

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT
DISPUTES**

Gavrilović and Gavrilović d.o.o.

v.

Republic of Croatia

(ICSID Case No. ARB/12/39)

DECISION ON BIFURCATION

Members of the Tribunal

Michael C. Pryles, President of the Tribunal
Stanimir A. Alexandrov, Arbitrator
Matthias Scherer, Arbitrator

Secretary of the Tribunal

Lindsay Gastrell

Assistant to the President of the Tribunal

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21 January 2015

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I. INTRODUCTION

1. The present dispute arises out of the alleged investments of Mr. Georg Gavrilović, a national of Austria, and Gavrilović d.o.o., a company organized under the laws of Croatia (together, the “Claimants”), in the Republic of Croatia (the “Respondent” or “Croatia”).
2. The Claimants commenced this arbitration under the auspices of the International Centre for Settlement of Investment Disputes (“ICSID”) on the basis of the Agreement between the Republic of Austria and the Republic of Croatia for the Promotion and Protection of Investments, which entered into force on November 1, 1999 (the “BIT”), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on October 14, 1966 (the “ICSID Convention”).
3. On October 31, 2014, pursuant to paragraph 15.1.3 of Procedural Order No 1 of August 21, 2013 (as amended on November 16, 2013 and February 19, 2014) (“Procedural Order No 1”), the Respondent submitted its Counter-Memorial on the Merits and Memorial on Preliminary Objections (the “Counter-Memorial”) and a Submission in Support of Bifurcation of the Proceedings (the “Request”).
4. On December 1, 2014, pursuant to paragraph 15.1.4 of Procedural Order No 1, the Claimants submitted their Observations on the Respondent’s Bifurcation Request (the “Observations”).
5. By letter dated December 4, 2014, the Respondent requested that the Tribunal allow a second round of written submissions on the issue of bifurcation.
6. That same day, the Tribunal granted the Respondent’s request, setting forth a schedule for further submissions. The Tribunal also invited each party to propose a schedule for each of a bifurcated proceeding and a non-bifurcated proceeding.
7. On December 12, 2014, in accordance with the Tribunal’s schedule, the Respondent filed its Reply on Bifurcation (the “Reply”).

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8. On December 19, 2014, the Claimants requested a three-day extension of time to file their rejoinder submission. The Tribunal granted this request.
9. On December 22, 2014, the Claimants subsequently submitted their Rejoinder on Bifurcation (the “Rejoinder”).
10. On December 31, 2014, each party filed its proposed schedule for each of a bifurcated proceeding and a non-bifurcated proceeding.
11. Following receipt of the parties’ written submissions, the Tribunal considered the respective submissions of the parties, and deliberated.
12. For the reasons set out in Section IV below, the Tribunal has decided to refuse the Respondent’s request for bifurcation of the proceedings into a jurisdictional phase and a merits phase.

II. THE PARTIES’ SUBMISSIONS

A. The Respondent’s Submissions

13. In the Counter-Memorial, the Respondent raises objections to the jurisdiction of the Tribunal and to the admissibility of the Claimants’ claims. In the Request, the Respondent asks the Tribunal to hear and decide these objections as preliminary issues prior to considering the merits.
14. The Respondent raises the following objections to the Tribunal’s jurisdiction:
 - a. first, it contends that the Claimants have not made an “investment” in Croatia within the meaning of Article 25(1) of the ICSID Convention and Article 1(1) of the BIT, as they have neither made a contribution of economic resources in Croatia nor assumed the necessary investment risk (the “First Objection”);¹ and

¹ Counter-Memorial, Section III.B; Request, ¶4.

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- b. second, it contends that legality is an express requirement of the BIT and an implicit condition of consent to ICSID arbitration, and the Claimants' alleged investment was acquired illegally in breach of Croatian and international law, and in contravention of international public policy (the "Second Objection")² It follows, so it contends, that the Tribunal does not have jurisdiction.²
15. Further or alternatively, the Respondent submits that the Claimants' claims are inadmissible and should be dismissed on the following grounds:
- a. first, it says that, as a matter of general principles of law, international law and international public policy, a court or tribunal will not grant assistance to a party that has engaged in illegality, as the Claimants have done in this case (the "Third Objection");³ and
- b. second, it contends that the Purchase Agreement of November 11, 1991 contains an exclusive choice of forum clause providing that the Regional Commercial Court in Zagreb has jurisdiction over "any dispute" arising in relation to the agreement. Accordingly, the Tribunal should not consider the merits of the Claimants' claims concerning alleged non-performance of obligations in the Purchase Agreement (the "Fourth Objection").⁴
16. The Respondent submits that the Tribunal has the power to consider these objections as a preliminary matter and to suspend the proceeding on the merits pursuant to Article 41 of the ICSID Convention and Rules 41(3) and 41(4) of the ICSID Arbitration Rules.⁵ Even if one were to assume that these provisions address only jurisdictional objections, the Respondent argues that "the Tribunal has the discretion to rule on admissibility objections

² Counter-Memorial, Section III.C; Request, ¶5.

³ Counter-Memorial, Section IV.A; Request, ¶7.

⁴ Counter-Memorial, Section IV.B; Request, ¶8.

