

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

EMS Shipping & Trading GmbH
Claimant

v.

Republic of Albania
Respondent

(ICSID Case No. ARB/23/9)

PROCEDURAL ORDER NO. 3
BIFURCATION

Members of the Tribunal

Prof. Gabrielle Kaufmann-Kohler, President of the Tribunal
Prof. Stanimir Alexandrov, Arbitrator
Prof. Albert Jan van den Berg, Arbitrator

Secretary of the Tribunal

Ms. Izabela Chabinska

Assistant to the Tribunal

Ms. Laura Zimmerman

23 February 2024

TABLE OF CONTENTS

I.	PROCEDURAL BACKGROUND	1
II.	THE PARTIES' POSITIONS	1
	A. The Respondent's Position	1
	1. Introduction	1
	2. Legal Standard.....	2
	3. Bifurcation is warranted	3
	a. The Legality Objection	3
	b. The Contribution Objection	5
	B. The Claimant's Position	7
	1. Introduction	7
	2. Legal Standard.....	7
	3. The Bifurcation Request Should Be Denied	8
	a. The Objections are intertwined with the merits	8
	b. The Objections are baseless	9
	c. Bifurcation would not serve procedural efficiency and fairness	10
III.	ANALYSIS	10
	A. Legal Framework	10
	B. The Objections	12
	1. The Legality Objection.....	12
	2. The Contribution Objection.....	13
	C. Conclusion	13
IV.	ORDER	14

I. PROCEDURAL BACKGROUND

1. On 20 September 2023, the Tribunal issued Procedural Order No. 1 (“PO1”) along with the Procedural Timetable appended as Annex B thereto.
2. On 19 January 2024, on the date provided in Scenarios 2 and 3 of the Procedural Timetable, the Republic of Albania (“Albania” or the “Respondent”) filed its Identification of Preliminary Objections and Request for Bifurcation (the “Bifurcation Request” or “Request”), accompanied by factual exhibits nos. R-0001 to R-0034 and legal authorities nos. RL-0001 to RL-0028.
3. On 9 February 2024, EMS Shipping & Trading GmbH (“EMS” or the “Claimant” and, together with Albania, the “Parties”) filed its Response to the Bifurcation Request (the “Bifurcation Response”), accompanied by factual exhibit C-0240 and legal authorities nos. CL-0136 to CL-0138.
4. This Procedural Order decides on the Bifurcation Request.

II. THE PARTIES’ POSITIONS

A. THE RESPONDENT’S POSITION

1. Introduction

5. The Respondent submits that it has the two following preliminary objections related to jurisdiction *ratione materiae*:
 - (i) the Claimant did not acquire its alleged investment in accordance with Albanian law, as required by Article 1(1) of the Treaty between the Federal Republic of Germany and the Republic of Albania concerning the Encouragement and Reciprocal Protection of Investments (the “BIT” or “Treaty”) (the “Legality Objection”);¹ and
 - (ii) the Claimant did not make a substantial contribution in Albania, and, thus, failed to fulfil the requirements of an investment pursuant to Article 25(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “ICSID Convention”) (the “Contribution Objection”, together with the Legality Objection, the “Objections”).²

¹ Request, paras. 6, 16, *citing Exh. CL-1*, Treaty, Article 1(1).

² Request, para. 17, *referring to* ICSID Convention, Preamble; **Exh. RL-0012**, *Salini Costruttori SPA and Italstrade SPA v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, para. 52; **Exh. RL-0013**, *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v.*

6. According to the Respondent, these Objections should be dealt with in a separate jurisdictional phase of these proceedings, while the proceedings on the merits remain suspended.³
7. Albania argues that both Objections meet the legal standard for bifurcation in ICSID arbitrations. Specifically, Albania contends that each objection, if successful, would end the arbitration.⁴

