitude is telling given that it could easily substantiate when, where and how each of the Four Turbines was installed.

64. In contrast, the Claimant has submitted all the evidence and information at his disposal to substantiate his claim that the expropriation took place after the BIT entered into force. This is sufficient, at the very least for the purposes of Rule 41, to support the Claimant's allegation that the Four Turbines were installed and connected to the power grid during the spring and summer of 2022, and to refute the Respondent's glib allegation, made without any evidence whatsoever, that this occurred at some point between 2019 and 2021.

65. If the Respondent insists on suppressing the information and evidence on the installation, whereabouts and maintenance conditions of the Four Turbines, such evidence will be the subject of document production in the merits phase of this arbitration. What is clear at this stage is that the Claimant's factual allegations on the timing of the installation of the Four Turbines are not "*plainly without any foundation*"[64] or "*incredible, frivolous, vexatious or inaccurate or made in bad faith*".[65]

2. The Respondent bears the burden of proof regarding the timing of installation of the Four Turbines in the Respondent's plants

66. The Claimant has already laid out Angola's burden of proof for its jurisdictional objection under Rule 41, which includes the burden regarding its alternative account of the timing of installation.

67. It should be noted, however, that the burden of proving Angola's alternative factual allegations on the timing of the installation lies with Angola not only in the context

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C-25, Aenergy's request to the Provincial Court of Luanda (with informal translation into English), 24 May 2022.

[63] Respondent's Rule 41 Submission, ¶15, p. 6.

[64] **CLA-11**, *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Republic of Hungary*, ICSID Case No. ARB/12/2, Decision on Respondent's Objection Under ICSID Arbitration Rule 41(5), 11 March 2013, ¶26, p. 7; **CLA-12**, *Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait*, ICSID Case No. ARB/18/2, Award on the Respondent's Application under Rule 41(5) of the ICSID Arbitration Rules, 1 November 2019, ¶33, p. 14.

[65] Respondent's Rule 41 Submission, ¶141, p. 41.

of the summary decision on its Rule 41 Submission but also for the final plenary decision on the merits.

68. Generally, when a party introduces new allegations, such as the alleged alternative dates of installation of the Four Turbines, it assumes the burden of proving those allegations.[66] As articulated by the tribunal in *Rompetrol v. Romania*:[67]

> *"*[I]*f the respondent chooses to put forward fresh allegations of its own in order to counter or undermine the claimant's case, then by doing so the respondent takes upon itself the burden of proving what it has alleged".*

69. Additionally, as explained previously, Angola is in a much better position to prove when and where it installed the Four Turbines.

70. Civil law jurisdictions recognise the principle that the party best positioned to prove a fact bears the burden of proving it. Common law jurisdictions and, generally, ICSID tribunals, reach the same result by making adverse inferences from the a party's failure to prove a certain fact which it is better positioned to prove. As stated by the ICJ in the *Corfu Channel Case*:[68]

> *"*[T]*he fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions".*

71. It is undisputed that the Claimant has sought information from the Angolan authorities regarding the whereabouts of the Four Turbines on repeated occasions, to no avail.[69] It is also undisputed that Angola installed the Four Turbines in its

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[66] **CLA-15**, Evidence in International Investment Arbitration, Frédéric G Sourgens, Kabir AN Duggal, Ian A Lair, Oxford University Press, 2018, Chapter 2, 1 January 2018, ¶2.53, p. 43; **CLA-16**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Jurisdiction and Admissibility, 18 April 2008, ¶75, p. 24; **CLA-17**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, ¶179, p. 91; **CLA-18**, *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Award, 10 February 2012, ¶79, p. 22; **CLA-19**, *Vito G. Gallo v. Government of Canada*, PCA Case No. 2008-03, Award, 15 September 2011, ¶277, p. 53; **CLA-20**, *Alpha Projektholding v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, ¶236, p. 84; **CLA-21**, *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, ¶315, p. 81; **CLA-22**, *Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador (I)*, PCA Case No. 2007-02/AA277, Interim Award, 1 December 2008, ¶138, p. 79.

[67] **CLA-17**, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, ¶179, p. 91 (emphasis added).

[68] **CLA-23**, *Corfu Channel case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, International Court of Justice, Judgement, 9 April 1949, p. 18.

[69] **C-23**, Aenergy's request to the Provincial Court of Luanda (with informal translation into English), 22 April 2022; **C-24**, Letter from Aenergy to IGAPE (with informal translation into English), 22 April 2022; **C-25**, Aenergy's request to the Provincial Court of Luanda (with informal translation into English), 24 May 2022.

power plants[70] and that it has the relevant information and evidence, since the Four Turbines were under its custody when they were installed in state-owned power plants.

72. Should the Respondent continue to refuse to produce the necessary evidence that would show when, where and how the Four Turbines were installed, the Tribunal should draw the inference that the Four Turbines were installed in 2022. Otherwise, Angola would be allowed to revert the burden of proof on the Claimant while also depriving the Claimant of his ability to substantiate its claim.[71]

B. The Claimant's factual allegations on Angola's concealment are not fabricated nor manipulated

73. The Respondent lightly posits that the Claimant has "*blatantly fabricated*" his allegation of a breach of Angola's obligation to answer in good faith Aenergy's information requests regarding the whereabouts of the seized turbines.[72] It also argues that the Claimant has tried to "*manipulate post-treaty facts*" to benefit from the BIT's lift of the temporal restriction by submitting three letters in 2022, while not providing the Angolan authorities sufficient time to respond before sending the Notice of Dispute.[73]

74. As explained above,[74] MINEA published a press release citing the Minister's visit to inspect the Ondjiva Power Plant on 18 March 2022. Aenergy suspected that the turbines referred to in the press article were in fact Aenergy's turbines and decided to file three requests for information between April and May 2022. This is not a manipulation of post-treaty facts, but a legitimate action by Aenergy to try to ascertain where its turbines were located.

75. Mr Machado rejects Angola's gratuitous attribution of mischievous intentions. Anyhow, Angola does not deny (i) that Aenergy sent the requests for information in question, nor (ii) that the Angolan authorities received them, nor (iii) that they failed to provide any reply. These facts are undisputed, and they evidence Angola's deliberate concealment from Aenergy and denial of due process. Hence, Angola's vitriolic accusations that the Claimant has engaged in "fabrications" and "manipulations" are utterly misguided. The Claimant has stated the facts as they occurred, and he has no influence on Angola's own choice to ignore Aenergy's pleadings for information about the fate of its Four Turbines.

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[70] **C-16**, Angola's response to Mr Machado's notification for the amicable settlement of the dispute (with informal translation into English), 8 December 2022, ¶26, p. 13.
[71] *See* **CLA-24**, Evidence in International Investment Arbitration, Frédéric G Sourgens, Kabir AN Duggal, Ian A Lair, Oxford University Press, 2018, Chapter 8, 1 January 2018, ¶8.43, p. 163.
[72] Respondent's Rule 41 Submission, ¶¶162-163, 170-172, pp. 47-49.
[73] Respondent's Rule 41 Submission, ¶¶171-172, p. 49.
[74] *See* ¶¶42(iii)and 43(i)(a) above.

76. Further, the Respondent argues that the Claimant only gave Angola 34 business days to respond to the information requests before filing the Notice of Dispute. This criticism is untenable. Article 159 of the Procedural Code of Angola provides that "*orders that are not merely procedural shall be issued within five days*"[75] and, as of now, close to three years after the requests were made, Angola has still not provided an answer to the requests.

V. The Tribunal does not manifestly lack *ratione temporis* jurisdiction to hear Mr Machado's case

77. The Tribunal has jurisdiction over this dispute, in accordance with article 25 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "**ICSID Convention**").

78. The Respondent is a signatory of the ICSID Convention. At all times material to this dispute, the Claimant has been a Portuguese citizen, that is, a national of another Contracting State. Further, by virtue of article 15(2)(c) of the BIT, the Respondent expressed its consent to submitting disputes concerning investments made lawfully by Portuguese investors in Angolan territory to arbitration, with the option of ICSID. Likewise, the Claimant expressed his consent to submit the present dispute to ICSID by filing the Request for Arbitration. Having done so more than six months after notifying the Respondent of the dispute and attempting negotiations,[76] Mr Machado has also complied with the cooling off period set out in article 15(2) of the BIT.[77] The Respondent disputes none of this.

79. Moreover, the Tribunal has jurisdiction *ratione temporis* over the dispute. In this regard, article 2(1) of the BIT stipulates:[78]

> *"This Agreement applies to all investments made by investors of one Party in the territory of the other Party, in accordance with the applicable law of the latter. However, it does not apply to disputes and/or claims arising from facts that occurred before its entry into force".*

80. The BIT applies to *all* investments, making no distinction between investments made before or after the BIT's entry into force. Thus, the Claimant's investment,

[75] **CLA-13**, Civil Procedure Code of Angola, 28 December 1961, article 159(2).
[76] The Claimant notified the Respondent of the dispute on 9 June 2022. The Respondent rejected any friendly settlement of the dispute via a letter dated 8 December 2022. Thus, the Claimant submitted his Request for Arbitration on 20 February 2024. *See* **C-26**, Notification from Mr Machado to Angola for the amicable settlement of the dispute (with informal translation into English), 9 June 2022; **C-16**, Angola's response to Mr Machado's notification for the amicable settlement of the dispute (with informal translation into English), 8 December 2022.
[77] *See* Request for Arbitration, section V, pp. 16-17.
[78] **CLA-25**, Consolidated text of the BIT with informal translation to English, 22 December 2021article 2(1).

which was made lawfully between June 2016 and June 2017,[79] is protected by the BIT.

81. Again, the Respondent does not dispute this. Instead, it puts forward that the 2008 version of the BIT (which is no longer in force) included a temporal restriction on investments.[80] Yet, this is evidently irrelevant, seeing as the Claimant has not invoked the 2008 version of the BIT.

82. Indeed, the Claimant agrees that the BIT does not apply retroactively. It is common ground between the Parties that, pursuant to article 2 of the BIT, claims that arise from facts that predate the BIT's entry into force are generally excluded. However, as explained above,[81] the facts giving rise to the Claimant's claims occurred after the BIT entered into force on 22 December 2021. The Claimant's claims are therefore not excluded by article 2 of the BIT.

83. It should be stressed again that it is the Claimant's prerogative to define its causes of action, *i.e.*, to submit the claims and factual allegations in support thereof which he deems appropriate. The Respondent may not swap out the Claimant's claims and factual allegations for different ones and then argue that other events, not put forward by the Claimant, do not fall within the Tribunal's jurisdiction.