⁵ Request, ¶¶12-15.

as a preliminary matter under its residual powers and Article 44 of the ICSID Convention”.⁶

17. According to the Respondent, it is common practice in international investment arbitration to bifurcate proceedings between preliminary objections and the merits.⁷ The Respondent contends that early resolution of jurisdictional and admissibility issues “avoids spending time and resources on issues that will become moot if the Tribunal turns out to be unable to hear the claims.”⁸ Further, for the Respondent, the case for bifurcation of preliminary objections is particularly strong when the respondent is a sovereign State, as States “need not give an account of themselves before an international court or tribunal on the substance of a dispute when jurisdiction has not yet been established”.⁹
18. In this regard, the Respondent points to procedural regimes such as the UNCITRAL Arbitration Rules 1976, the Swiss Rules 2012 and the Swiss Private International Law Act 1987, which the Respondent says “adopt a presumption or general rule in favour of bifurcation in order to ensure that a tribunal seised of a case proceeds on a sound footing”.¹⁰ The fact that the ICSID Convention and ICSID Arbitration Rules contain no such explicit presumption does not suggest that bifurcation is to be discouraged in ICSID cases. Rather, the Respondent asserts that previous decisions in ICSID cases reflect the shared rationale that:

notwithstanding the importance of the specific circumstances and claims advanced, bifurcation makes sense where (i) an attempt is undertaken to make a State a party to proceedings and (ii) its consent to arbitrate or the admissibility of the claims are in doubt, especially where jurisdiction is

⁶ Reply, ¶20.

⁷ Request, ¶24, citing *inter alia* C. Schreuer, *The ICSID Convention: A Commentary* (CUP, 2009), pp. 537, 534.

⁸ Request, ¶20.

⁹ Request, ¶28, citing S. Rosenne, *The World Court: What it Is and How it Works* (Martinus Nijhoff, 2003), p. 81.

¹⁰ Request, ¶21.

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sought based on the respondent State's unilateral advance offer in respect of a potentially unlimited number of cases.¹¹

19. The Respondent submits that the relevant considerations in determining whether bifurcation is appropriate are those set out by the tribunal in *Glamis Gold v United States of America* ("Glamis Gold").¹² In *Glamis Gold*, the tribunal opined that bifurcation is not apt where the preliminary objections are: (i) frivolous; (ii) incapable of materially reducing the scope of proceedings; or (iii) unduly entwined with the merits.¹³ According to the Respondent, none of these factors is present in this case.

20. The Respondent deals with each of those factors in turn, as follows.

(i) *Factor 1: Frivolousness*

21. The Respondent submits that its objections are "anything but frivolous"; indeed, they contend that they are substantial and supported by ample evidence.¹⁴

22. In relation to the First Objection, the Respondent considers it an uncontested fact that the payment made to acquire the Claimants' alleged investment, which was required by law to have gone to five separate bankruptcy estates in Croatia, was instead transferred to the Swiss account of a Panamanian company.¹⁵ It follows from this fact, it says, that "there was no contribution or genuine economic arrangement amounting to a qualifying 'investment' for the purposes of the constituent treaties."¹⁶

23. In relation to the Second and Third Objections, which are based on the Claimants' alleged unlawful actions, the Respondent submits that, in its Counter-Memorial, it identified a

¹¹ Reply, ¶43.

¹² Request, ¶25; Reply, ¶6, citing *Glamis Gold Ltd. v. United States of America*, NAFTA/UNCITRAL, Procedural Order No. 2 (Revised), 31 May 2005, ¶ 12(c).

¹³ Id.

¹⁴ Request, ¶31; Reply, ¶21.

¹⁵ Request, ¶32; Reply, ¶13.

¹⁶ Reply, ¶13. See also, Request, ¶33.

number of illegalities relating to the Claimants' alleged investment, including what they described in the Counter-Memorial as "gross violations of Croatian and international law" and infringements of "transnational public policy".¹⁷ Further, the Respondent points to current criminal investigations into the Claimants so as to highlight the seriousness of these objections.¹⁸

24. In relation to the Fourth Objection, the Respondent rejects the Claimants' contention that the objection is "not tenable". It contends that the Claimants have misrepresented the Respondent's position.¹⁹ According to the Respondent, this objection is substantial because:

the binding, voluntary and unqualified choice to resolve "any" dispute from the Purchase Agreement in the Commercial Court in Zagreb ... provides a compelling reason why the Tribunal should not enter into the merits of such a dispute, even on the assumption that it might have jurisdiction under an international legal instrument.²⁰

(ii) Factor 2: Reduction in Scope of Issues

25. The Respondent submits that early determination of its preliminary objections "would result in a complete dismissal of the case or, at the very least, materially reduce its scope if the Respondent prevails".²¹ Indeed, according to the Respondent, if either of its jurisdictional objections is upheld, or if the Tribunal finds the claims inadmissible, the case cannot proceed. At a minimum, bifurcation would shorten the proceedings and save costs.²²

¹⁷ Counter-Memorial, ¶318.

¹⁸ Reply, ¶14.

¹⁹ Reply, ¶19.

²⁰ Reply, ¶19.

²¹ Request, ¶35.

²² Request, ¶38.

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26. In particular, the Respondent contends that bifurcation could obviate the need for the parties and the Tribunal to engage in the complex and costly task of, respectively, making submissions upon, and determining, the merits of the Claimants' claims. Although the Respondent has submitted a Counter-Memorial on the merits, it contends that there is still extensive work outstanding, such as written pleadings, expert and witness testimony, oral hearings and document production. According to the Respondent, all of these processes will be narrower, less time-consuming and less costly if focused solely on preliminary objections.²³ As an example, the Respondent contends:

addressing the merits of the Claimants' case would involve examining and determining the ownership of no fewer than 80 commercial properties and 470 apartments spread out over more than three thousand plots of land throughout Croatia.²⁴

27. Furthermore, the Respondent argues that it would be a waste of time and costs to address the Claimants' quantum claim any further before the Tribunal decides the jurisdictional and admissibility issues.²⁵ In this regard, the Respondent says that the Claimants' claim for direct damages "entails determination of the market value of 80 commercial properties and 470 apartments ... as well as calculation of the income allegedly obtainable from letting some of those properties between 2002 and 2013",²⁶ and that the claim for indirect damages involves a range of "complex variables affecting the Croatian meat industry".²⁷

28. The Respondent also argues that early determination of its Fourth Objection relating to the Purchase Agreement could significantly reduce the scope of claims before the Tribunal. Those claims, according to the Respondent, would require the determination of many

²³ Request, ¶¶39-44.

²⁴ Request, ¶41.

²⁵ Request, ¶45.