2. Legal Standard

8. Albania submits that the Tribunal is empowered to order the bifurcation of the proceedings pursuant to Article 41(2) of the ICSID Convention and Rule 41(3) of the “ICSID Arbitration Rules”.⁵ It argues that it is “routine” in ICSID arbitrations for tribunals to decide on matters of jurisdiction at a preliminary stage.⁶
9. Albania contends that while the Tribunal’s decision whether to bifurcate depends on the circumstances of each case, the “main drivers” to decide a bifurcation request are procedural efficiency and fairness.⁷ It further argues that, according to the “widely accepted” criteria set out in *Glamis Gold v. United States*, bifurcation enhances procedural efficiency and fairness and is thus warranted where the preliminary objections raised: (i) are *prima facie* serious and substantial; (ii) can be analyzed “without prejudging or delving into the merits”; and (iii) if successful, can dispose of the claims, either fully or in a significant part.⁸

Argentine Republic, ICSID Case No. ARB/14/32, Decision on Jurisdiction, 29 June 2018, paras. 187-189; **Exh. RL-0014**, *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, PCA Case No. 2007-07/AA280, Award, 26 November 2009, para. 207; **Exh. RL-0015**, *Clorox Spain SL v. The Bolivarian Republic of Venezuela*, PCA Case No. 2015-30, Award, 20 May 2019, paras. 828-832; **Exh. RL-0016**, *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v. The Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, paras. 232-233; **Exh. RL-0017**, *KT Asia Investment Group BV v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, paras. 203-206.

³ Request, para. 24.

⁴ Request, para. 33.

⁵ Request, paras. 25-26. The Tribunal notes that Albania does not mention to which version of the ICSID Arbitration Rules it refers. However, the language of the cited Rule 41(3) suggests that it refers to the 2006 Rules.

⁶ Request, para. 27, referring to **Exh. RL-0018**, C. Schreuer et al., *The ICSID Convention: A Commentary*, Cambridge University Press, 2009, p. 534.

⁷ Request, para. 27, referring to **Exh. RL-0019**, *Hope Services LLC v. Republic of Cameroon*, ICSID Case No. ARB/20/2, Procedural Order No. 2, Decision on the Respondent’s Request for Bifurcation, 19 October 2020, para. 20; **Exh. RL-0020**, *Rand Investments Ltd and others v. Republic of Serbia*, ICSID Case No. ARB/18/8, Procedural Order No. 3, 24 June 2019, para. 15; **Exh. RL-0021**, *Cairn Energy Plc and Cairn UK Holdings Limited v. The Republic of India*, PCA Case No. 2016-7, Procedural Order No. 4, Decision on the Respondent’s Application for Bifurcation, 19 April 2017, para. 78.

⁸ Request, para. 28, referring to **Exh. RL-0022**, *Glamis Gold Ltd v. The United States of America*, UNCITRAL, Procedural Order No. 2 (Revised), 31 May 2005, para. 12; **Exh. RL-0019**, *Hope Services LLC v. Republic of Cameroon*, ICSID Case No. ARB/20/2, Procedural Order No 2, Decision on the Respondent’s Request for Bifurcation, 19 October 2020, para. 22; **Exh. RL-0023**, *Canepa Green Energy Opportunities I, S.á.r.l. and Canepa Green Energy Opportunities II, S.á.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/19/4, Procedural Order No. 3, Decision on Bifurcation, 28 August 2020, para. 67.

3. Bifurcation is warranted

a. The Legality Objection

10. Albania asserts that the Legality Objection goes to the root of the Tribunal’s jurisdiction and, therefore, warrants being addressed in a bifurcated procedure before consideration of the merits of the dispute.
11. The Respondent recalls that, under Article 1(1) of the BIT, protected investments are “assets that are invested pursuant to the national legislation of each respective Contracting Party”.⁹ This requirement extends to “any instrument, including the ICSID Convention”, even in the absence of express language to that effect.¹⁰
12. It is Albania’s further submission that, to the extent that the actions which violate local law are carried out at the time of making the investment, they should be reviewed in the context of jurisdiction.¹¹ Albania argues that in this case, the Tribunal lacks jurisdiction *ratione materiae* because there are indications that the Claimant did not acquire its investment pursuant to Albanian law, as the Treaty requires.¹²
13. The Respondent alleges that the following instances show lack of compliance with local law:
 - (i) [REDACTED]

⁹ Request, para. 7, citing **Exh. CL-1**, Treaty, Article 1(1).