84. The Claimant's case rests on a series of measures taken by Angola which have led to Angola's definitive appropriation of the Four Turbines. Since the Four Turbines were preventively seized and IGAPE was appointed as trustee to preserve and safeguard them,[82] Mr Machado has remained mostly in the dark. However, he obtained fragmentary information about certain events that occurred in 2022, namely the installation of the Four Turbines in Angola's power plants which wrested them from preventive custody, and the Angolan public authorities' actions and omissions during the process, including IGAPE's failure to maintain custody, the Provincial Court of Luanda's failure to exercise its judicial authority and control over the custody of the turbines, and both authorities' disregard of Aenergy's repeated requests for information on the whereabouts, status, and maintenance conditions of the Four Turbines.

85. The installation and deployment of the Four Turbines, together with the complete abdication of custodial responsibilities by the Provincial Court of Luanda and the depositary, IGAPE, settled the matter: the Four Turbines were no longer in

[79] **C-7**, GE notice of transfer of ownership to Aenergy, 30 June 2016; **C-8**, GE notice of transfer of ownership to Aenergy, 31 March 2017; **C-9**, GE notice of transfer of ownership to Aenergy, 29 June 2017; **C-10**, GE notice of transfer of ownership to Aenergy, 30 June 2017.
[80] Respondent's Rule 41 Submission, ¶121, p. 34.
[81] *See* section III.B.1 above.
[82] **C-18**, Order of the Provincial Court of Luanda for the preventive seizure of Aenergy's Four Turbines (with informal translation into English), 6 December 2019.

preventive custody but had been definitely appropriated by Angola. As explained, these actions post-date the entry into force of the BIT.[83]

VI. The Respondent's remaining merits arguments are irrelevant to its Rule 41 submission

86. It ought to be stressed, again, that whether the post-BIT facts alleged by the Claimant in fact constitute breaches of the BIT, *i.e.*, whether or not the Claimant's claims have *substantive* merit, is irrelevant for the purpose of evaluating the Respondent's Rule 41 Submission, which is grounded exclusively on the Tribunal's supposed lack of jurisdiction (*ratione temporis*).

87. However, out of an abundance of caution and for the sake of completeness, the Claimant will briefly set out its merits position on Angola's breaches of the BIT and will then address the Respondent's arguments on the merits, while reserving the right to fully develop its merits position in due course.

A. The breaches of the BIT asserted by the Claimant

1. Expropriation

88. Article 7(1) of the BIT prohibits expropriation, unless it is made for a public purpose and against payment of prompt, adequate and effective compensation; both direct expropriations and "*measure*[s] *having equivalent effect*", or indirect expropriations, are covered by the BIT:[84]

> *"The investments of investors of a Party shall not be nationalised, expropriated or otherwise subject to any other measure having equivalent effect to nationalisation or expropriation (hereinafter referred to as 'expropriation') in the territory of the other Party, except for purposes of public interest and against prompt, adequate and effective compensation. Expropriation shall be carried out on a non-discriminatory basis and in accordance with legal procedures".*

89. Article 7(4) of the BIT clarifies that the protection against unlawful expropriation extends to "*the assets of a company incorporated or constituted in accordance with* [the] *law in force and in which the investors* […] *hold assets, bonds or other forms of participation*".[85] Since the Four Turbines are assets of Aenergy, a company

[83] *See* ¶¶37-51 above.
[84] **CLA-25**, Consolidated text of the BIT with informal translation to English, 22 December 2021article 7(1).
[85] **CLA-25**, Consolidated text of the BIT with informal translation to English, 22 December 2021article 7(4).

constituted in accordance with the law of Angola and wholly owned by the Claimant,[86] article 7 of the BIT applies.

90. An expropriation is a governmental taking of property for which compensation is required.[87] In international investment law, the traditional meaning of expropriation is generally understood as a direct taking of property by state authorities or the deprivation of an investor's property by state authorities.[88]

91. In the words of the tribunal in *SD Myers v. Canada*:[89]

> *"In general, the term 'expropriation' carries with it the connotation of a 'taking' by a governmental-type authority of a person's 'property' with a view to transferring ownership of that property to another person, usually the authority that exercised its de jure or de facto power to do the 'taking'".*

92. A "*taking of property*" also encompasses:[90]

> *"*[A]*ny such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference".*

93. In a similar vein, in *Pope & Talbot v. Canada*, the tribunal explained that "*the test is whether* [the state's] *interference is sufficiently restrictive to conclude that the property has been 'taken' from the owner*".[91]

94. The Respondent does not dispute Aenergy's property rights in these proceedings; it admits that Aenergy was the rightful owner of the Four Turbines when they were expropriated and still is.[92] Indeed, in its response to the Notice of Dispute Angola averred that it "*has always acknowledged that the turbines in question are of Aenergy S.A.'s property*".[93]

95. During 2022, Angola finalised the necessary authorisations to initiate the procurement process for the contracts for the installation works and it then installed

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[86] **C-5**, Statement issued by Aenergy on the identity of its shareholders (with informal translation into English), 14 February 2004.
[87] **CLA-26**, International Investment Arbitration Substantive Principles (Second Edition), Oxford International Arbitration Series, Campbell McLachlan, Laurence Shore, 2017, Chapter 8, ¶8.03, p. 360.
[88] **CLA-26**, International Investment Arbitration Substantive Principles (Second Edition), Oxford International Arbitration Series, Campbell McLachlan, Laurence Shore, 2017, Chapter 8, ¶8.68, p. 380.
[89] **CLA-27**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, ¶280, p. 69.
[90] **CLA-28**, Draft Convention on the International Responsibility of States for Injuries to Aliens, Yearbook of the International Law Commission, 1969, Vol.II, article 10, p. 144.
[91] **CLA-29**, *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Interim Award, 26 June 2000, ¶102, p. 35.
[92] **C-16**, Angola's response to Mr Machado's notification for the amicable settlement of the dispute (with informal translation into English), 8 December 2022, ¶23, p. 13.
[93] **C-16**, Angola's response to Mr Machado's notification for the amicable settlement of the dispute (with informal translation into English), 8 December 2022, ¶23, p. 13.

the Four Turbines into the national grid, while IGAPE and the Provincial Court of Luanda failed to exercise their custodial duties and judicial authority, respectively. The Respondent has admitted that the Four Turbines have been deployed in state-owned power plants and are currently used to supply energy to the Angolan population.[94] This "*taking of property*" falls squarely within the definition of expropriation as understood in international investment law.[95]

96. Moreover, the Respondent has not given "*prompt, adequate and effective compensation*"[96] to the Claimant for the expropriation of his investment. This is not disputed. Therefore, the installation by Angola of the Four Turbines in its state-owned power plants, together with the dereliction of custodial responsibilities by the Provincial Court of Luanda and the depositary, IGAPE, constitutes an unlawful expropriation, in violation of article 7 of the BIT.

2. Fair and equitable treatment

97. Pursuant to article 4 of the BIT, Angola is required to accord the Claimant's investments "*fair and equitable treatment*".[97] Angola is also required to refrain from impairing the "*management, maintenance, use, enjoyment, or disposal*" of investments by "*arbitrary or discriminatory measures*".[98]

98. The BIT does not define what constitutes "*fair and equitable treatment*" ("**FET**"). It is generally accepted that this standard cannot be summarised in a precise statement of legal obligation.[99] As explained by Christoph Schreuer, "[t]*he principle of fair and equitable treatment allows for independent and objective third-party determination of this type of behaviour* ***on the basis of a flexible standard***" and that like any broad principle of law, "*it is susceptible of specification through judicial practice*".[100]

99. For example, the tribunal in *Swisslion v. Macedonia* found that, "*the* [FET] *standard basically ensures that the foreign investor is not unjustly treated, with due*

[94] **C-16**, Angola's response to Mr Machado's notification for the amicable settlement of the dispute (with informal translation into English), 8 December 2022, ¶26, p. 13.
[95] **CLA-27**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, ¶280, p. 69; **CLA-28**, Draft Convention on the International Responsibility of States for Injuries to Aliens, Yearbook of the International Law Commission, 1969, Vol.II, article 10, p. 144; **CLA-29**, *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Interim Award, 26 June 2000, ¶102, p. 35.
[96] **CLA-25**, Consolidated text of the BIT with informal translation to English, 22 December 2021article 7(1).
[97] **CLA-25**, Consolidated text of the BIT with informal translation to English, 22 December 2021article 4(2).
[98] **CLA-25**, Consolidated text of the BIT with informal translation to English, 22 December 2021article 4(3).
[99] *See* **CLA-30**, Fair and Equitable Treatment in Arbitral Practice, Christoph Schreuer, June 2005, p. 365.
[100] **CLA-30**, Fair and Equitable Treatment in Arbitral Practice, Christoph Schreuer, June 2005, p. 365 (emphasis added).

regard to all surrounding circumstances, and that it is a means to guarantee justice to foreign investors".[101]

100. In a similar vein, Rudolf Dolzer has expressed that this standard of protection is "*directly linked to the fundamental moral and legal grounding of the notion of fairness, anchored in a universally accepted sense of justice, but also in classic rules of customary law governing the protection of foreign nationals and companies*".[102]

101. However, bad faith is not required for there to be a violation of the FET standard. In this regard, the tribunal in *CMS v. Argentina* found that "*this is an objective requirement unrelated to whether the Respondent has had any deliberate intention or bad faith*".[103]

102. Through time, tribunals have contributed to the clarification of this standard, identifying certain types of conduct which constitute unfair and inequitable treatment. Generally, but not exclusively, these include (i) frustration of the investor's legitimate expectations,[104] (ii) violations of due process,[105] and (iii) measures that are arbitrary or discriminatory.[106]

103. Through a series of actions and omissions by its public authorities, the Respondent has breached the standard of FET, as well as the prohibition against discriminatory and arbitrary treatment established in article 4 of the BIT. Such conduct is attributable to the Respondent, in accordance with public international law.[107]

104. Specifically, IGAPE (the public company appointed as trustee of the preventively seized turbines) and the Provincial Court of Luanda (the judicial body overseeing the proceedings in which the preventive seizure of the Four Turbines was ordered) have failed to keep custody and preserve the Four Turbines, and to protect Aenergy's property rights.

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[101] **CLA-31**, *Swisslion DOO Skopje v. Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, 6 July 2012, ¶273, p. 88.
[102] **CLA-32**, Fair and Equitable Treatment: Today's Contours, Rudolf Dolzer, Santa Clara Journal of International Law, Vol. 12, 17 January 2014, p. 12.
[103] **CLA-33**, *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No ARB/01/8, Award, 12 May 2024, ¶280, p. 82.
[104] **CLA-34**, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, 5 November 2015, ¶7.75, p. 284 ("*It is widely accepted that the most important function of the fair and equitable treatment standard is the protection of the investor's reasonable and legitimate expectations*").
[105] **CLA-32**, Fair and Equitable Treatment: Today's Contours, Rudolf Dolzer, Santa Clara Journal of International Law, Vol. 12, 17 January 2014, p. 29 *("Fair procedure is a basic component of the rule of law and a vital element of FET*").
[106] **CLA-33**, *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No ARB/01/8, Award, 12 May 2024, ¶290, p. 84 ("*Any measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment*").
[107] **RL-0012**, International Law Commission's 2001 Articles on the Responsibility of States for Internationally Wrongful Acts, 12 December 2001, articles 4-5, pp. 2-3.