²⁶ Request, ¶46.

²⁷ Request, ¶47.

issues of Croatian law, an exercise that could be avoided if the Fourth Objection were upheld in a preliminary phase.²⁸

29. In its Reply, the Respondent argues that the Claimants underestimate the extent of outstanding work in this case.²⁹ In particular, the Respondent rejects the Claimants' contention that the Tribunal need not consider "strict ownership" under Croatian law to decide their claims. Rather, the Respondent contends that the Claimants' right *in rem* under Croatian law is a necessary precursor to any question of liability under the BIT relating to Claimants' real property.³⁰ Similarly, the Respondent asserts that, contrary to the Claimants' argument, the Tribunal will need to consider the status of thousands of land plots because it cannot take for granted that the Claimants have correctly bundled the plots as properties.³¹

(iii) *Factor 3: Connection with the Merits*

30. In relation to the third factor identified in *Glamis Gold*, the Respondent submits that its preliminary objections "turn on discrete and self-contained questions of fact, Croatian and international law, and international public policy", which are distinct from the merits.³² Therefore, there would be no duplication of work in a bifurcated proceeding. According to the Respondent, because its preliminary objections concern only the questions of whether consent exists and whether the claims are admissible, the Tribunal can decide these issues without touching upon the substance of the Claimants' claims.³³
31. In particular, the Respondent argues that the facts relevant to deciding the preliminary objections (including the alleged failure to pay for shares and misuse of bankruptcy proceedings) are not connected to the facts relevant to the Claimants' claims (relating to

²⁸ Request, ¶¶48-49.

²⁹ Reply, Section V.

³⁰ Reply, ¶60.

³¹ Reply, ¶61.

³² Reply, ¶23.

³³ Request, ¶52.

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real property ownership and land registration).³⁴ Similarly, in the Respondent’s submission, there is no overlap between the evidence relevant to the preliminary objections and that which is relevant to the merits. For example, the witnesses and experts who would testify in relation to the merits would not be expected to testify in relation to the preliminary objections.³⁵

32. Regarding the First Objection – lack of an “investment” – the Respondent asserts that “the issue can be resolved by assessing whether or not there was a contribution of value by the Claimants” and whether any such contribution would be lost if the venture failed.³⁶

33. With respect to the Second and Third Objections – illegality – the Respondent argues that the relevant facts and evidence concern “the source of the funds, the destination of the funds and the bankruptcy illegalities”.³⁷ According to the Respondent, none of these matters is related to land ownership or registration, which is central to the Claimants’ case on the merits. In this respect, the Respondent refers the decision in *Philip Morris Asia Limited v. Australia*, in which the tribunal considered an objection based on non-conformity with host-State law to be:

suitable for bifurcation because it concerns the foundation of the Tribunal’s jurisdiction under the Treaty. In the Tribunal’s view, it can be considered as a discrete and self-contained question both factually and legally limited to the application of Australian law...³⁸

34. As to the Fourth Objection, the Respondent states that “it is undisputed that this requires virtually no factual analysis at all and that it is not connected to the merits.”³⁹

³⁴ Request, ¶54.

³⁵ Request, ¶¶58-63.

³⁶ Reply, ¶24.

³⁷ Reply, ¶25.

³⁸ Reply, ¶41, quoting *Philip Morris Asia Limited v. Commonwealth of Australia*, PCA Case No. 2012-12, Procedural Order No. 8 regarding Bifurcation of the Procedure, 14 April 2014, ¶111.

³⁹ Reply, ¶27.

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35. In any event, the Respondent rejects the Claimants’ apparent suggestion that bifurcation is not appropriate if the preliminary objections are “fact-intensive”.⁴⁰ In the Respondent’s view, there is a benefit of potential cost and time savings in dealing with such objections separately when the relevant factual examination is unconnected with the merits.

(iv) *Procedural Fairness*

36. In addition to its arguments relating to the three factors identified in *Glamis Gold*, the Respondent submits that bifurcation is appropriate in this case because “the balance of procedural fairness favors the Respondent”.⁴¹ According to the Respondent, the Claimants will not be prejudiced by bifurcation of the proceedings because: (i) there is no risk of delay given that the Tribunal can set an efficient timetable for separate phases; (ii) there will be no waste of time because the preliminary objections must be heard and decided in any event; (iii) in light of the disconnect between preliminary issues and the merits, a decision on jurisdiction and admissibility could not prejudge the merits; and (iv) a decision on bifurcation can be made without prejudging the Respondent’s preliminary objections.⁴²

37. In this regard, in the Reply, the Respondent denies any suggestion made by the Claimants that bifurcation would affect the quality of evidence or unduly prolong the dispute.⁴³ The Respondent specifically rejects the Claimants’ use of empirical studies on bifurcation to suggest that bifurcation is time-consuming and inefficient. According to the Respondent these studies are not only “empirically and methodologically questionable”, but they are based on an assumption that a respondent’s objections will be rejected.⁴⁴ In any event, the Respondent contends that the Tribunal “should—all other things being equal—err on the side of caution rather than speed.”⁴⁵

⁴⁰ Reply, ¶28.

⁴¹ Request, Section IV.

⁴² Request, ¶¶65-68.

⁴³ Reply, Section VI.

⁴⁴ Reply, ¶47.

⁴⁵ Request, ¶74.