¹⁰ Request, para. 7, referring to **Exh. RL-0001**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines II*, ICSID Case No. ARB/11/12, Award, 10 December 2014, para. 467; **Exh. RL-0002**, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016, paras. 264, 268; **Exh. RL-0003**, *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, PCA Case No. 2005-03/AA226, Final Award, 18 July 2014, paras. 1349-1356; **Exh. RL-0004**, *Khan Resources Inc., Khan Resources B.V., and CAUC Holding Company Ltd. v. The Government of Mongolia and Monatom Co., Ltd*, PCA Case No. 2011-09, Decision on Jurisdiction, 25 July 2012, para. 383; **Exh. RL-0005**, *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, para. 101; **Exh. RL-0006**, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, paras. 138-140; **Exh. RL-0007**, *Saluka Investments BV (The Netherlands) v. Czech Republic*, PCA Case No. 2001-04, Partial Award, 17 March 2006, para. 204.

¹¹ Request, para. 8, referring to **Exh. RL-0009**, *Alasdair Ross Anderson et al v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award, 19 May 2010, paras. 57, 59; **Exh. RL-0010**, *Liman Caspian Oil BV and NCL Dutch Investment BV v. The Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award, 22 June 2010, paras. 181-182, 193-194; **Exh. RL-0002**, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016, para. 264; **Exh. RL-0001**, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, 10 December 2014, paras. 337-338.

¹² Request, paras. 8, 16.

¹³ Request, paras. 9-10, 16, referring to Claimant’s Memorial on the Merits, paras. 75, 81, 91; **Exh. C-0004**, Concession Agreement, Preamble, paras. 1-7; **Exh. C-0040**, Letter from the Ministry, 1 June 2011, p. 9; **Exh.**

[Redacted]

[Redacted]

(iii) [Redacted]

14. On this basis, Albania argues that the Legality Objection meets the three criteria advanced in *Glamis Gold v. United States*:

(i) Due to the irregularities identified in the process for the negotiation and award of the Concession, the Objection is *prima facie* serious, as opposed to frivolous or unfounded.¹⁷

(ii) [Redacted]

C-0041, Pre-Feasibility Report, 4 August 2011; **Exh. R-0001**, Notification Form of the winning contract in the tender process for the Concession of the East Terminal, 8 July 2013, p. 5; **Exh. R-0014**, Standard Concession Documents, November 2012.

¹⁴ Request, para. 11, *referring to* [Redacted]

¹⁵ [Redacted]

¹⁶ Request, paras. 14-15, *referring to* [Redacted]

¹⁷ Request, paras. 16, 30.

- [REDACTED]
- [REDACTED]
- [REDACTED]¹⁹
- (iii) If successful, the Objection will likely dispose of all or a significant part of the claims.²⁰

b. The Contribution Objection

15. For the following reasons, Albania argues that the proceedings should be bifurcated to deal with the Contribution Objection.
16. Albania contends that the commitment of substantial resources in the host State is one of the objective components of an investment under Article 25(1) of the ICSID Convention,²¹ failing which, an ICSID tribunal lacks jurisdiction *ratione materiae*.²²
17. It is Albania's submission that the Concession Agreement and the bidding documents required EMS to make investments in the East Terminal of the Durrës Port (the "East Terminal") in the amount of approximately EUR 20,000,000,²³ and that EMS has not complied with this requirement. Albania notes that the Claimant alleges to have made about half of the required investments, but provides no evidence other than witness testimony.²⁴ Moreover, the Claimant

¹⁸ Request, para. 31, referring to Claimant's Memorial on the Merits, paras. 82, 96, 411; **Exh. RL-0024**, *Orazul International España Holdings S.L. v. Argentine Republic*, ICSID Case No. ARB/19/25, Decision on the Respondent's Request for Bifurcation, 7 January 2021, para. 31; **Exh. RL-0025**, *Eco Oro Minerals Corp v. Republic of Colombia*, ICSID Case No. ARB/16/41, Procedural Order No 2, Decision on Bifurcation, 28 June 2018, para. 52.