105. The Respondent installed the Four Turbines and connected them to the national grid, where they are being used to this day. Aenergy was never notified. This, in addition to an unlawful expropriation, constitutes a breach of the FET standard.

106. Further, IGAPE and the Provincial Court of Luanda have turned a deaf ear to Aenergy's repeated requests for information.[108]

a. Angola has frustrated the Claimant's legitimate expectations

107. The notion of legitimate expectations is one of the dominant elements of the FET standard.[109] As explained by the *Saluka v. Czech Republic* tribunal "[a] *foreign investor whose interests are protected under the Treaty is entitled to expect that the* [state] *will not act in a way that is manifestly inconsistent, non-transparent, unreasonable*".[110]

108. When Mr Machado –through his company Aenergy– invested in Angola in 2017, he had the legitimate expectation that Angola's executive and judiciary powers would abide by their own substantive and procedural laws, including the observance and enforcement of orders of preventive seizure issued by Angola's judiciary.

109. Pursuant to the Angolan Civil Procedure Code ("**CPC**"), the attachment of movable assets requires their seizure and placement under the custody of a judicial depositary.[111] In addition to the general obligations of a depositary under civil law –namely, preservation and safeguarding– the judicial depositary is legally required to hold the assets in trust with the diligence and zeal of a *bonus paterfamilias*. This includes a fiduciary duty to ensure their integrity and to give proper account.[112] Moreover, the depositary has the duty to furnish the seized movable assets upon judicial order.[113]

110. The CPC is very stringent on the use of seized property by the depositary. It only allows it exceptionally in the case of attached vessels, and only if both the party seeking enforcement and the enforcement debtor agree to it and a judicial authorisation is granted.[114] The exception is specific to vessels, but even if one were to draw an analogy between the installation of the Four Turbines and the operation

[108] **C-23**, Aenergy's request to the Provincial Court of Luanda (with informal translation into English), 22 April 2022; **C-24**, Letter from Aenergy to IGAPE (with informal translation into English), 22 April 2022; **C-25**, Aenergy's request to the Provincial Court of Luanda (with informal translation into English), 24 May 2022.
[109] **CLA-35**, *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶302, p. 65.
[110] **CLA-35**, *Saluka Investments BV v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶309, p. 67.
[111] **CLA-13**, Civil Procedure Code of Angola, 28 December 1961, article 848(1).
[112] **CLA-13**, Civil Procedure Code of Angola, 28 December 1961, article 843(1).
[113] **CLA-13**, Civil Procedure Code of Angola, 28 December 1961, article 854(1).
[114] **CLA-13**, Civil Procedure Code of Angola, 28 December 1961, article 852.

of an attached vessel, the use of the turbines would still have required prior judicial authorisation and consent of the parties involved, neither of which was given here.

111. In this case, all legal safeguards governing the seizure and deposit of movable assets were completely disregarded. Angola's government flagrantly and wilfully flouted the judicial order of preventive seizure and all applicable legal rules by wresting the Four Turbines from judicial custody and installing and using them in its own power plants without any judicial authorisation. Aenergy never knew of Angola's intentions, let alone agreed to the installation and use of its turbines in Angola's power plants.[115] All the while, the Provincial Court of Luanda, who had ordered the preventive seizure, as well as the public entity IGAPE, the court-designated depositary, looked on and chose to do nothing to prevent this outrage. Adding insult to injury, the Provincial Court of Luanda and IGAPE further aided the plunder by steadfastly ignoring Aenergy's repeated requests for information, in further breach of Angola's own rules of procedure. As explained above,[116] Angola had five days to answer these requests for information but has not yet provided any response after almost three years.

112. Mr Machado's legitimate expectations were utterly frustrated.

b. Angola has failed to grant the Claimant due process and to act transparently

113. Due process and transparency are further core elements of the FET standard.[117] The tribunal in *Lemire v. Ukraine* highlighted that "*whether due process has been denied to the investor*" and "*whether there is an absence of transparency in the legal procedure*" are two relevant factors to determine a breach of the FET treatment obligation.[118] In the present case, the two elements are linked.

114. In this regard, the *ADC v. Hungary* tribunal found that:[119]

> *"*[I]*n the expropriation context,* [due process] *demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it.* ***Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful****. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its*

[115] Damaging a seized asset is also typified as a crime in article 343 of the Criminal Code of Angola.
[116] *See* ¶19 above.
[117] **CLA-32**, Fair and Equitable Treatment: Today's Contours, Rudolf Dolzer, Santa Clara Journal of International Law, Vol. 12, 17 January 2014, pp. 29-30.
[118] **CLA-36**, *Joseph Charles Lemire v. Ukraine (II)*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶284, p. 59.
[119] **CLA-37**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, ¶435, p. 79 (emphasis added).

legitimate rights and have its claims heard. If no legal procedure of such nature exists at all, the argument that 'the actions are taken under due process of law' rings hollow".

115. In the same vein, different tribunals have recognized that "*due process breaches include not notifying the investor of hearings and that deciding in the investor's absence amounts to a gross violation of procedural rules*".[120]

116. The tribunal in *García Armas and García Gruber v. Venezuela* found that the lack of response to submissions made by the claimants in the proceedings that confirmed the preventive seizure of their investment, coupled with the permanent occupation of their investment, constituted a serious breach of due process, and consequently, a breach of the FET standard.[121]

117. Angola breached its obligations of due process and transparency when it installed the Four Turbines in local power plants and connected them to the national grid. Aenergy was never notified, nor, to Mr Machado's knowledge, was this measure the subject of any request, procedure or hearing before the Provincial Court of Luanda or elsewhere. Such unilateral and covert action denied Aenergy any participation in the process and any opportunity to challenge the decision or defend its rights and interests. The Respondent only admitted to installing the turbines in its power plants after the Claimant presented its Notice of Dispute.[122]

118. The Respondent mentions that it deployed the Four Turbines with the approval of the "*attorney general*".[123] The Respondent has not substantiated this claim or provided any proof of such authorisation. In any case, any supposed authorisation by the attorney general is irrelevant, as the Provincial Court of Luanda, in charge of the judicial proceeding and the preventive seizure was the only authority that could have validly issued such authorisation. And, in that case, the court should have first heard both parties. As explained above,[124] none of this occurred.

119. Not only did Angola fail to notify Aenergy of the installation of the turbines, but it also consistently refused to answer the requests for information on the whereabouts and storage conditions of the seized turbines.[125] This failure to respond constitutes a further breach of Angola's transparency and due process obligations.

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[120] **CLA-38**, *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award, 20 September 2021, ¶228, p. 69 (citing *Al-Bahloul v. Tajikistan*).
[121] **CLA-39**, *Serafín García Armas and Karina García Gruber v. Bolivarian Republic of Venezuela*, PCA Case No. 2013-03, Final Award, 26 April 2019, ¶347, p. 126.
[122] **C-16**, Angola's response to Mr Machado's notification for the amicable settlement of the dispute (with informal translation into English), 8 December 2022, ¶¶26-27, p. 13.
[123] Respondent's Rule 41 Submission, ¶¶99, 103, pp. 28-30.
[124] *See* ¶¶114-119 above.
[125] **C-23**, Aenergy's request to the Provincial Court of Luanda (with informal translation into English), 22 April 2022; **C-24**, Letter from Aenergy to IGAPE (with informal translation into English), 22 April 2022; **C-25**, Aenergy's request to the Provincial Court of Luanda (with informal translation into English), 24 May 2022.

120. Consequently, the Respondent has failed to act in a transparent manner and grant the Claimant due process of law. These failures by Angola, in turn, violate the FET standard provided in article 4(2) of the BIT.

c. Angola has impaired the Claimant's investment in an arbitrary manner

121. In addition to the general FET standard, article 4(3) of the BIT includes a standalone provision requiring Angola to refrain from impairing the "*management, maintenance, use, enjoyment, or disposal*" of investments by "*arbitrary or discriminatory measures*".[126]

122. As defined by Christoph Schreuer, a measure is arbitrary if "*taken for reasons that are different from those put forward by the decision maker*" or "*taken in willful disregard of due process and proper procedure*".[127]

123. The Respondent has put forward several contradictory excuses for removing the Four Turbines from judicial custody and installing them in its power plants. For instance, in the local proceedings in Luanda, the Respondent argued that it was their rightful owner, hence the seizure order.[128] However, in the response to the Notice of Dispute, Angola claimed to have "*always acknowledged that the turbines in question are of Aenergy S.A.'s property*".[129]

124. Moreover, Angola claimed that the Four Turbines had to be placed with a trustee to prevent deterioration.[130] The trustee (IGAPE) then stored the turbines at PRODEL's premises who, as per Angola's explanations, was "*better equipped to ensure the conservation and storage of the turbines in good condition*".[131] Angola then changed tune again, stating that "*due to the social function that they may perform*" the turbines must not remain inactive, and that their deployment "*contributes to avoid the decay that would result should said turbines remain inactive*".[132]

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[126] **CLA-25**, Consolidated text of the BIT with informal translation to English, 22 December 2021article 4(3).
[127] **CLA-40**, *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, ¶494, p. 106.
[128] Respondent's Rule 41 Submission, ¶69, p. 21; **C-15**, Request for preventive seizure of Aenergy's Four Turbines (with informal translation into English), 4 October 2019, ¶76, p. 32.
[129] **C-16**, Angola's response to Mr Machado's notification for the amicable settlement of the dispute (with informal translation into English), 8 December 2022, ¶23, p. 13.
[130] Respondent's Rule 41 Submission, ¶69, p. 21; **C-15**, Request for preventive seizure of Aenergy's Four Turbines (with informal translation into English), 4 October 2019, ¶75, p. 32.
[131] **C-16**, Angola's response to Mr Machado's notification for the amicable settlement of the dispute (with informal translation into English), 8 December 2022, ¶23, p. 13.
[132] **C-16**, Angola's response to Mr Machado's notification for the amicable settlement of the dispute (with informal translation into English), 8 December 2022, ¶25, p. 13.

125. Angola further suggested that it decided to deploy the Four Turbines because it believed they "*have already been wholly paid for by the Government*".[133] As explained in further detail below,[134] this is patently false.

126. The Respondent's contradictions show that Angola has not been forthright regarding its real motivations for the appropriation of the Four Turbines.[135] As explained in section VI.A.2.b above, the expropriation of the turbines was also carried out in violation of due process.