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38. The Respondent argues that it would suffer serious prejudice if the preliminary objections are joined to the merits.
39. First, the Respondent says that, in the absence of bifurcation, it would be burdened with the extensive task of defending itself in a full case in “improper proceedings to which it did not consent”.⁴⁶
40. Second, given that the Respondent has complied with the Tribunal’s direction in Procedural Order No 1 to submit a full Counter-Memorial on the merits, it argues that at this stage, it would serve procedural fairness and equality of arms to address the Respondent’s objections before considering the merits.⁴⁷
41. Third, the Respondent states that its request for bifurcation stands “apart from routine bifurcation requests” because the Claimants acquired their alleged investment unlawfully and “now seek the assistance of the Tribunal to further profit from their own wrongs”.⁴⁸

B. The Claimants’ Submissions

42. In their Observations and Rejoinder, the Claimants ask the Tribunal to refuse the Respondent’s Request in its entirety.
43. The Claimants contend that the ICSID Rules do not contain a presumption in favour of bifurcation; indeed, the ICSID Administrative Council explicitly rejected such a policy when, as part of the 2006 amendments to the ICSID Arbitration Rules, it amended the previous rule that provided for automatic suspension of the merits.⁴⁹ Citing *Ascension v. Hungary*, the Claimants state that a tribunal should exercise its discretion to bifurcate

⁴⁶ Request, ¶69.

⁴⁷ Request, ¶72.

⁴⁸ Request, ¶73.

⁴⁹ Observations, ¶13.

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proceedings only after considering whether bifurcation would preserve or improve fairness and procedural efficiency.⁵⁰

44. The Claimants say that the Respondent’s analysis of different procedural regimes is “irrelevant and inaccurate”.⁵¹ In particular, the Claimants contend that the Respondent has failed to consider that, in 2010, the UNCITRAL Arbitration Rules were changed “to remove any previously existing presumption in favour of bifurcation”,⁵² and that *Glamis Gold* was decided under an out-dated version of these rules which did have such a presumption.⁵³
45. The Claimants reject the Respondent’s assertion that bifurcation is common practice in international investment arbitration, citing a study “which found that only 45 out of 174 ICSID tribunals have bifurcated proceedings between jurisdiction, merits and quantum.”⁵⁴
46. The Claimants agree with the Respondent that the three factors listed by the Tribunal in *Glamis Gold* are among the relevant considerations for determining whether to bifurcate proceedings but emphasise that they are not the only considerations that may be relevant.⁵⁵ Instead, tribunals deciding whether to bifurcate proceedings must look “through the lens of several factors that either promote or detract from procedural efficiency and judicial economy.”⁵⁶

⁵⁰ Observations, ¶¶9-10 and Rejoinder, ¶45, citing *Accession Mezzanine Capital L.P. and Danubis Kereskedohaz Vagyonekzelo Zrt. v. Hungary*, ICSID Case No. ARB/12/3, Decision on Respondent’s Notice of Jurisdictional Objections and Request for Bifurcation, August 8, 2013, ¶38.

⁵¹ Observations, ¶11.

⁵² Observations, ¶12.

⁵³ Observations, ¶20; Rejoinder, ¶57.

⁵⁴ Observations, ¶16, citing Lucy Greenwood, “Does Bifurcation Really Promote Efficiency?” *Journal of International Arbitration*, Kluwer Law International, Volume 28, Issue 2 (2011).

⁵⁵ Observations, ¶22; Rejoinder, ¶¶46-50.

⁵⁶ Rejoinder, ¶54.

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47. According to the Claimants, “statistical evidence and procedural fairness” are relevant considerations in this case.⁵⁷ Thus, the Claimants state that “[a]s a baseline”, one must recognise that a bifurcated jurisdictional phase may add a year or more to the length of the proceedings and can be expensive to litigate; yet, they say that “only less than a quarter of ICSID cases are dismissed for lack of jurisdiction”.⁵⁸

48. Applying these considerations to the present case, the Claimants argue that, for several reasons, bifurcation would not be procedurally efficient and would result in procedural and substantive unfairness for the Claimants. It is convenient to set out their arguments in relation to each of these two matters separately.

(i) *Efficiency of the Proceeding*

49. With respect to the question of the efficiency of the proceeding, the Claimants argue that early determination of the Fourth Objection would be of no procedural advantage since the case would continue to the merits phase even if the objection were granted.⁵⁹ Although the Claimants accept that the First, Second and Third Objections, if granted, could dispose of the entire case, they contend that there would be little cost or time savings from bifurcation because the facts underlying these objections are intertwined with the merits.⁶⁰ In any event, they say that there is little chance the Respondent will prevail in respect of any of its objections.⁶¹

50. First, the Claimants point to the decision in *Mesa Power Group LLC v. Canada* to support their position that “even a partial overlap of evidence” between preliminary and merits issues is sufficient to deny bifurcation.⁶² Further, citing *Minnotte v. Poland* and

⁵⁷ Rejoinder, ¶51.

⁵⁸ Observations, ¶23.

⁵⁹ Observations, ¶29.

⁶⁰ Observations, ¶30.

⁶¹ Observations, ¶31; Rejoinder, ¶6.

⁶² Observations, ¶33, citing *Mesa Power Group, LLC v. Government of Canada*, NAFTA Chapter 11, PCA Case No. 2012-17, Procedural Order No. 2, January 18, 2013, ¶16.

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Generation Ukraine v. Ukraine, the Claimants contend that “tribunals confronted with allegations of fraud and that the investment at stake was not made in accordance with the host State’s law typically decide to join such objections to the merits”, and that the Respondent has made such allegations in this case.⁶³

51. According to the Claimants, “[t]wo factual matrices are central to both merits and jurisdiction questions: the bankruptcy proceedings and the pre-bankruptcy assets of Claimant Gavrilović d.o.o.”.⁶⁴ As such, the evidence relating to the Respondent’s preliminary objections is intrinsically and inextricably linked to the merits of the dispute.⁶⁵ In particular, the Claimants contend that numerous exhibits to their Memorial on the Merits, most notably the Record and the Asset List, would need to be reviewed from the perspective of both jurisdiction and merits.⁶⁶ In this regard, the Claimants reject as “simply false” the Respondent’s statement that the Record and the Asset List are not mentioned in the Respondent’s preliminary objections; the Claimants point out that the Respondent references these documents in relation to its allegation that Mr. Gavrilović schemed with the bankruptcy trustee, and that the Respondent’s “Bankruptcy Law Expert Report” discusses the Record extensively.⁶⁷
52. Similarly, the Claimants state that “at least half of the witnesses testify both as to the circumstances of the bankruptcy purchase (jurisdiction) and later breaches of FET by Croatia (merits)”.⁶⁸ Thus, many witnesses would need to appear twice during this arbitration if the Tribunal were to bifurcate the proceedings.⁶⁹

⁶³ Observations, ¶¶36, citing *Minnotte and Lewis v. Republic of Poland*, ICSID Case No. ARB (AF)/10/1, Award, May 16, 2014, ¶129.