¹⁹ Request, para. 32, referring to **Exh. RL-0026**, *Gavrilović and Gavrilović d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Bifurcation, 21 January 2015, para. 93.

²⁰ Request, para. 33.

²¹ Request, para. 17, referring to **Exh. RL-0012**, *Salini Costruttori SPA and Italstrade SPA v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, para. 52; **Exh. RL-0013**, *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction, 29 June 2018, paras. 187-189; **Exh. RL-0014**, *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, PCA Case No. 2007-07/AA280, Award, 26 November 2009, para. 207.

²² Request, para. 17, referring to **Exh. RL-0015**, *Clorox Spain SL v. The Bolivarian Republic of Venezuela*, PCA Case No. 2015-30, Award, 20 May 2019, paras. 828-832; **Exh. RL-0016**, *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v. The Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, paras. 232-233; **Exh. RL-0017**, *KT Asia Investment Group BV v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, paras. 203-206.

²³ Request, para. 19, referring to **Exh. C-0004**, Concession Agreement, 6 May 2013, Article 8.6; **Exh. C-0005**, Technical Proposal for the Concession Agreement for the Management, Operation and Maintenance of the Durrës Port East Terminal, 28 January 2013, pp. 86-91; **Exh. C-0006**, Economic/Financial Proposal for the Concession Agreement for the Management, Operation and Maintenance of the Durrës Port East Terminal, 28 January 2013, pp. 55-56.

²⁴ Request, para. 20, citing **Exh. CWS-1**, Witness Statement of Mr. Florian Çimo, para. 23.

never addressed the Durrës Port Authority's ("DPA") repeated requests for EMS to make the investments to which it committed in the Concession Agreement.²⁵

18. The Respondent further advances that the fact that EMS APO paid it royalties under the Concession Agreement does not constitute a contribution for investment purposes. According to the Respondent, these royalties, which consist of a portion of the service charges collected by EMS APO for the use of the East Terminal, are "disconnected from any investment obligation on EMS' side".²⁶
19. The Claimant's argument that it was the DPA which should have invested in and maintained the East Terminal is also to no avail, as EMS as concessionaire assumed these obligations pursuant to the Concession Agreement.²⁷
20. On this basis, it is the Respondent's position that the Contribution Objection also satisfies the three criteria for bifurcation:
 - (i) The Claimant's failure to make any contribution to Albania, or at least the contribution contemplated in the Concession Agreement and the bidding terms, constitutes a *prima facie* serious and substantive objection.²⁸
 - (ii) The Objection is "almost exclusively purely legal" and independent from the merits, since the Tribunal only has to determine the legal requirements for an

²⁵ Request, para. 20, referring to **Exh. R-0016**, Letter from the DPA to EMS APO No. 2688, 7 September 2015; **Exh. R-0017**, Letter from the DPA to EMS APO No. 3802, 28 December 2015; **Exh. R-0018**, Letter from the DPA to EMS APO No. 563, 16 February 2016; **Exh. R-0019**, Letter from the DPA to EMS APO No. 1842.1, 16 July 2016; **Exh. R-0020**, Letter from the DPA to EMS APO No. 2881, 25 October 2016; **Exh. R-0021**, Letter from the DPA to EMS APO No. 2266, 24 May 2018; **Exh. R-0022**, Letter from the DPA to EMS APO No. 3028, 12 July 2018; **Exh. R-0023**, Letter from the DPA to EMS APO No. 4440, 12 November 2018; **Exh. R-0024**, Letter from the DPA to EMS APO No. 848, 8 March 2019; **Exh. R-0025**, Letter from the DPA to EMS APO No. 1266, 4 April 2019; **Exh. R-0026**, Letter from the DPA to EMS APO No. 2254, 27 June 2019; **Exh. R-0027**, Letter from the DPA to EMS APO No. 3248, 30 September 2019; **Exh. R-0028**, Letter from the DPA to EMS APO No. 1500, 20 May 2020; **Exh. R-0029**, Letter from the DPA to EMS APO No. 1932, 19 June 2020; **Exh. R-0030**, Letter from the DPA to EMS APO No. 3115, 20 September 2021; **Exh. R-0031**, Letter from the DPA to EMS APO No. 3553, 22 October 2021; **Exh. R-0032**, Letter from the DPA to EMS APO No. 1623, 27 April 2022; **Exh. R-0033**, Letter from the DPA to EMS APO No. 2719, 1 August 2022; **Exh. R-0034**, Letter from the DPA to EMS APO No. 3586, 24 October 2022; **Exh. R-0012**, Letter from the DPA to EMS APO No. 371, 14 February 2023.