127. Thus, the Respondent has arbitrarily impaired the management, maintenance, use, enjoyment, and disposal of the Claimant's investment, in breach of article 4(3) of the BIT.

3. Full protection and security

128. The Respondent has also breached its duty to provide full protection and security ("**FPS**") to the Claimant's investment, contemplated under article 4.2 of the BIT:[136]

> *"Investments made by investors of each Party shall be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Party".*

129. The FPS standard is a fundamental principle of international investment law. It requires states to ensure the physical and legal security of foreign investors and their investments within their territory.[137]

130. As stated in *Cengiz v. Lybia*, the FPS standard requires states to safeguard investments from physical harm caused by state actors or third parties.[138] Tribunals have commonly found a breach of the FPS standard when states fail to take measures that fall within their normal exercise of government functions, and maintain law and order that could have protected the investor or the investment from physical or legal harm.[139]

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[133] **C-16**, Angola's response to Mr Machado's notification for the amicable settlement of the dispute (with informal translation into English), 8 December 2022, ¶26, p. 13. *See also* Respondent's Rule 41 Submission, ¶¶55, 58, p. 18.
[134] *See* section VII below.
[135] *See* **CLA-40**, *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015, ¶512, p. 111.
[136] **CLA-25**, Consolidated text of the BIT with informal translation to English, 22 December 2021article 4(2).
[137] **CLA-41**, *Frontier Petroleum Services Ltd. v. The Czech Republic*, PCA Case No. 2008-09, Final Award, 12 November 2010, ¶¶262-267, pp. 88-89; **CLA-42**, *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶¶729-730, p. 216.
[138] **CLA-43**, *Cengiz İnşaat Sanayi ve Ticaret A.S v. Libya*, ICC Case No. 21537/ZF/AYZ, Final Award, 7 November 2018, ¶403, p. 81.
[139] **CLA-44**, *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, ¶85(b), p. 562 ("*The Tribunal notes in this respect that* ***the failure to resort to such***

131. The FPS standard can extend to the protection of legal rights, such as ensuring a stable, transparent, and predictable legal environment.[140] As explained by the *National Grid v. Argentina* tribunal:[141]

> *"Given that these terms are closely associated with fair and equitable treatment, which is not limited to such physical situations, and in the context of the protection of investments broadly defined to include intangible assets, the Tribunal finds no rationale for limiting the application of a substantive protection of the Treaty to a category of assets –physical assets– when it was not restricted in that fashion by the Contracting Parties".*

132. For the *National Grid* tribunal, this conclusion was reinforced by "*the inclusion of this commitment in the same article of the Treaty as the language on fair and equitable treatment*".[142] Such is the case of the present BIT, where both the FET and FPS standards are included in article 4(2).[143]

133. The Respondent's actions constitute a violation of the FPS standard in that they caused both a physical and a legal harm.

134. First, the installation and use of the Four Turbines has caused them physical harm.

135. TM2500 GE turbines convert mechanical motion into electricity by burning fuel (or, alternatively, gas). Fuel quality is a critical factor impacting the turbines' lifespan. Poor-quality fuels, commonly used in Angola, contain particulates, alkali metals, and other contaminants that erode and corrode turbine components. Using off-specification fuels accelerates wear and increases the need for frequent repairs, thereby reducing the overall lifespan of the turbine.

136. Moreover, the environmental conditions in Angola further impact turbine durability. High dust levels, humidity, extreme heat and coastal conditions with salt-laden air can exacerbate wear and tear on components. Turbines operating under these conditions require enhanced filtration systems and anti-corrosion measures to mitigate damage and sustain performance. To extend the lifespan of TM2500 GE turbines in Angola, it is essential to use fuel that meets the

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precautionary measures acquires more significance when taking into consideration that such measures fall within the normal exercise of governmental inherent powers*—as a public authority—entitled to order undesirable persons out from security sensitive areas*. […] *Accordingly, the Tribunal considers that the Respondent through said inaction and omission violated its due diligence obligation which requires undertaking all possible measures that could be reasonably expected to prevent the eventual occurrence of killings and property destructions*." (emphasis added)).

[140] **CLA-45**, *National Grid PLC v. Argentine Republic*, UNCITRAL, Award, 3 November 2008, ¶189, pp. 76-77; **CLA-46**, *Azurix Corp. v. Argentine Republic (I)*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶408, p. 146; **CLA-47**, *Compañía de Aguas del Aconquija S.A. v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Award II, 20 August 2007, ¶7.4.15, p. 206.

[141] **CLA-45**, *National Grid PLC v. Argentine Republic*, UNCITRAL, Award, 3 November 2008, ¶187, p. 75.

[142] **CLA-45**, *National Grid PLC v. Argentine Republic*, UNCITRAL, Award, 3 November 2008, ¶189, pp. 76-77.

[143] **CLA-25**, Consolidated text of the BIT with informal translation to English, 22 December 2021article 4(2).

manufacturer's specifications, invest in preventative maintenance, and implement advanced filtration systems to manage environmental contaminants.

137. Failure to meet GE's technical fuel specifications exposes the turbines to significant risks, including material degradation, reduced performance, increased emissions, and shortened equipment lifespan. In fact, GE does not provide a warranty for the equipment or for any repaired or replacement parts against wear and tear resulting from environmental or operational conditions, fuel type or quality, adverse air inlet conditions, erosion, corrosion, or material deposits from fluids.

138. The constant use of the Four Turbines inevitably damages the turbines and decreases their value, especially so under the harsh conditions prevalent in Angola. Moreover, the turbines have been installed outdoors, exposed to harsh environmental conditions without any form of cover or protection from the elements.

139. Second, the illegal installation of the Four Turbines, without proper due process, has harmed Mr Machado's legal rights.[144] The preventive seizure sought to preserve the Four Turbines until a decision in the underlying proceedings was reached. Installing the Four Turbines and using them runs counter to this aim and was carried out in violation of the Claimant's due process rights, as the Claimant was never notified or given a chance to object to their installation.

140. Angola's actions (from the installation of the Four Turbines to the lack of response from its authorities regarding the whereabouts of the Four Turbines) were –and remain– completely opaque and in clear breach of the duty to provide a transparent and predictable legal environment contemplated under the FPS standard.

B. The Respondent's arguments on the timing of the expropriation

141. The Respondent raises several arguments that seek to establish that certain events, different from –and prior to– the ones the Claimant invokes as constitutive of an expropriation, could amount to an expropriation.

142. Before addressing these arguments, the Claimant wishes to stress once again that, if successful, these arguments would, at most, refute that the later events invoked by the Claimant are in fact an expropriation. However, such finding would be a finding on the merits that cannot deprive the Tribunal from *jurisdiction* to hear and decide that very merits issue.

[144] *See* **CLA-41**, *Frontier Petroleum Services Ltd. v. The Czech Republic*, PCA Case No. 2008-09, Final Award, 12 November 2010, ¶273, p. 91.

143. Thus, even if successful, the Respondent's arguments cannot possibly support its Rule 41 Submission, which is solely based on the Tribunal lacking jurisdiction (*ratione termporis*).

144. In this section, the Claimant will first set out his position on the relevant moment to ascertain an expropriation. Thereafter, it shall briefly examine the Respondent's merits arguments on the timing of the expropriation.

1. The relevant moment of expropriation

145. The relevant moment to consider whether an investment has been expropriated is "*when the effect of measures taken by the state has been to deprive the owner of title, possession, or access to the benefit and economic use of his property*".[145]

146. In evaluating whether an expropriation has taken place, the determinative factor is the effect and the impact of the controverted measures. The aims of the state's interferences and the forms used to carry them out are not determinative. As explained by Michael Reisman and Robert Sloane:[146]

> *"*[T]*he Permanent Court of International Justice in* Certain German Interests in Polish Upper Silesia*, and the arbitral award rendered by a tribunal established pursuant to a special agreement between Norway and the United States in the* Norwegian Shipowners Claims *case* […] *establish (i) 'that* ***a State may expropriate property, where it interferes with it, even though the State expressly disclaims any such intention****,' and (ii) 'that even though a State may not purport to interfere with rights to property, it may, by its actions, render those rights so useless that it will be deemed to have expropriated them.' Subsequently, international decisions and commentary alike have incorporated these conclusions. The Iran-U.S. Claims Tribunal, for example, has repeatedly held that '***[t]*****he intent of the government* [concerning expropriation] *is less import ant than the effects of the measures on the owner and the form of the measures of control or interference is less important than the reality of their impact****'".*

147. For instance, in the case of *Tippets, Abbett, McCarthy, Stratton v. Iran*, the Iran-U.S. Claims Tribunal found that:[147]

> *"While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted* ***whenever***

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[145] **CLA-48**, *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 February 2000, ¶77, p. 194.

[146] **CLA-49**, Indirect Expropriation and its Valuation in the BIT Generation, in 74 BRIT. Y.B. INT'L L. 115, Michael Reisman & Robert D. Sloane, 16 November 2004, pp. 119-120 (emphasis added). *See also* **CLA-50**, *Antoine Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana*, UNCITRAL, Award on Jurisdiction and Liability, 27 October 1989, ¶81, p. 19 ("*The motivations for the actions and omissions of Ghanaian governmental authorities are not clear. But the Tribunal need not establish those motivations to come to a conclusion in the case*").

[147] **CLA-48**, *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 February 2000, ¶77, p. 194 (citing *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, IUSCT Case No. 7, Award, 29 June 1984 (emphasis added by the *Santa Elena* tribunal)).

> ***events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral****. The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact".*

148. Commenting on the above reasoning by the Iran-U.S. Claims Tribunal, the tribunal in *Santa Elena v. Costa Rica* observed:[148]

> *"*[I]*nternational law does not lay down any precise or automatic criterion, such as the date of the transfer of ownership or the date on which the expropriation has been 'consummated' by agreed or judicial determination of the amount of compensation or by payment of compensation.* […] ***This is a matter of fact for the Tribunal to assess in the light of the circumstances of the case****".*

149. Likewise, in *Rumeli v. Kazakhstan* the tribunal stated that: "[t]*he moment at which the expropriation took place is not to be determined by any principle of international law, but is a question of fact to be determined by the Tribunal in the particular circumstances of the case*".[149]

150. Consequently, the timing of expropriation is a fact-sensitive question that is to be determined on a case-by-case basis. It is the effect of the state's interference on the investor, rather than the form or the time of the decision, that is key.