⁶⁴ Rejoinder, ¶21.

⁶⁵ Observations, ¶¶4, 41.

⁶⁶ Observations, ¶¶41-46; Rejoinder, ¶¶21-30.

⁶⁷ Rejoinder, ¶¶31-32.

⁶⁸ Rejoinder, ¶37.

⁶⁹ Observations, ¶¶47-50; Rejoinder, ¶¶33-37.

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53. Second, the Claimants contend that “to determine whether bifurcation is appropriate, it is necessary to make a preliminary determination of the likelihood of success of the preliminary objections”.⁷⁰ Applying this test, the Claimants contend that the Respondent’s objections are insufficiently substantial to warrant bifurcation.⁷¹
54. According to the Claimants, the First Objection is “particularly frivolous” for several reasons, including that “risk is already indicated by the existence of a dispute” and that “the origin of capital used in investments is immaterial”.⁷²
55. The Claimants say that the Second and Third Objections are unsubstantiated because (i) the Respondent did not “successfully challenge the purchase in the 23 years” since the investment; (ii) Croatian courts have never refused to confirm the transaction’s effectiveness; (iii) a senior state attorney of Croatia confirmed that the investment was made in accordance with Croatian legislation made pursuant to the BIT; (iv) the Respondent subjected the bankruptcy purchase to a state audit process which did not find any illegalities; (v) the Respondent’s key witness for these objections is a convicted felon who recently entered into a plea agreement with the Respondent’s state attorney’s office reducing his punishment; (vi) the Respondent has “not cited to one Croatian [statute] or other applicable law that either of the Claimants supposedly breached”; and (vii) documents in the criminal file which the Respondent has concealed “demonstrate that the transfer of funds to Mr. Gavrilović in connection with this investment was not unlawful”.⁷³

⁷⁰ Rejoinder, ¶¶52-60.

⁷¹ Observations, ¶51.

⁷² Observations, ¶52.

⁷³ Observations, ¶¶54-63; Rejoinder, 8-17.

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56. The Claimants argue that the Fourth Objection is not substantial either because, as the tribunal explained in *Vivendi v. Argentina*, “a forum selection clause in a contract pointing to domestic courts will not oust ICSID’s jurisdiction”.⁷⁴

57. Finally in relation to issues of efficiency, the Claimants argue that dismissing their claims on the merits would not lead to substantially less cost and expense because: (i) the parties have already provided complete submissions covering all stages of the proceedings; (ii) the Respondent has “grossly exaggerated” the amount of outstanding work related solely to the merits by claiming that each land plot and property requires a unique determination, when in fact many can be addressed simultaneously and the parties have already submitted expert reports on this subject; and (iii) the Respondent’s jurisdictional objections are “highly fact-based”, such that “having one document production for the jurisdictional and merits phases will save considerable time and costs”.⁷⁵

(ii) *Procedural Fairness*

58. Turning to the issue of procedural fairness, the Claimants argue that bifurcation of the proceedings would prolong the arbitration and with it the Respondent’s illegal “campaign of harassment and deprivation”, which the Respondent has, according to the Claimants, “intensified” since the filing of the arbitration. This conduct has caused “serious damage to [the Claimants’] business reputation” and relationships, and forms the basis of the Claimants’ Request for Provisional Measures.⁷⁶

59. Furthermore, the Claimants argue that, by delaying the merits phase, bifurcation could deprive the Tribunal of the opportunity to hear testimony from several witnesses “due to

⁷⁴ Observations, ¶¶64.

⁷⁵ Observations, ¶¶ 65-71; Rejoinder, ¶¶38-43.

⁷⁶ Observations, ¶¶72-77; Rejoinder, ¶¶18-20.

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their high age and health problems”.⁷⁷ Thus, bifurcation would “manifestly reduce the fairness of these proceedings.”⁷⁸

III. ANALYSIS

60. Having carefully considered the submissions of the parties, the Tribunal has decided to refuse the Respondent’s request for bifurcation of the proceedings into, first, a jurisdictional and admissibility phase and, then, a merits phase.
61. Before turning to the reasons for this decision, it is necessary to put to one side some preliminary matters.
62. First, it is clear that the ICSID Convention and the ICSID Arbitration Rules provide a sufficient basis for the existence of the Tribunal’s power to decide whether to bifurcate.
63. Second, as to the breadth of the discretion, while the Tribunal has been assisted by reference to the relevant regimes under other arbitration rules, and decisions of other tribunals, the exercise of its discretion is not to be unduly narrowed by reference to presumptions or circumstances in which other tribunals have considered it appropriate to (or not to) bifurcate on the facts of other cases. The Tribunal notes that, formerly, the ICSID Arbitration Rules provided that when a respondent State raised an objection to jurisdiction, all proceedings on the merits were automatically suspended until the tribunal either ruled on the respondent’s jurisdictional objections or ordered them to be joined to the merits.⁷⁹ The present Rules provide for a discretion in such circumstances: Rule 41(3) now states that “[u]pon the formal raising of an objection relating to the dispute, the Tribunal may decide to suspend the proceeding on the merits” (emphasis added). The present Rules, therefore, contain no such mandatory suspension; nor is there any reference to a presumption in favour of bifurcation.

⁷⁷ Observations, ¶78.

⁷⁸ Observations, ¶7.

⁷⁹ ICSID Convention, Regulations and Rules, ICSID/15/Rev. 1 (2003), Rule 41(3).