²⁶ Request, para. 18, referring to Claimant's Memorial on the Merits, para. 118.

²⁷ Request, para. 22, referring to **Exh. C-0004**, Concession Agreement, 6 May 2013, Articles 8, 12; **Exh. CWS-2**, Witness Statement of Mr. Heiko Luikenga, para. 7.

²⁸ Request, paras. 23, 30.

investment to qualify as such under the ICSID Convention, and to examine limited evidence to ascertain if EMS fulfilled these requirements.²⁹

- (iii) If successful, the Objection will likely dispose of all or a significant part of the claims.³⁰

B. THE CLAIMANT’S POSITION

1. Introduction

21. The Claimant submits that the Bifurcation Request lacks merit and should be denied, asserting that neither of the two Objections raised by Albania satisfies the legal standard for bifurcation, and that bifurcation would increase costs and delay the proceedings.³¹ It argues that the Objections should be considered together with the merits, which would ensure that the proceedings are conducted efficiently.³²

2. Legal Standard

22. EMS observes that Albania “wrongly invoke[s]” the test set out in *Glamis Gold v. United States* and that the proper test is enshrined in Rule 44(2) of the ICSID Arbitration Rules in force as of 1 July 2022 (the “2022 ICSID Arbitration Rules”), which requires tribunals to consider if bifurcation would: (i) reduce the proceedings’ time and cost; (ii) bring the proceedings to an end; and (iii) be practical in light of the potential links between the preliminary objection and the merits.³³
23. Additionally, the Claimant emphasizes that the 2022 ICSID Arbitration Rules, unlike the 1968 version of the Rules, do not contain a presumption in favor of bifurcation.³⁴ This is so because jurisdictional objections “are [...] not always genuine” and are often used by respondent States to delay the proceedings.³⁵ The Claimant contends that academic studies show that bifurcation tends to lengthen, rather than shorten the proceedings.³⁶ The Tribunal thus enjoys ample

²⁹ Request, para. 31, referring to **Exh. RL-0019**, *Hope Services LLC v. Republic of Cameroon*, ICSID Case No. ARB/20/2, Procedural Order No. 2, Decision on the Respondent’s Request for Bifurcation, 19 October 2020, paras. 27-28.

³⁰ Request, para. 33.

³¹ Bifurcation Response, paras. 8-9, 34, 40.

³² Bifurcation Response, paras. 12, 34, 40.

³³ Bifurcation Response, paras. 7, 9.

³⁴ Bifurcation Response, para. 10.

³⁵ Bifurcation Response, para. 11.

³⁶ Bifurcation Response, paras. 11, 31-33, referring to **Exh. CL-0136**, L. Greenwood, *Does Bifurcation Really Promote Efficiency?*, 28(2) *Journal of International Arbitration* (2011), p. 107; **Exh. CL-0137**, N. J. Calamita and E. Sardinha, *The Bifurcation of Jurisdictional and Admissibility Objections in Investor-State Arbitration*, 16(1) *The Law & Practice of International Courts and Tribunals* (2017), p. 50. **Exh. CL-0138**, L. Greenwood, *Revisiting Bifurcation and Efficiency in International Arbitration Proceedings*, 36(4) *Journal of International Arbitration* (2019), p. 424.

discretion to determine whether to hear jurisdictional objections separately from or together with the merits.³⁷