151. As explained by George Christie:[150]

> *"When a seizure which is not originally deemed to be an expropriation ripens into one, the date of 'taking' should not be held to go back to the time when the property was initially seized, but the 'taking' should, rather, date from the* ***time at which it is determined that there was no reasonable prospect that the property would ever be returned****".*

152. This criterion is highly relevant to the present case. The initial seizure pursuant to the preventive order by the Provincial Court of Luanda does not mark the moment of the expropriation. By its inherent legal nature, the measure was preventive and there were reasonable prospects that the property would be returned once the court made its final decision. Likewise, when the court-designated depositary IGAPE stored the turbines at the premises of PRODEL who, as per Angola's explanations, was "*better equipped to ensure the conservation and storage of the turbines in good condition*",[151] the turbines remained in judicial custody, ready to be returned to Aenergy eventually. By the same token, when the turbines were moved by

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[148] **CLA-48**, *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 February 2000, ¶78, p. 195 (emphasis added).
[149] **CLA-51**, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan,* ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶788, p. 214.
[150] **CLA-52**, George C. Christie, What Constitutes a Taking of Property Under International Law?, 38 Brit. Y.B. Int'l L. 307-338 (1962), , p. 337(emphasis added).
[151] **C-16**, Angola's response to Mr Machado's notification for the amicable settlement of the dispute (with informal translation into English), 8 December 2022, ¶23, p. 13.

PRODEL between their premises, the turbines remained in judicial custody and could have been returned to the Claimant without significant loss of value.

153. It was only when the Four Turbines were installed in Angola's power plants and connected to the grid and when IGAPE and the Provincial Court of Luanda outwardly signalled –by ignoring the Claimant's requests for information– that they condoned the taking and would do nothing to restore the turbines to judicial custody, that it was determined that there was no reasonable prospect that the Four Turbines would ever be returned. This was the moment at which Angola's actions ripened into an expropriation.

2. The date of the decision to expropriate is not decisive

154. The Respondent contends that an expropriation does not take place when the taking is actually carried out but rather at the moment the decision to carry it out is taken.[152]

155. In support of its position, the Respondent cites the single case of *Mabco Constructions SA v. Kosovo*, which involved the privatisation and ownership of the Grand Hotel in Pristina, Kosovo. In that case, the tribunal found that "*it is uncontested that on 31 May 2012 the* [Kosovo Privatisation Agency] *took the* ***official decision*** *to order execution of the withdrawal of shares*",[153] and it decided that the relevant time of expropriation was that date of that official decision which it deemed to be "*sufficiently definitive*".[154]

156. However, in the present case no such official decision exists. At least none that Mr Machado is aware of. Likewise, although the Respondent seeks to attribute crucial importance to the supposed decision, it fails to make any allegation as to when, how or by whom the supposed official decision to install the Four Turbines was made (while at the same time faulting the Claimant for failing "*to prove that Angola's decision to expropriate and to order the expropriation was also taken after the BIT's entry into force*").[155] Of course, neither the Claimant nor the Respondent can pinpoint the official decision to expropriate the Four Turbines because there never was such official decision. Indeed, the Claimant's claim is premised on a *de facto* expropriation.

157. Even if the relevant moment were deemed to be that of the official decision to expropriate (*quod non*), this test cannot be meaningfully applied to the present case.

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[152] Respondent's Rule 41 Submission, ¶138, p. 40 and ¶¶144, 146, p. 42.
[153] **RL-0014**, *Mabco Constructions SA v. Kosovo*, ICSID Case No. ARB/17/25, Decision on jurisdiction, 30 October 2020, ¶467, p. 134 (emphasis added).
[154] Respondent's Rule 41 Submission, ¶145, p. 42; **RL-0014**, *Mabco Constructions SA v. Kosovo*, ICSID Case No. ARB/17/25, Decision on jurisdiction, 30 October 2020, ¶467, p. 134.
[155] Respondent's Rule 41 Submission, ¶146, pp. 42-43.

3. The Respondent's crude "stand-alone breach" argument must fail

158. The Respondent argues that the events claimed by the Claimant to constitute an expropriation fail to meet the standard of a "stand-alone breach".[156]

159. Specifically, the Respondent argues that neither Presidential Order No. 60/22, of 16 March 2022, nor MINEA's press release of 18 March 2022, can constitute an expropriation.[157]

160. Of course, it is not the Claimant's case that these events, *per se*, constitute an expropriation. They were merely presented by the Claimant as *evidence* for the date of the installation and deployment of the Four Turbines, which form part of the events of 2022 that constitute the expropriation, as per the Claimant's case. In particular, the presidential orders submitted by the Claimant refer to a tender process directed at third parties, in preparation of a future expropriation.

161. The Respondent's argument requires no further refutation.

4. The factual allegations made by Aenergy in previous proceedings do not support the Respondent's case

a. The factual allegations made by Aenergy in previous proceedings are irrelevant

162. In its Rule 41 Submission, Angola recounts facts alleged by Aenergy in various U.S. proceedings and suggests that, somehow, Mr Machado is thereby prevented from making the claims it makes in this arbitration.

163. However, the allegations made by Aenergy in previous proceedings are irrelevant to this case. It should be noted that none of the U.S. proceedings were decided on the merits. They were all dismissed on the grounds of *forum non conveniens*, with no *res iudicata* effect. Indeed, Angola does not even make an attempt at invoking a legal theory, such as estoppel, that could possibly bind Mr Machado in this arbitration to Aenergy's statements made years ago in different proceedings.

164. Even if Aenergy's allegations in the U.S. proceedings could, in principle, constrain Mr Machado in the present arbitration (*quod non*), this would not be so in the instant case. Aenergy's allegations in the U.S. proceedings were predicated on the information it had available at that time, some of which originated directly from Angola.[158] If the said information was incorrect, that is on Angola, not on Aenergy or Mr Machado, who had no means of verifying the information provided by

[156] Respondent's Rule 41 Submission, ¶150, p. 43.
[157] Respondent's Rule 41 Submission, ¶152-155, pp. 43-44.
[158] *See* ¶¶181-183 below.

Angola. Mr Machado cannot be barred by allegations made by Aenergy in the U.S. proceedings from making factual allegations in this arbitration based on new and better information that they were able to obtain thereafter.

165. In any case, as stated above, Angola does not argue estoppel or any other legal theory for preclusion. Instead, Angola's argument seems to be that there are two different and mutually exclusive versions of certain facts (the ones presented in the U.S. proceedings and the ones presented in this arbitration), the true version being the one put forward by Aenergy in the U.S. proceedings. Consequently, in Angola's view, Mr Machado's current account of the facts must be false and tailored to fit the dispute into the BIT.[159]

166. As explained above,[160] the burden of proving that Angola installed the Four Turbines at whichever moment Angola may allege it installed them (it has yet to provide specifics), lies entirely with Angola. However, Angola has not even attempted to prove either that the dates of installation alleged by Aenergy in the U.S. proceedings are true or that the dates alleged here by Mr Machado are untrue, although it would have been easy for Angola to make specific allegations on when and where exactly each turbine was installed, and to provide evidence for such allegations.

167. Pointing at allegations made by someone else in different proceedings does not discharge Angola from its –light– burden of proof.

168. Indeed, the U.S. proceedings are distinct and different from the present arbitration in many ways:

169. First, the parties are different. In the U.S. proceedings, the plaintiffs were Aenergy and Combined Cycle Power Plant Soyo, S.A., and the claims were directed against some or all of the following defendants: the Republic of Angola, two ministries and two state-owned entities, together with three General Electric companies.[161] In this arbitration, the Claimant is Mr Machado, and the Respondent is the Republic of Angola.

170. Second, the causes of action and the applicable laws are different: in the U.S. proceedings Aenergy claimed for breach of contract and expropriation under U.S. law.[162] Aenergy alleged that the preventive seizure constituted a judicial expropriation, and its case was premised on Angola having declared that Angola was the owner of the turbines. In contrast, in this arbitration Mr Machado claims

[159] Respondent's Rule 41 Submission, section 3.2.1, pp. 37-40.
[160] *See* section IV.A.2 above.
[161] *See*, *e.g.*, **R-0006**, Aenergy, S.A. and Combined Cycle Power Plant Soyo, S.A., v. Republic of Angola, et al and General Electric Company, et al., Case no. 20 cv 3569, 7 May 2020, p. 1.
[162] The expropriation claims made in the U.S. proceedings were made under the Foreign Sovereign Immunities Act, which is a domestic law.

that the Four Turbines were subject to a *de facto* expropriation when the turbines were removed from IGAPE's custody and appropriated by Angola, and that this constitutes a violation of its rights under the BIT.

171. Third, the underlying facts are different: while some facts may overlap, Mr Machado's claims are grounded in events of 2022, whereas Aenergy's claims in the U.S. proceedings derived from events that had occurred prior to 2022, namely the preventive seizure of the turbines which, in Aenergy's view, amounted to a judicial expropriation.

b. In any event, neither Aenergy nor the Claimant have acknowledged that the Four Turbines were installed between 2019 and 2021

172. Although irrelevant to this arbitration, we need to correct the Respondent's assertion that Aenergy conceded in the U.S. proceedings that the installation of the turbines took place in 2021.[163]

173. Aenergy made no such "concession".

174. Due to the opaqueness of Angola's machinations, Aenergy had very little information on the whereabouts of its turbines. Thus, as further described below, the statements Aenergy made before the U.S. courts about the installation of the turbines were based (i) on certain circumstantial evidence and (ii) on previous statements by Angola that it had installed the turbines in its power plants in 2021.

175. In its account of the facts in support of its judicial expropriation case, Aenergy mentioned its reasonable belief that the turbines had been installed in Angola's power plants. But Aenergy did not conclusively allege nor prove that they had been installed on a certain date. It had no way of knowing and it did not claim otherwise. And, in any case, the installation date was not in itself relevant to Aenergy's case.

176. The Respondent refers to two instances where Aenergy made statements before the U.S. courts regarding the installation of the turbines.

177. First, it points to a statement made by Aenergy before the U.S. Court of Appeals for the Second Circuit, dating the installation and connection of the turbines to the power grid at the end of May 2021.[164]

178. Aenergy made this allegation based on Google Earth images and other circumstantial evidence showing that the Four Turbines had been first transported to PRODEL's headquarters in Luanda and, later, two of them had been transported to the Lubango Power Plant, where Aenergy reasonably believed they had been

[163] Respondent's Rule 41 Submission, ¶147, p. 43.
[164] Respondent's Rule 41 Submission, ¶85, p. 25.

deployed. Aenergy's lawyers filed a letter to the judge laying out their suspicion and the evidentiary basis for their suspicion:[165] Aenergy assumed that the transportation to Lubango, which is a complex logistical issue considering that it is 1000 km away from Luanda and required that the Four Turbines be transported on a road in very poor conditions, was made with the purpose of installing them in the Lubango Power Plant. Consequently, and although it could not confirm whether the turbines had in fact been installed in the Lubango Power Plant, it made the – overhasty– allegation that the Four Turbines had been installed in state-owned power plants, clearly laying out the meagre evidentiary basis for this allegation.[166]

179. Mr Machado believes that, after Aenergy made these allegations in the U.S., Angola became apprehensive and refrained from proceeding with the installation of the two turbines in the Lubango Power Plant. This hesitation would explain why the authorisation to initiate the necessary public contracts for the installation works was only granted on 26 October 2021, and why the process was finalised only on 16 March 2022, by Presidential Order No. 60/2022. Until these presidential orders were issued, no information had been made public regarding the installation of the turbines in Lubango or any other region in Angola, and no communication was directed at Aenergy in this regard.