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64. Third, the Tribunal considers that little assistance is gained by seeking to identify, if it may exist, the common practice of international arbitral tribunals.
65. Fourth, statistical data on how many bifurcation applications have been granted are apt to mislead.
66. What is clear is that each case must turn on its own facts. And, this being so, the Tribunal does not consider that it should be placed in the “straightjacket” of considering this question by reference to the *Glamis Gold* factors, and nothing further. To do so would be to overlook what can be discerned from relevant cases, namely a governing principle that a decision on an application for bifurcation, like other procedural orders, must have regard to the fairness of the procedure to be invoked and the efficiency of the Tribunal’s proceedings. To identify, and discuss in turn, only certain identified factors may distract from the task at hand.

A. The Objections Re-visited

67. It will be recalled that the Respondent’s request for bifurcation rests on four objections to either jurisdiction or admissibility.⁸⁰ While it is, of course, unnecessary for the purposes of this decision to rule on these objections, it is important, indeed critical, to the outcome to have regard to what would be involved in determining, in a bifurcated phase, whether the objections should be upheld. Before turning to consider the procedural advantages and disadvantages of considering each of these objections in a bifurcated phase, it bears briefly re-visiting the First to Fourth Objections.
- a. The First Objection is a jurisdictional one. The Respondent claims that the Claimants have not made an “investment” in Croatia within the meaning of Article 25(1) of the ICSID Convention and Article 1(1) of the BIT.

⁸⁰ See paragraphs 14-15 above.

- b. The Second Objection is also a jurisdictional one, namely that legality is an express requirement of the BIT and an implicit condition of consent to ICSID arbitration. As the Claimants' alleged investment was acquired illegally in breach of Croatian and international law, and in contravention of international public policy, it was obtained illegally and, thus, the Tribunal does not have jurisdiction.
- c. The Third Objection can be considered together with the Second Objection – it, however, goes to the admissibility of the Claimants' claims. As a matter of general principles of law, international law and international public policy, a court or tribunal will not grant assistance to a party that has engaged in illegality.
- d. The Fourth Objection relates only to alleged non-performance of the Purchase Agreement dated November 11, 1991. At least insofar as disputes under that agreement are concerned, they should be determined by the chosen court, namely the Regional Commercial Court in Zagreb, and not this Tribunal.

B. The First Objection

- 68. The Respondent's contention that the Tribunal is able to simply determine the issue of whether there is an "investment" has a superficial attraction to it. Indeed, the Respondent contends that the evidence in support of the First Objection arises from the Claimants' own evidence: "A letter from the First Claimant's bank dated 18 March 1991 and two foreign transfer orders dated 6 and 16 March 1992 demonstrate that the money that should by law have gone to five separate bankruptcy estates in Croatia in return for five companies in bankruptcy ... was instead transferred to the account of a Panamanian company ... in Zug, Switzerland".⁸¹
- 69. The Tribunal's present view is that there is merit in the Claimants' Response. It may be that the determination of whether there was a relevant "investment", and thus jurisdiction, will require consideration to be given, at least, to the bankruptcy proceedings that preceded the

⁸¹ Request, ¶32.

payment identified by the Respondent and the other salient aspects of the context in which the investment was (or was not) made. That this is so follows from the contentions relied upon by the Claimants to support the existence of an “investment”. In their Observations, they identify four such contentions,⁸² namely (i) the broad interpretation of the term “investment”; (ii) the acceptance of an “investment” where the purchase price has been a nominal amount; (iii) the assumption of risk by the Claimants which is evidenced by the existence of a dispute; and (iv) the fact that tribunals have generally found that the origin of capital used in investments is immaterial. Whether these contentions ultimately succeed is another question, but the issue of whether a financial contribution was made may well necessitate the Tribunal’s review of the relevant bankruptcy proceedings in considerable detail, so as to assess not only their legality under the domestic law, but also to determine exactly what assets were transferred, and to whom, in the course of the bankruptcy proceedings. Furthermore, as the tribunal identified in *Kardasopoulous v. Georgia*, the prevailing political and economic climate may also inform the existence, or otherwise, of an assumption of risk.

70. Further, the Tribunal’s opinion is informed by the approach of the tribunal in *Minnotte v. Poland*, where it was explained that the investment must be a real one. But the precise amount and value of which is not critical to the question of the existence, or otherwise, of jurisdiction.⁸³ The First Objection, as to the ultimate veracity of which we say nothing, requires an investigation of that which preceded the relevant payment to identify whether, indeed, there was value which passed from the Claimants to the Respondent. That value may take many forms, and the fact that funds were deposited in a Swiss account (assuming that to be so) does not explain the provenance of those funds, nor the ultimate beneficiary of such funds. In short, the First Objection cannot, in the Tribunal’s view, be determined by reference to a factual matrix as narrow as that posited by the Respondent. Indeed to do so would be to overlook what the Tribunal considers may, in an appropriate case (of which this may be one), be relevant to the determination of the existence, or otherwise, of an

⁸² Observations, ¶52.

⁸³ *Minnotte and Lewis v Republic of Poland*, ICSID Case No. ARB (AF)/10/1, Award, May 16, 2014, ¶112.

“investment”, namely the other conduct which preceded and post-dated the relevant payment.

71. Accordingly, insofar as the First Objection is concerned, the Tribunal does not accept the proposition, emphasised numerous times by the Respondent (in relation to this objection and others) that the preliminary objection can be determined on the basis of “discrete and self-contained questions of fact”.⁸⁴ The proceeding, in this regard, bears insufficient resemblance to *Philip Morris Asia Limited v. Australia*, where it was said that the relevant question was a “discrete and self-contained question both factually and legally limited to the application of [national] law”.⁸⁵ Indeed, the Tribunal considers that deciding upon the First Objection is, indeed, a task requiring a considerable “fact-intensive” analysis.