3. The Bifurcation Request Should Be Denied

24. EMS asks the Tribunal to reject the Bifurcation Request. First, it argues that Albania has failed to demonstrate that either of its Objections meets the legal standard, be it the standard relied upon by the Claimant or the one wrongly invoked by the Respondent.³⁸ Second, it asserts that bifurcation is not appropriate in this case from the perspective of procedural efficiency and fairness.

a. The Objections are intertwined with the merits

25. The Claimant contends that the Objections raise factual issues directly relevant to the merits.³⁹ As a result, bifurcation would result in the Parties pleading these issues twice and the Tribunal being called upon to assess the related evidence and legal arguments twice, which would be impractical and inefficient.⁴⁰

26. Concerning the Legality Objection, the Claimant underscores that the factual issues underlying it are important to, and intertwined with, the merits of its claims, for the following reasons:⁴¹

(i) The exchanges between EMS and Albania during the negotiation and finalization of the Concession Agreement are relevant to the merits since EMS' fair and equitable treatment claim is largely based on the legitimate expectations it formed "precisely during that period".⁴² According to the Claimant, the nature of the interactions and the contractual negotiations between the Parties are essential to interpret the Parties' expectations;⁴³

(ii) The Claimant's umbrella clause claim assumes reviewing "whether the [Concession Agreement] was legally entered into" and EMS' acquisition of contractual rights.⁴⁴ Therefore, the Claimant contends that the facts surrounding the conclusion of the Concession Agreement are closely linked to the umbrella clause claim and, hence, to the Legality Objection.⁴⁵

³⁷ Bifurcation Response, para. 10.

³⁸ Bifurcation Response, para. 9.

³⁹ Bifurcation Response, para. 12.

⁴⁰ Bifurcation Response, para. 12.

⁴¹ Bifurcation Response, paras. 12-13.

⁴² Bifurcation Response, para. 13.

⁴³ Bifurcation Response, paras. 13-14, *citing* Claimant's Memorial on the Merits, para. 497.

⁴⁴ Bifurcation Response, para. 15.

⁴⁵ Bifurcation Response, para. 15, *referring to* Claimant's Memorial on the Merits, paras. 166-179.

27. In connection with the Contribution Objection, EMS asserts that the extent of its commitment of resources in Albania and the liability and quantum of its claims are “intricately tied”.⁴⁶ It refers in particular to the argument in its Memorial on the Merits that it did not make certain investments due to Albania’s failure to comply with its own obligations, including those related to the renovation and dredging of the basin of the East Terminal.⁴⁷ Further, the damages sought are directly linked to Albania’s failure to make improvements in the East Terminal.⁴⁸

b. The Objections are baseless

28. EMS argues that Albania has failed to show that its Objections withstand scrutiny.⁴⁹ As a consequence, the Tribunal should refuse to bifurcate the proceedings.⁵⁰

29. In relation to the Legality Objection, EMS disputes Albania’s assertion that it did not make its investment in compliance with Albanian law.

30. First, for the Claimant, the Respondent’s contentions in this respect are “speculative” [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

31. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

32. Third, the Claimant refutes Albania’s assertion that its submission of consolidated financial statements was in breach of the tender’s legal requirements. For the Claimant, by granting the

⁴⁶ Bifurcation Response, para. 16.

⁴⁷ Bifurcation Response, paras. 16-18, *referring to* Claimant’s Memorial on the Merits, paras. 260, 456-459, 482-506, 509-511; **Exh. CWS-1**, Witness Statement of Mr. Florian Çimo, paras. 35, 37.

⁴⁸ Bifurcation Response, paras. 16-17, *referring to* Claimant’s Memorial on the Merits, paras. 260, 589.

⁴⁹ Bifurcation Response, para. 22.

⁵⁰ Bifurcation Response, para. 29.

⁵¹ Bifurcation Response, para. 24.

⁵² Bifurcation Response, para. 25, *referring to* [REDACTED]
[REDACTED]
[REDACTED]

⁵³ Bifurcation Response, para. 24, *referring to* **Exh. C-0032**, Masterplan, p. v; **Exh. CWS-2**, Witness Statement of Mr. Heiko Luikenga, para. 7.