180. Be it as it may, Mr Machado has now obtained further information and evidence on the installation and deployment of the Four Turbines, which confirms that the Four Turbines were installed in the Ondjiva Power Plant and in the Malembo Power Plant in May and August 2022, respectively,[167] but it might also be the case that two of them were installed in the Lubango Power Plant, also in 2022.

181. Second, the Respondent states that, before the Columbia court, Aenergy dated the installation of the Four Turbines and their permanent connection to the power grid in June 2021.[168] Conspicuously, however, the Respondent fails to mention that Aenergy made this allegation by explicit reference to Angola's own account of the installation of the turbines.

182. Specifically, when Angola responded to Mr Machado's Notice of Dispute, it stated that "*the turbines were relocated to the sites where they were deployed, and commissioned in June 20th 2021*".[169] This is why, in the Columbia proceedings, Aenergy reproduced Angola's account that it had "*connect*[ed] *AE's turbines to*

[165] **C-29**, Letter on the transportation of the Four Turbines and Google Earth images, 30 November 2020.
[166] **R-0018**, Aenergy, S.A. and Combined Cycle Power Plant Soyo, S.A., v. Republic of Angola, et al and General Electric Company, et al., Case No. 21-1510-CV and Case No. 21-1752-Cv, Brief on Appeal from the United States District Court for the Southern District of New York, 8 September 2021, pp. 9, 44.
[167] **C-31**, Extract from GRD website indicating installation of two turbines in the Odjiva Power Plant, 1 May 2022; **C-30**, Press release announcing the installation of two turbines in the Malembo Power Plant (with informal translation into English), 15 August 2022.
[168] Respondent's Rule 41 Submission, ¶¶93, 95, pp. 27-28.
[169] **C-16**, Angola's response to Mr Machado's notification for the amicable settlement of the dispute (with informal translation into English), 8 December 2022, ¶27, p. 13.

Angola's power grid in June 2021".[170] And it did so while openly explaining that this allegation was based on "***the Republic*** [having] ***stated that*** […] ***PRODEL had actually installed the turbines to the power grid in June 2021***".[171]

183. This was indeed the first time that Angola confirmed that the Four Turbines had been deployed in state-owned power plants, and it was a significant admission. It is remarkable that Angola only informed Aenergy of the installation of the Four Turbines once it had received the Notice of Dispute. And it is also remarkable that it then dated the installation in 2021, paving the way for its current position that the installation of the turbines took place before the entry into force of the BIT, but failing, to this day, to provide any specifics or evidence.

184. In any event, Aenergy having reproduced Angola's admission does in no way amount to a concession by Aenergy –or by Mr Machado–of the dates on which the installation purportedly occurred. Angola's assertion that the Four Turbines had been installed was only made in Angola's response to the Notice of Dispute and Aenergy simply provided the Columbia court with this additional information originating from Angola itself.

185. In any case, the date of the installation of the turbines was not the focus of the Columbia proceedings; rather, Aenergy adduced Angola's admission to highlight Angola's lack of credibility and consistency, seeing as its previous position had been that the Four Turbines had to be placed with a trustee and stored to prevent deterioration.[172]

5. The Claimant's expropriation claim is not barred by the earlier preventive seizure of the Four Turbines

186. In addition to its crude "stand-alone breach" argument, discussed in section VI.B.3 above, the Respondent makes a more subtle allegation: it seems to argue that the installation and deployment of the Four Turbines was "*rooted*" in the earlier preventive seizure of the Four Turbines.[173] This, together with Angola's assertion that Aenergy stated in previous proceedings that the Four Turbines were expropriated when the preventive seizure took place,[174] would somehow foreclose the Claimant's expropriation claim.

187. It is the Claimant's case that the installation and deployment of the Four Turbines marked an inflection point. Until that moment, it could be argued –and, indeed,

[170] **R-0022**, Aenergy, S.A. v. Republic of Angola, et al, Case No. 22-CV-02514, First Amended Complaint, 15 February 2023, ¶6, p. 3.
[171] **R-0022**, Aenergy, S.A. v. Republic of Angola, et al, Case No. 22-CV-02514, First Amended Complaint, 15 February 2023, ¶62, p. 23 (emphasis added).
[172] **R-0022**, Aenergy, S.A. v. Republic of Angola, et al, Case No. 22-CV-02514, First Amended Complaint, 15 February 2023, ¶6, p. 3.
[173] Respondent's Rule 41 Submission, section 3.2.3, pp. 43-46.
[174] Respondent's Rule 41 Submission, ¶¶76-78, pp. 22-23.

Angola did vehemently argue–[175] that the Four Turbines had not been appropriated but were being kept in custody on behalf of the Provincial Court of Luanda. The installation and deployment of the Four Turbines, together with the complete abdication of custodial responsibilities by the Provincial Court of Luanda and the depositary, IGAPE, settled the matter: the Four Turbines were no longer in custody but had been appropriated by Angola.

188. The mere fact that the post-BIT *de facto* taking of the Four Turbines by Angola has a pre-BIT backstory –namely the Four Turbines being held in custody by the Provincial Court of Luanda– does not negate the post-BIT taking.

189. None of the cases cited by the Respondent[176] demonstrate that tribunals should consider that there is no actionable breach where disputes relate or are connected to pre-treaty conduct. On the contrary, the case law cited by the Respondent demonstrates that the question of whether post-treaty conduct constitutes an actionable breach is a fact-sensitive inquiry. By the Respondent's own admission,[177] such an inquiry should not be carried out under Rule 41.

190. In *Société Générale v. Dominican Republic*, the State raised two jurisdictional objections concerning retroactive application, one in respect of the relevant treaty's entry into force and the other in respect of the investor's nationality. The tribunal was persuaded that:[178]

> *"*[T]*here might be situations in which the continuing nature of the acts and events questioned could result in a breach as a result of acts commencing before the critical date but which only become legally characterized as a wrongful act in violation of an international obligation when such an obligation had come into existence after the effective date of the treaty. The tribunals in MCI, Feldman and Mondev, while not accepting jurisdiction over acts and events preceding the date of entry into force of the treaty, nevertheless* ***did not exclude the consideration of prior acts for 'purposes of understanding the background, the causes, or scope of the violations of the BIT that occurred after the entry into force****' or the relevance of prior events to breaches taking place after the treaty's entry into force".*

191. In that same vein, the tribunal in *Carrizosa v. Colombia* observed that, if post-treaty conduct can give rise to a self-standing breach of the BIT, the principle of non-

[175] **C-32**, Angola's Brief on Appeal from the United States District Court for the Southern District of New York, 13 October 2021, p. 8; **R-0024**, Aenergy, S.A. v. Republic of Angola, et al, Case No. 22-CV-02514, Supplemental Declaration of Henrique Abecasis in Support of the Angolan Defendants' Motion to Dismiss Plaintiff's First Amended Complaint, 8 March 2023, ¶8, p. 2.
[176] Respondent's Rule 41 Submission, ¶¶157-158, pp. 45-46.
[177] Respondent's Rule 41 Submission, ¶¶113-114, pp. 32-33.
[178] **CLA-53**, *Société Générale in respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections on Jurisdiction, 19 September 2008, ¶¶87, 91-92, pp. 40, 42 (emphasis added).

retroactivity will not place that post-treaty breach outside the treaty's temporal scope.[179]

192. This is precisely the Claimant's case: the facts constituting a breach of the BIT occurred after the treaty entered into force, and accordingly, the Tribunal has jurisdiction *ratione temporis* over the claims. The Respondent will have the opportunity to challenge whether the facts alleged by the Claimant, by themselves, amount to violations of the BIT at a later stage of the proceedings. But this is a merits issue, not a jurisdictional issue.

193. Alternatively, the Claimant submits that, to the extent that any of the relevant facts giving rise to the expropriation occurred prior to the BIT's entry into force, these should be seen as part of a composite act, culminating in the events that occurred during 2022 and Angola's definitive appropriation of the Four Turbines without compensation, in violation of article 7 of the BIT. The Tribunal would have *ratione temporis* jurisdiction over this dispute.

194. An indirect expropriation that takes place through a series of measures over time is referred to as a "*creeping*" expropriation.[180] Investment arbitration tribunals have routinely recognised that investments may be expropriated indirectly through measures tantamount to expropriation.[181] Furthermore, tribunals have found that expropriations can be materialised incrementally, as composite acts.[182]

195. As the tribunal in *Generation Ukraine v. Ukraine* explained:[183]

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[179] **RL-0013**, *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No ARB/18/5, Award, 19 April 2021, ¶138, p. 44. In a similar vein, in *Feldman v. Mexico*, the tribunal considered that, even though "*NAFTA itself did not purport to have any retroactive effect* […] *if there has been a permanent course of action by Respondent which started before* [the treaty entered into force] *and went on after that date* […] *part of Respondent's alleged activity* is *subject to the Tribunal's jurisdiction*". *See* **RL-0017**, *Marvin Karpa v. United Mexican States*, ICSID Case No. ARB AF 991, Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000, ¶62, p. 28.

[180] **CLA-54**, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶114, p. 43 ("*the term '..equivalent to expropriation...' or 'tantamount to expropriation'* […] *refers to the so-called 'indirect expropriation' or 'creeping expropriation,'*" "*it is generally understood that they materialize through actions or conduct, which do not explicitly express the purpose of depriving one of rights or assets, but actually have that effect*".); **CLA-48**, *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 February 2000, ¶76, pp. 193-194 ("*As is well known, there is a wide spectrum of measures that a state may take in asserting control over property* […]. *Likewise, the period of time involved in the process may vary* […]. *It is clear, however, that a measure or series of measures can still eventually amount to a taking, though the individual steps in the process do not formally purport to amount to a taking or to a transfer of title*").

[181] **CLA-55**, *Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan (I)*, SCC Case No. 116/2010, Award, 19 December 2024, ¶1156, p. 248.

[182] *See, e.g.,* **CLA-56**, *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, ¶¶20.22, 20.26, pp. 87, 89.

[183] **CLA-56**, *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, ¶¶20.22, 20.26, pp. 87, 89.