C. The Second and Third Objections

72. The Second and Third Objections concern allegations of illegality which, in the Respondent’s submissions, go to, respectively, jurisdiction and admissibility. That is, the Respondent alleges, *inter alia*, that the First Claimant “orchestrated the bankruptcy of the Five New LLCs and fraudulently took possession of them”⁸⁶ or “fraudulently took money belonging to the Croatian State”.⁸⁷ The Respondent contends that a finding on these matters, at a jurisdictional or admissibility phase, would alleviate the need for the burdensome task of reviewing the propriety, or otherwise, of the ownership of no fewer than 80 commercial properties and 470 apartments throughout Croatia.
73. The Tribunal is cognisant of the need to ensure procedural efficiency, and can see the good sense in considering an objection which, if upheld, would save the parties considerable time and expense in considering such fact-intensive inquiries. Indeed, the Claimants frankly concede that the Respondent’s success on either of the Second or Third Objections

⁸⁴ cf. Reply, ¶61.

⁸⁵ *Philip Morris Asia Limited v. Commonwealth of Australia*, PCA Case No. 2012-12, Procedural Order No 8 regarding Bifurcation of the Procedure, 14 April 2014, ¶111.

⁸⁶ Counter-Memorial, ¶20.

⁸⁷ Counter-Memorial, ¶33.

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(as well as the First Objection) would dispose of their claims in their entirety, and thereby obviate a need for a merits phase at all.⁸⁸

74. The Tribunal is not, however, satisfied that the proceeding can be neatly divided in the manner suggested by the Respondent. Absent consideration of the various factual disputes in relation to the bankruptcy proceedings, and perhaps the consideration of the provenance of the title of each and every property (that is, the determination of issues such as validity and proper registration of the relevant titles), no proper conclusion can be drawn as to the illegality (or otherwise) of the Claimants' conduct. This may well involve careful consideration of the propriety of the actions of various administrative and judicial authorities in registering (or refusing to register) title. To determine that question at the first stage, without the benefit of a comprehensive evidential basis, would be to risk prematurely dismissing the Claimants' claims.
75. The Tribunal is not persuaded by the Respondent's argument that various documents can be effectively ignored for the purposes of determining the appropriateness of bifurcating the proceeding. By way of example, the Respondent contends that the Record and Asset List are each a sham produced to obscure the fact that various properties were not properly divided amongst the relevant companies. Whether that is so can only be determined on a proper analysis of the evidence in support of that proposition.
76. The Claimants rely on these very documents as evidence of their rights for the purposes of the merits of the dispute and highlight that the Respondent relies on the very same documents to posit illegality for the purposes of its jurisdictional and admissibility objections. It must follow, in the Tribunal's view, that the jurisdictional and admissibility stage, on the one hand, and the merits stage, on the other, will be linked, if not inextricably, at least closely. In this regard, the Tribunal notes that it was accepted by the tribunal in

⁸⁸ Observations, ¶30.

*Mesa Power Group, LLC v. Government of Canada*⁸⁹ that the existence of “closely linked” facts may, of itself, be sufficient to justify a refusal of an application to bifurcate.

77. Further, the prospect of a division between these phases, especially in relation to the matters the subject of the Second and Third Objections, raises the prospect of witnesses having to give evidence on two occasions. That may be particularly problematic where, as here, there are serious allegations of fraud to be put to witnesses. The Tribunal considers that the possibility of it being asked to consider such allegations, and make findings as to credibility, at the jurisdictional or admissibility stage is such that the Tribunal may be asked to undertake this task where it has not yet had the benefit of the full factual matrix. Only a hearing of the entirety of the dispute will provide the Tribunal with all of the relevant evidence to properly consider such serious allegations. That is not to say that where allegations of fraud and illegality are made, bifurcation will never be appropriate. But where, as here, the allegations said to support the Second and Third Objections are, at least, closely linked, bifurcation is rendered difficult, if not impossible.
78. Finally, the Respondent’s reliance on the existence of a criminal investigation in Croatia⁹⁰ as “emphasis[ing] the seriousness of the Respondent’s objections”⁹¹ is, in our view, unhelpful. What matters to the Tribunal’s ultimate determination of the illegality (or otherwise) of conduct in Croatia at the relevant time will turn on the evidence led by the parties, not the existence (or otherwise) of an investigation.
79. In these circumstances, the Tribunal considers that the reduction in scope of the issues identified by the Respondent is more apparent than real. At least insofar as the Second and Third Objections are concerned, the overlap between the factual matters is such that the jurisdiction or admissibility phase, even if it were considered to be appropriate, would be time-consuming. Indeed, if that objection failed, the length of the proceeding, as a whole, would be significantly increased because similar, if not identical, matters would have to be

⁸⁹ NAFTA Chapter 11, PCA Case No. 2012-17, Procedural Order No. 2, January 18, 2013, ¶16,

⁹⁰ See further, paragraph 23 above.

⁹¹ Reply, ¶14.

canvassed in evidence at the merits stage as well. As such, a hearing of the entirety of the dispute at once must be preferable.

D. The Fourth Objection

80. As to the Fourth Objection – the forum selection clause in the Purchase Agreement – the Tribunal accepts that this objection could be determined discretely. However, there are three reasons why the Tribunal is minded not to divide this issue from the merits phase for separate determination.
81. First, it must be borne in mind that, as the Claimants emphasised, and as is well-established by decisions of other tribunals, a jurisdiction agreement pointing to domestic courts will not necessarily oust ICSID’s jurisdiction.⁹² So much is recognised (perhaps implicitly) by the Respondent in identifying this objection as one that goes to *admissibility*, rather than jurisdiction.
82. Secondly, even if the Respondent were successful in its reliance on this agreement, it would not appear to obviate the need for a merits phase, at least in relation to those claims that are unrelated to the Purchase Agreement. Indeed, the scope of the dispute, although perhaps narrower, may not be so narrowed as to warrant the cost, expense and inconvenience of dividing the proceeding into two phases. Put simply, as the Claimants contend, it appears not to be a substantial enough objection, in and of itself, to justify bifurcation.⁹³
83. Thirdly, in light of the conclusions in relation to the First, Second and Third Objections, the bifurcation of the Fourth Objection alone would be causative of unnecessary delay, in circumstances where the proceeding would be divided into two phases for very little procedural, or other, advantage. If it were appropriate to bifurcate the First, Second and Third Objections, the Tribunal would be persuaded to determine the Fourth Objection at

⁹² See, eg, *Enron Corporation and Ponderosa Assets LP v The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, January 14, 2004, ¶91.