⁵⁴ Bifurcation Response, para. 26.

concession to EMS, the Albanian authorities “implicitly confirmed there was nothing wrong” with EMS submitting consolidated statements.⁵⁵

33. In respect of the Contribution Objection, EMS contends that it invested millions of Euros into the port project, a fact not contested by Albania. It also stresses that matters related to the amount of its investments are for the merits.⁵⁶

c. Bifurcation would not serve procedural efficiency and fairness

34. EMS disputes that the Objections are serious and will succeed, so as to dispose of the entire dispute. It considers that it has sufficiently shown that the Objections are “unfounded allegations crafted in an attempt to delay the proceedings and tarnish EMS’ reputation”.⁵⁷
35. Against this backdrop, EMS argues that bifurcating the proceedings would be inefficient and would increase the cost and duration of the proceedings.⁵⁸ If bifurcation is granted and the Objections fail, the Tribunal would have to hold two hearings to review the same facts and the same documentary and witness evidence.⁵⁹ If bifurcation is granted and the Respondent prevails at least on the Legality Objection, the Tribunal would still need to consider liability and quantum in respect of EMS APO’s rights under the Concession Agreement, which issues would remain, as Albania does not allege “that there was anything untoward in [EMS APO’s] incorporation”.⁶⁰

III. ANALYSIS

A. LEGAL FRAMEWORK

36. For the avoidance of doubt, this decision is made on the basis of the Tribunal’s understanding of the record as it presently stands and shall not preempt any later finding of fact or conclusion of law. The purpose of this Order is to decide the Bifurcation Request and not the merit or lack of merit of the Objections. The Order starts by setting out the legal framework and standards before applying the requirements for bifurcation that arise from the framework to the specifics of this dispute.

⁵⁵ Bifurcation Response, para. 27, referring to **Exh. R-0013**, Letter from the Ministry to EMS No. 1128, 28 February 2013; **Exh. C-0240**, Letter from EMS to the Ministry, March 2013.

⁵⁶ Bifurcation Response, para. 28.

⁵⁷ Bifurcation Response, para. 37.

⁵⁸ Bifurcation Response, paras. 34, 40.

⁵⁹ Bifurcation Response, para. 38.

⁶⁰ Bifurcation Response, para. 39.

37. This arbitration is governed by the ICSID Convention and the 2022 ICSID Arbitration Rules (Section 1.1, PO1). The Tribunal’s power to rule on the Bifurcation Request arises from Article 41(2) of the ICSID Convention, which reads as follows:

Article 41

[...]

(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

38. The requirements for bifurcation are set in 2022 ICSID Arbitration Rule 44, which in relevant part reads as follows:

Rule 44

Preliminary Objections with a Request for Bifurcation

[...]

(2) In determining whether to bifurcate, the Tribunal shall consider all relevant circumstances, including whether:

(a) bifurcation would materially reduce the time and cost of the proceeding;

(b) determination of the preliminary objection would dispose of all or a substantial portion of the dispute; and

(c) the preliminary objection and the merits are so intertwined as to make bifurcation impractical.

39. It is evident from the aforesaid provisions that there is no presumption for or against bifurcation therein. Bifurcation is subject to a three-fold test focusing on whether the bifurcation would bring gains in terms of efficiency. More specifically, the test hinges on: (i) whether bifurcation would reduce time and cost; (ii) whether if successful, the bifurcated objection would resolve the entire or a significant part of the dispute; and (iii) whether the preliminary objection is closely linked to the merits, in which case bifurcation makes no sense.

40. The Respondent relies on the widely used test in *Glamis Gold*, which also focuses on efficiency and partially overlaps with the elements of the test just referred to. However, in an arbitration governed by the 2022 version of the ICSID Arbitration Rules which codifies earlier practice, the Tribunal must apply the requirements as they are framed in the 2022 ICSID Arbitration Rules.