> *"Creeping expropriation is a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State over a period of time culminate in the expropriatory taking of such property* […]. *A plea of creeping expropriation must proceed on the basis that the investment existed at a particular point in time and that subsequent acts attributable to the State have eroded the investor's rights to its investment to an extent that is violative of the relevant international standard of protection against expropriation".*

196. Similarly, in *Vivendi v. Argentina*, the arbitral tribunal held that "[i]*t is well-established under international law that even if a single act or omission by a government may not constitute a violation of an international obligation, several acts taken together can warrant finding that such obligation has been breached*".[184] Here, the tribunal concluded that the claimant's investment had been expropriated, as the benefits of the investment "*had been effectively neutralised and rendered useless*".[185]

197. An indirect expropriation is consummated when the state's conduct reaches an equivalent effect to an outright taking.[186] In other words, when the state's conduct has the effect of depriving the investor of its rights or renders them practically useless.[187]

198. The ILC Draft Articles on State Responsibility discuss composite acts in article 15, which states that "[t]*he 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*".[188]

199. The last step in a creeping expropriation is the straw that breaks the camel's back, depriving the investor of the right to its investment.

200. In *Azurix Corp. v. Argentina* the tribunal held that in the context of a creeping expropriation "*the date of the expropriation is 'the day when the interference has ripened into a more or less irreversible deprivation of the property rather than on the beginning date of the events*'".[189]

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[184] **CLA-47**, *Compañía de Aguas del Aconquija S.A. v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Award II, 20 August 2007, ¶7.5.31, p. 235.
[185] **CLA-47**, *Compañía de Aguas del Aconquija S.A. v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Award II, 20 August 2007, ¶7.5.34, p. 237.
[186] **CLA-54**, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶114, p. 43.
[187] **CLA-54**, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶115, p. 43.
[188] **RL-0012**, International Law Commission's 2001 Articles on the Responsibility of States for Internationally Wrongful Acts, 12 December 2001, article 15, p. 5.
[189] **CLA-46**, *Azurix Corp. v. Argentine Republic (I)*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶417, p. 150 (citing *Reza Said Malek v. The Government of the Islamic Republic of Iran*, IUSCT Case No. 193, Final Award, 11 August 1992).

201. Likewise, in *Hydro v. Albania*, the investors claimed that the state had orchestrated a "*campaign of destruction*" against their company culminating in the seizure of the investment, which amounted to expropriation. Albania countered that this "*campaign*" began before the investors had acquired their investment in 2014 and, therefore, the tribunal lacked jurisdiction *ratione temporis*. However, the tribunal accepted jurisdiction over the claim, as the relevant sequence of events only "*crystallised*" into an alleged breach in 2015. In the words of the tribunal:[190]

> *"**The principle*** [of non-retroactivity] ***does not exclude the application of treaty obligations where the series of acts result in an aggregate breach*** *after the claimant acquires its investment. This is because a composite act 'crystallizes' or 'takes place at a time when the last of these acts occurs and violates (in aggregate) the applicable rule**. A tribunal therefore 'has jurisdiction ratione temporis** in respect of Treaty breaches concerning acts and events having taken place after* [the claimant acquired the relevant investment]*,' **and also 'may take into account prior acts and events resulting in such** **[t]reaty breaches**'".*

202. In conclusion, events that took place before a treaty entered into force are not precluded from tribunals' considerations, be it as background to a later conduct that, by itself, constitutes an actionable breach or as the earlier part of a composite conduct that crystalised or reached its consummation point later. This was aptly put as follows by the tribunal in *Tecmed v. Mexico*:[191]

> *"The* [wording of the treaty] *rules out any interpretation to the effect that the provisions of the Agreement, even in relation to investments existing as of the time of its entry into force, apply retroactively.*
>
> *However, **it should not necessarily follow from this that events or conduct prior to the entry into force of the Agreement are not relevant** for the purpose of determining whether the Respondent violated the Agreement through conduct which took place or reached its consummation point after its entry into force".*

203. Furthermore, the *Tecmed v. Mexico* tribunal decided that, in order to evaluate the investor's claims of expropriation, breach of FET and FPS, it would take into account article 18 of the Vienna Convention on the Law of Treaties:[192]

> *"A State shall refrain from acts that defeat the object and purpose of a treaty when:*
> *a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty* [...]*".*

204. In line with article 18 of the Vienna Convention on the Law of Treaties, between 16 July 2021 (when the BIT was revised) and 21 December 2021 (the day before

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[190] **CLA-57**, *Hydro S.r.l., Costruzioni S.r.l., Francesco Becchetti, Mauro De Renzis, Stefania Grigolon, Liliana Condomitti v. Republic of Albania (I)*, ICSID Case No. ARB/15/28, Award, 24 April 2019, ¶558, p. 117 (emphasis added).

[191] **CLA-54**, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶¶65-66, p. 21 (emphasis added).

[192] **CLA-54**, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶70, p. 22; **RL-0011**, Vienna Convention on the Law of Treaties, 23 May 1969, article 18, p. 8.

the BIT entered into force), the Respondent should have refrained from defeating the object and purpose of the BIT. Even though the BIT had not yet become binding, the Respondent was bound by customary international law principles of good faith.

205. Additionally, composite breaches, such as creeping expropriations or composite violations of the FET standard, are exceptions to the principle of non-retroactivity. Article 15 of the ILC Draft Articles on State Responsibility provides that "*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*".[193]

6. The Claimant's expropriation claim is not barred by the way in which Aenergy characterised the preventive seizure before the U.S. courts

206. Angola states that the Claimant "*alleged before US courts that the Four Unsolicited Turbines were expropriated without due process prior to December 2021*".[194]

207. However, as explained above, the expropriation claims made in the U.S. proceedings are irrelevant to this case and they differ in many ways from the claims made in this arbitration.[195] The expropriation claim made in the U.S. proceedings was based on the preventive seizure of the Four Turbines, which Aenergy considered tantamount to an expropriation under U.S. law. However, Mr Machado does not claim that the turbines were expropriated when the preventive seizure took place. Rather, the Claimant assumes, without admitting it, that the preventive seizure of the Four Turbines had been legally ordered by the Provincial Court of Luanda, especially in light of Angola's late acknowledgement that the Four Turbines remain the property of Aenergy pending the outcome of the Provincial Court of Luanda proceedings on the merits.

208. It is subsequent events that Mr Machado deems a *de facto* expropriation under the BIT. Mr Machado is not alleging that any expropriated turbines were expropriated again, but rather that the turbines were expropriated when they were removed from judicial custody when they were installed in Angola's state-owned power plants and when IGAPE and the Provincial Court of Luanda failed to take any action to restore them to judicial custody.

209. Angola further argues that the Claimant "*has been consistently alleging different relevant events in different jurisdictions to fabricate an expropriation claim based on the same Four Unsolicited Turbines*".[196]

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[193] **RL-0012**, International Law Commission's 2001 Articles on the Responsibility of States for Internationally Wrongful Acts, 12 December 2001, article 15(2), p. 5.
[194] Respondent's Rule 41 Submission, section 2.4, pp. 21-30.
[195] *See* ¶¶167-170 above.
[196] Respondent's Rule 41 Submission, section 3.2.1, pp. 37-40.

210. However, it was Angola who, in the past, shifted positions on the ownership of the Four Turbines and was never clear on their whereabouts. Considering this, it is not improper for the Claimant to adapt his factual and legal case to Angola's shifting portrayal of the facts.

211. Specifically, Angola first claimed to be the owner of the turbines,[197] but later, amid the U.S. proceedings, the Respondent conceded that the turbines belonged to Aenergy and denied that an expropriation had occurred.[198] In that situation, it is perfectly permissible for Mr Machado to assume the Respondent's latest factual allegations (*i.e.*, that the preventive seizure was not an expropriation because Anergy retained title to the Four Turbines) and to argue that subsequent actions by Angola do constitute an expropriation.

C. The Respondent's allegation that the installation of the turbines and their connection to the power grid is "temporary" must fail

212. The Respondent tries to justify the illegal installation of the Four Turbines at state-owned power plants by claiming that this was a temporary measure necessary for their correct maintenance.[199] However, the installation and use of the Four Turbines was not a temporary measure, and its effects are obviously the opposite of correct maintenance.

213. The Provincial Court of Luanda ordered that they "*be duly seized and handed over to the Legal Custodian IGAPE - Institute for the Management of Assets and State Holdings, headquartered in Luanda*".[200] It also stated that "*being exposed to the elements, the probabilities of their deterioration are manifestly greater*".[201]

214. As outlined above,[202] the installation and use of the Four Turbines is most likely causing irreversible damage to the turbines due to wear and tear, further enhanced by likely improper operation and maintenance. Additionally, the turbines are exposed to severe wear damage as a result of particles and environmental contaminants such as salts, sands and sulphur. This deterioration not only compromises their functionality but also results in a significant and continuing

[197] Respondent's Rule 41 Submission, ¶69, p. 21; **C-15**, Request for preventive seizure of Aenergy's Four Turbines (with informal translation into English), 4 October 2019, ¶76, p. 32.
[198] **C-32**, Angola's Brief on Appeal from the United States District Court for the Southern District of New York, 13 October 2021, p. 8; **R-0024**, Aenergy, S.A. v. Republic of Angola, et al, Case No. 22-CV-02514, Supplemental Declaration of Henrique Abecasis in Support of the Angolan Defendants' Motion to Dismiss Plaintiff's First Amended Complaint, 8 March 2023, ¶8, p. 2; **C-16**, Angola's response to Mr Machado's notification for the amicable settlement of the dispute (with informal translation into English), 8 December 2022, ¶24, p. 13.
[199] Respondent's Rule 41 Submission, ¶103, p. 30.
[200] **C-18**, Order of the Provincial Court of Luanda for the preventive seizure of Aenergy's Four Turbines (with informal translation into English), 6 December 2019, p. 2.
[201] **C-17**, Ruling of the Provincial Court of Luanda on the preventive seizure of Aenergy's Four Turbines (with informal translation into English), 5 December 2019, p. 30.
[202] *See* ¶¶135-137 above.

depreciation of their value. This further accelerates wear and tear, exacerbating the damage and reducing their operational lifespan.

215. As for the Respondent's contention that the deployment of the Four Turbines was only temporary, it suffices to point out that Angola has been using them for almost three years.