⁹³ Observations, ¶64.

the same time but, in and of itself, it does not warrant the bifurcation sought. Indeed, the Respondent does not appear to suggest otherwise.

E. Procedural Fairness

84. Both parties rely on arguments as to procedural fairness in support of their respective positions. They have been summarised above.⁹⁴
85. It is, of course, trite to observe that the provision of an adequate opportunity to be heard and to put one's case is fundamental to an arbitral proceeding.
86. The Tribunal considers that the matters relied upon by the Respondent are not sufficient to persuade us that the Respondent will be deprived of the opportunity to fairly put its case if the proceeding is not bifurcated. In this regard, the Tribunal rejects the contention that the State has an entitlement to have jurisdiction determined before the merits.⁹⁵ The objections of a State (whether jurisdictional or otherwise), like the objections of a non-State party, are entitled to be properly considered, and ruled upon. The Tribunal does not consider itself bound to afford a State a bifurcated hearing on the basis of a submission of such an entitlement; nor does it accept that it is bound by a "general rule"⁹⁶ that States need not make submissions as to the merits unless, and until, jurisdiction is definitively established.
87. Further, the Tribunal does not accept that the Respondent's provision of a full Counter-Memorial on the merits is such that procedural fairness and equality of arms demand a bifurcated hearing. The provision of the full Counter-Memorial was required in accordance with Procedural Order No. 1 and, indeed, to enable the Claimants (and the Tribunal) to understand the Respondent's case. It is difficult to understand an argument

⁹⁴ See the summary of the Respondent's contentions at paragraphs 36-41 and the summary of those of the Claimants at paragraphs 58-59 above.

⁹⁵ cf. Request, ¶28. The Respondent's contention in this regard is summarised more fully at paragraph 17 above.

⁹⁶ cf. Request, ¶28. See further, paragraph 17 above.

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that calls in aid the provision of a full Counter-Memorial as providing a basis why bifurcation must necessarily be ordered.

88. The fact that the Respondent relies upon the unlawful conduct of the Claimants does not, in the Tribunal's view, necessarily support a decision in favour of bifurcation. Indeed, for the reasons explained in paragraph 77 above, the seriousness of the allegations suggests that they need be determined in the one hearing.
89. In short, a non-bifurcated proceeding can be conducted in a manner that ensures that both parties are accorded procedural fairness. The convenience of having particular issues determined first, so as to seek to either conclude the proceeding at an earlier stage or, at least, narrow the issues, does not go to the question of procedural fairness. Indeed, the Tribunal will, after publication of this decision, give the parties a (further) opportunity to make submissions on the question of an appropriate timetable.

F. Exercise of the Tribunal's Discretion

90. As we have explained above, the Tribunal's discretion is a broad one. Its proper consideration of the Respondent's Request is not confined to the *Glamis Gold* factors or indeed the factors identified in other cases, each of which fell to be determined on the basis of its own facts.
91. In deciding the Respondent's request, therefore, the Tribunal also had regard to the other matters relied upon by the parties in support of their respective positions. In considering the matters above in the context of each of the First to Fourth Objections, the Tribunal was of the view that the relevant factors called in aid by the parties were such that, ultimately, bifurcation was not appropriate.
92. The balancing of these various considerations is often a difficult task. In this case, the Respondent has not satisfied the Tribunal that it is appropriate, having regard to all the circumstances, that bifurcation should be ordered. In particular, the Tribunal is not persuaded that bifurcated proceedings would enable the consideration of separate, and thus

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not overlapping, factual matrices at each of the jurisdiction and admissibility stage and at the merits stage. Put another way, the result of bifurcation may well require a consideration of the same, or similar, facts for the purpose of jurisdiction and admissibility and then, later, for the purpose of the merits. In these circumstances, the balance favours one single hearing where each party can present its full case as to jurisdiction, admissibility and the merits. As such, this is not an appropriate case for bifurcation.

93. Put simply, a ruling on at least three of the four preliminary objections would in all likelihood require a detailed examination of the same evidence that will ultimately need to be examined at the stage of determining the merits. There is no procedural or other advantage with bifurcating the proceeding, so as to require not only the Tribunal to consider the same, or similar, evidence on two occasions, but so as to require witnesses to appear on two occasions, submissions to be prepared which canvass the same, or similar, matters, and the consequential cost and expense. Most fundamentally, it risks a determination on jurisdiction and admissibility divorced from the entirety of the factual matrix. Once a considerable factual overlap is accepted, which the Tribunal considers to be the case, little can be said in support of the division of the case. Indeed, such bifurcation would be unfair, both to the parties (in terms the cost and expense of preparing for two significant hearings) and the witnesses (who may be required to appear twice). Further, unavoidable delay would be thereby caused.

IV. DECISION

94. For the foregoing reasons, the Tribunal refuses the Respondent's request for bifurcation of the proceedings into a jurisdictional phase and a merits phase.

V. FURTHER PROCEDURAL ORDERS

95. In light of this decision, it will be necessary for the Tribunal to make further procedural orders for the conduct of the proceeding. Having had regard to the proposed schedule for a non-bifurcated proceeding submitted by each of the parties, the Tribunal will shortly circulate draft orders to the parties for their consideration.

For and on behalf of the Tribunal,

[signed]

Michael Pryles
President of the Tribunal
Date: 21 January 2015.