B. THE OBJECTIONS

41. In essence, the Respondent submits that, if upheld, the Objections would either dispose of the dispute in full or at least in significant part, which the Claimant disputes.
42. Further, the Respondent asserts that the Objections are independent of the merits and, thus, can be determined without delving into the substance of the alleged breaches. It argues that the Objections are legal in nature or deal with facts distinct from those relevant to the merits and involving limited evidence. Conversely, the Claimant considers that it would be impractical to bifurcate the proceedings since the Objections are too intertwined with the merits.
43. Lastly, the Respondent contends that bifurcating the proceedings would reduce the cost and length of the proceedings. By contrast, the Claimant points to studies conducted by Lucy Greenwood and confirmed by the ICSID Working Group, according to which bifurcation does not necessarily promote efficiency.
44. In accordance with Rule 44(2), the Tribunal has taken all the relevant circumstances into account to decide whether to bifurcate the proceedings. It has also reviewed all of the Parties' arguments, even where it does not expressly refer to them. In the following discussion, it will emphasize those aspects that are decisive, addressing first the Legality Objection (1) and the Contribution Objection (2), before concluding (C).

1. The Legality Objection

45. The Tribunal accepts that, if the Legality Objection is upheld, it would dispose of the entire or a significant part of the dispute. Nonetheless, based on its current understanding of the record, the Tribunal finds that the review of the fair and equitable treatment and umbrella clause claims is most likely to include an assessment of the facts surrounding the negotiations and award of the Concession Agreement. As a consequence, in case of bifurcation, the same evidence, documentary and testimonial, and the same submissions, would have to be considered twice. Indeed, in its Memorial on the Merits, the Claimant argues that its legitimate expectations arose from "the documentation and negotiations leading up to the conclusion of the Concession Agreement".⁶¹ Similarly, it puts forward its case on the umbrella clause by reference to Albania's obligations under the Concession Agreement.⁶²

⁶¹ Claimant's Memorial on the Merits, para. 482. EMS also asserts that it made its investment in Albania only because it "reasonably relied on the commitments and representations arising from [the tender] process" (see Claimant's Memorial on the Merits, paras. 93-94).

⁶² Claimant's Memorial on the Merits, paras. 541-546.

46. It is thus the Tribunal's conclusion that the Legality Objection and the merits are so closely intertwined as to make a bifurcation of only the Legality Objection impractical. In addition, if the objection were to fail, it would be necessary to address the same facts and evidence twice instead of once, which would necessarily cause additional costs and use up more time. In other words, bifurcation would be inefficient.

2. The Contribution Objection

47. The Respondent argues that the inquiry would be restricted to the legal requirements for an investment to be protected under the Treaty and the ICSID Convention and the facts and evidence in respect of EMS' contribution in Albania. The Claimant objects that the examination of its contributions in Albania is intricately linked with the analysis of liability and quantum issues, since it was unable to make certain investments due to Albania's failure to comply with some of its contract obligations, particularly those related to the renovation and dredging of the East Terminal.

48. In the Tribunal's assessment, while the determination of the requirements for a qualifying investment is a legal issue, the fulfilment of such requirements is a matter of fact and it appears that at least some of these facts are likely to be at issue at the merits phase. Indeed, the Claimant contends that it was prevented from making certain investments because Albania failed to perform some of its contractual obligations.

49. Consequently, the Tribunal considers that it would be impractical and inefficient to bifurcate the Contribution Objection.

50. It also comes to the conclusion that a bifurcation of the Contribution Objection only would not materially reduce the duration and costs of the proceedings.

C. CONCLUSION

51. In light of the preceding discussion, the Tribunal comes to the conclusion that bifurcation of the Objections would not be justified.

IV. ORDER

52. For the foregoing reasons, the Tribunal:

- (i) Denies the Bifurcation Request;
- (ii) Determines that the proceedings shall continue under Scenario 2 of the Procedural Timetable;
- (iii) Reserves the costs of this decision for a later stage of these proceedings.

On behalf of the Tribunal,

[signed]

Prof. Gabrielle Kaufmann-Kohler

President of the Tribunal

Date: 23 February 2024