216. Moreover, from the outset Angola intended for the installation of the Four Turbines to be permanent. Indeed, the company that installed the two turbines in the Ondjiva Power Plant published in its website that "[t]*he aforementioned Thermal Power Plant is equipped with (2) two aeroderivative turbines, model TM2500 GEN8 functional* ***on a permanent basis*** *to meet the demand of the region*".[203]

217. Further, the complexities and logistics of connecting these turbines to the power grid and the high installation costs involved further confirms that it was not meant to be a mere temporary measure. The installation of the Four Turbines requires not only their transportation to power plants, which in itself is a complex issue given the poor roads between, for example, Luanda and Lubango, but it also requires pre-installation civil works. Also, the installation itself is costly. For example, Presidential Order no. 177/21 included a cost of Kz 6,714,397,724.88 (approx. USD 10,400,000) for the installation of two turbines in Lubango, a cost of Kz 10,984,814,028.30 (approx. USD 15,600,000) for the installation of two turbines in Ondjiva and a cost of Kz 4,068,967,066.56 (approx. USD 5,778,512.60) for the installation of one turbine in Malembo.[204]

218. The Respondent's allegation that the installation of the Four Turbines and their connection to the power grid was a temporary measure to properly preserve the Four Turbines is the textbook example of an incredible and frivolous allegation made in bad faith.

VII. The Respondent's allegations on the circumstances leading to the termination of the Contracts are irrelevant and, in any event, wrong

219. The Respondent's allegation that the Contracts were terminated because Aenergy used the Credit Facility to fund the Four Turbines not included in the Contracts without Angola's consent or knowledge is irrelevant to the present dispute.[205] However, since it paints the Claimant in a bad light, we shall briefly explain why it is wrong.

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[203] **C-31**, Extract from GRD website indicating installation of two turbines in the Odjiva Power Plant, 1 May 2022 (emphasis added).
[204] **C-21**, Presidential Order No. 177/21 authorising the opening of a public procurement procedure for various works at thermoelectric power plants (with informal translation into English), 26 October 2021, ¶1(b), (d) and (f), pp. 1-2.
[205] Respondent's Rule 41 Submission, ¶26, p. 9.

220. In December 2017, when Angola's Ministry of Finance ("**MINFIN**") requested to borrow from the Credit Facility to make payments owed to Aenergy under the Contracts, they referenced the specific Aenergy invoices that MINEA had approved (for a total of **eight turbines** as well as other goods and services).[206] In an internal e-mail exchanged within GE Capital, GE acknowledged that the invoices and the amount approved for disbursement corresponded to eight turbines only, and not 12.[207] This was the only disbursement made under the Credit Facility.

221. GE's dual role in the Angolan energy projects determined the structure of the Credit Facility (to which neither Aenergy nor Mr Machado were parties). On the one hand, GE Capital was lender to Angola, for the value of the Contracts. On the other, GE Global Parts & Products ("**GE GPP**"), and GE Packaged Power ("**GE PP**") were the equipment suppliers to Aenergy (under the Supply Contracts).

222. To guarantee the payment of the Supply Contracts, the Credit Facility allowed GE Capital to satisfy amounts due by Aenergy under the Supply Contracts, with money owed to Aenergy by Angola, by way of credit compensation. Therefore, GE Capital allocated part of the disbursement owed to Aenergy (withdrawn by Angola for the approved invoices) as payment under the Supply Contracts.

223. As a result, GE was paid in full for the twelve turbines with Aenergy revenue, earned under the Contracts, by virtue of this credit compensation. It is simply incorrect that the Claimant engaged in an elaborate scheme to fund the Four Turbines without Angola's consent, as the Respondent claims.[208]

224. In the same vein, the Respondent makes a further irrelevant and wrong allegation that needs addressing, namely, that an "*Invoice Summary*" drafted by Aenergy and GE allowed Aenergy to use the Credit Facility to pay GE for the Four Turbines.[209]

225. A simple glance at the document in question shows that, despite its name, it is not an invoice summary. The document does not reference any invoices from Aenergy or GE to be paid under the Credit Facility. Instead, this "*Invoice Summary*" is nothing more than payment instructions, identifying entities and their respective bank accounts. It serves no other purpose and certainly does not confirm the payment of equipment by Angola. As stated above,[210] the amounts disbursed and paid corresponded solely to the invoices issued by Aenergy and approved by MINFIN.

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[206] **R-0003**, Utilization Request, 24 December 2017, pp. 3-4; **R-0002**, Invoices approved by MINEA, 30 August 2017: Invoices 001/2017, 002/2017 and 003/2017 (2 Turbines), pp. 1-3; Invoices 007/2017, 008/2017 and 009/2017 (3 Turbines), pp. 6-8; Invoice 023/2017 and 024/2017 (2 Turbines), pp. 22-23; Invoice 044/2017 (1 Turbine), p. 38.
[207] **C-33**, E-mail from Willy Ireri to Sharad Jain (GE Capital), 14 January 2019.
[208] Respondent's Rule 41 Submission, ¶¶26, 55, pp. 9, 18.
[209] Respondent's Rule 41 Submission, ¶32, p. 11.
[210] *See* ¶220 above.

226. This understanding was articulated by GE's Brad Galvin in a communication with Ciel da Conceiçao from MINFIN.[211] After GE Capital sent the "*Invoice Summary*" to MINFIN, Mr Galvin explained that the document was critical for the financing process. According to clause 6.2(a)(iv) and (v) of the Credit Facility, confirmation from both Aenergy and GE was needed that the payment instructions were correct.

227. The only funds that were disbursed from the Credit Facility were the amounts requested by Angola in the utilisation request, which matched the approved Aenergy invoices, for a total of USD 643,605,988.51.[212]

228. In an effort to pin GE's lies on Mr Machado, Angola misrepresents that Mr Machado recognised that the Credit Facility had been used to fund twelve turbines.[213] In late 2018, Aenergy and MINEA had been negotiating an amendment to one of the Contracts (contract no. 6),[214] to reduce the services scope by USD 154 million and to instead include four additional turbines into the contract. This way, Angola would be able to add those four turbines to the scope of the projects without altering the total value of the Contracts.

229. In meetings held on 5 and 7 December 2018 between Aenergy, MINEA and Wilson da Costa, Mr da Costa stated that Angola had already paid for twelve turbines and therefore those turbines belonged already to Angola. This caused confusion.[215] The Claimant explained to GE that the Four Turbines where still Aenergy's, but if the plan to amend contract no. 6 went through, those extra turbines would get to be included in the Credit Facility. This is what Mr Machado believed Mr da Costa to be explaining in his e-mail of 7 December 2018.[216] Accordingly, Mr Machado stated in his response that "*we will proceed with the installations of the Turbines according to the plan under discussion*", referring to the contract no. 6 amendment.[217]

230. Ten days later, Mr Machado sent another e-mail, further clarifying what he had previously expressed in his 7 December e-mail:[218] that the Credit Facility had been used to finance strictly the supply of eight turbines and that MINEA and Aenergy had been in negotiations to include four additional turbines within the scope of contract no. 6, by reducing the services provided thereunder. This is not a

[211] **C-34**, E-mails exchanged between Brad Galvin and Ciel da Conceiçao, 28 December 2017
[212] **R-0003**, Utilization Request, 24 December 2017; **R-0002**, Invoices approved by MINEA, 30 August 2017.
[213] Respondent's Rule 41 Submission, ¶¶51-53, pp. 16-17.
[214] Contract no. 6 is one of the 13 Contracts signed between Aenergy and Angola.
[215] Respondent's Rule 41 Submission, ¶50, p. 15.
[216] **R-0012**, Emails exchanged between GE Power (Wilson da Costa), AEnergy (Ricardo Machado) and MINEA, 7 December 2018, p. 2.
[217] **R-0012**, Emails exchanged between GE Power (Wilson da Costa), AEnergy (Ricardo Machado) and MINEA, 7 December 2018, p. 1.
[218] **R-0012**, Emails exchanged between GE Power (Wilson da Costa), AEnergy (Ricardo Machado) and MINEA, 7 December 2018, p. 7.

"retraction"[219] by Mr Machado, but a clarification. Seeing as the amendment never materialised, the ownership of the Four Turbines was never transferred.

VIII. Summary of the Claimant's position in this Rule 41 proceeding

231. Mr Machado is by nature the *dominus litis* in the present arbitration and, acting as such, (i) he claims that certain facts constituting an expropriation of Aenergy's Four Turbines, along with further breaches of the BIT by Angola, occurred during 2022 and thus after the entry into force of the BIT; (ii) he has provided sufficient evidence to find that his claims are not plainly without any foundation or incredible, frivolous, vexatious or inaccurate or made in bad faith; and (iii) although irrelevant to the present Rule 41 exception, he has responded to other merits allegations presented in the Respondent's Rule 41 Submission. Any analysis of such merits issues should be made in the plenary phase of these proceedings, but not at this procedural stage. The Respondent's Rule 41 objection should be dismissed.

IX. Costs

232. ICSID Rule 52(2) provides: "*If the Tribunal renders an Award pursuant to Rule 41(3)* [*i.e.*, if it decides that all claims are manifestly without legal merit] *it shall award the prevailing party its reasonable costs, unless the Tribunal determines that there are special circumstances justifying a different allocation of costs*".[220] However, if the Tribunal dismisses some or all of the objections raised by the Respondent, Rule 52(3) applies, which provides that the Tribunal "*may make an interim decision on costs at any time, on its own initiative or upon a party's request*".[221]

233. Further, Rule 52(1) sets out that the Tribunal shall consider:[222]

> *"*[A]*ll relevant circumstances, including: (a) the outcome of the proceeding or any part of it; (b) the conduct of the parties during the proceeding, including the extent to which they acted in an expeditious and cost effective manner and complied with these Rules and the orders and decisions of the Tribunal; (c) the complexity of the issues; and (d) the reasonableness of the costs claimed".*

234. In light of these principles, the Claimant seeks full recovery of all costs incurred in opposing the Respondent's Rule 41 Submission. As acknowledged by the Respondent, the aim of Rule 41 is to enhance procedural efficiency and prevent the abusive use of the ICSID system, by allowing the early dismissal of patently

[219] Respondent's Rule 41 Submission, ¶53, p. 17.
[220] Rule 52(2) of the ICSID Arbitration Rules 2022.
[221] Rule 52(3) of the ICSID Arbitration Rules 2022.
[222] Rule 53(1) of the ICSID Arbitration Rules 2022.

unmeritorious claims.[223] However, Rule 41 should not be used as a tactical tool to delay proceedings and cause unnecessary expense.

235. Here, the Respondent has challenged the jurisdiction of the Tribunal. In doing so, it has deliberately misconstrued the Claimant's case. This is because, as explained repeatedly throughout this submission, the Respondent's objections are meritless in light of the Claimant's actual case.

236. Thus, the Respondent has substantially delayed the proceedings by adding two rounds of unnecessary submissions and additional work for the Tribunal and the Secretariat. It should be responsible for the costs incurred by the Claimant in connection therewith.

237. Such costs shall be quantified at the end of the special procedure under the Rule 41, as per the Tribunal's directions.

X. Claimant's request for relief

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

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

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

and issue an interim decision on costs,

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

Respectfully submitted,

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

[223] Respondent's Rule 41 Submission, ¶106, p. 31.