SCC Case 2020/074

IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION RULES OF THE ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE (2017)

- between -

KOMAKSAVIA AIRPORT INVEST LTD

(the "Claimant")

- and -

THE REPUBLIC OF MOLDOVA

(the "Respondent", and together with the Claimant, the "Parties")

PROCEDURAL ORDER NO. 5

ON THE RESPONDENT'S REQUESTS FOR SUMMARY PROCEDURE AND/OR BIFURCATION

Tribunal
Ms. Jean Kalicki (Chair)
Prof. Philippe Sands QC
Prof. Brigitte Stern

Administrative Secretary to the Chair
Dr. Joel Dahlquist

26 March 2021

I. PROCEDURAL HISTORY

1. On 15 May 2020, the Claimant submitted its Request for Arbitration, to which the Respondent replied in its Answer to the Request for Arbitration on 9 July 2020. The Claimant filed its Comments to the Answer to the Request for Arbitration on 22 July 2020.

2. The Respondent filed its Application for Revocation of Emergency Award on 27 November 2020. Following further correspondence between the Parties, as well as a limited hearing on 15 February 2021, the Tribunal decided this application by virtue of its Procedural Order No. 4 on 22 March 2021.

3. The Claimant submitted its Statement of Claim on 15 January 2021, together with a number of witness statements, including the Second Witness Statement of Mr. Andreas Menelaou (the "**Second Menelaou Witness Statement**").

4. On 5 February 2021, the Respondent submitted its Request for Summary Procedure (the "**Request**"). In its Request, the Respondent asked the Tribunal to consider a number of objections to jurisdiction, admissibility and merits by way of a summary procedure, in accordance with Article 39 of the SCC Arbitration Rules (the "**SCC Rules**"). The procedural calendar had envisioned a request for bifurcation on this date, and the Request made clear that if the Tribunal was not inclined to grant the requested summary procedure, the Request instead "should be deemed the Respondent's Request for Bifurcation," as to the jurisdictional and admissibility points it raised.[1]

5. On 23 February 2021, the Claimant requested a one-week extension of the deadline to submit its Reply to the Respondent's Request for Summary Procedure (the "**Reply**"), which according to the procedural calendar was scheduled for 26 February 2021. In its request for extension, the Claimant indicated that the Respondent had agreed to the extension, which the Respondent confirmed in a separate email on 24 February 2021, "subject to a 1-week extension of the deadline for the submission of the Respondent's next

[1] Request, ¶ 162.

Memorial." In the absence of an objection from the Respondent, the Tribunal granted the Claimant's request on 24 February 2021.

6. The Claimant submitted its Reply on 5 March 2021, objecting against the Respondent's application in the Request for either a summary procedure or bifurcation.

II. PARTIES' POSITIONS

7. The Parties' positions with respect to each objection, as framed by the Respondent in its Request, are briefly summarized below. This Section begins with a short summary of the Parties' positions on the standard for the requested summary procedure, and how such a request differs from a bifurcation request. The summary then turns to each objection advanced by the Respondent, and the Parties' arguments as to whether these are suitable to be dealt with in a summary procedure or in a bifurcated manner.

A. SUMMARY PROCEDURE OR BIFURCATION

8. The Respondent has styled its Request as one for summary procedure under Article 39 of the SCC Rules, which provides as follows:

> (1) A party may request that the Arbitral Tribunal decide one or more issues of fact or law by way of summary procedure, without necessarily undertaking every procedural step that might otherwise be adopted for the arbitration.
>
> (2) A request for summary procedure may concern issues of jurisdiction, admissibility or the merits. It may include, for example, an assertion that:
>
> (i) an allegation of fact or law material to the outcome of the case is manifestly unsustainable;
>
> (ii) even if the facts alleged by the other party are assumed to be true, no award could be rendered in favour of that party under the applicable law; or
>
> (iii) any issue of fact or law material to the outcome of the case is, for any other reason, suitable to determination by way of summary procedure.
>
> (3) The request shall specify the grounds relied on and the form of summary procedure proposed, and demonstrate that such procedure is efficient and appropriate in all the circumstances of the case.

> (4) After providing the other party an opportunity to submit comments, the Arbitral Tribunal shall issue an order either dismissing the request or fixing the summary procedure in the form it deems appropriate.
>
> (5) In determining whether to grant a request for summary procedure, the Arbitral Tribunal shall have regard to all relevant circumstances, including the extent to which the summary procedure contributes to a more efficient and expeditious resolution of the dispute.
>
> (6) If the request for summary procedure is granted, the Arbitral Tribunal shall seek to make its order or award on the issues under consideration in an efficient and expeditious manner having regard to the circumstances of the case, while giving each party an equal and reasonable opportunity to present its case pursuant to Article 23(2).

9. In the view of the Respondent, proceeding by way of summary procedure under Article 39 would be the most "fair, efficient and economical method," ensuring procedural economy by potentially allowing for the entire case to be dismissed at an early stage. The Respondent also submits that Article 39 should be applied as a default, unless the Tribunal determines that it is not suitable in the individual case.[2] Furthermore, the Respondent says, none of its objections requires the Tribunal to decide on the Claimant's merits claims, and every objection, if sustained, would dispose of the entire case.[3]

10. The Claimant, meanwhile, says that Article 39 is a case-management tool, and that the summary procedure provided therein is different from an expedited procedure. Under Article 39(2), the threshold is relatively high, and examples mentioned therein of issues suitable for summary procedure include allegations that are material to the outcome of the case and manifestly unsustainable, as well as examples where the other party relies on facts that (even if true) could not lead to an award. In the Claimant's submission, none of the Respondent's objections are suitable for determination by way of summary procedure under this standard.[4]

11. Finally, the procedural calendar annexed to the Tribunal's Procedural Order No. 2 did not envision a request by the Respondent for a summary procedure at this stage, but rather a

[2] Request, ¶¶ 8-11.
[3] Request, ¶ 11.
[4] Reply, ¶¶ 14, 24.

potential request for bifurcation. The Respondent mentions briefly that the Request should be treated as a bifurcation request, in the event that the Tribunal is not inclined to grant the requested summary procedure. This would exclude, in the Respondent's view, "the merits-related issues *ratione materiae*," discussed further below.[5] The Claimant, while pointing out that the Respondent did not in fact submit a bifurcation request as expected, but rather a "wide-ranging request for its case [...] to be determined by summary procedure," does not object to the Respondent's structuring of the Request in this respect. However, the Claimant says that the Respondent has failed to identify any legal framework for bifurcation in the two paragraphs dedicated to bifurcation in the Request.[6] In the Claimant's view, the fact that the SCC Rules do not explicitly mention bifurcation does not mean that there is no applicable framework for deciding on bifurcation, and the Claimant asks the Tribunal to look to international arbitration scholarship more generally in deciding on whether to bifurcate. In any event, the Claimant argues that none of the Respondent's objections is suitable for bifurcation, as will be developed below.[7]

B. THE "SEAT OBJECTION"

1. The Respondent's Position

12. The Respondent argues that the Claimant fails to meet the threshold test under Article 1.3(b)(ii) of the BIT of not only being "constituted or incorporated in compliance with law" in the Republic of Cyprus, but also "having [its] seat in the territory of the Republic of Cyprus." In the Respondent's submission, these two cumulative criteria are necessary for the Claimant to qualify for BIT protection, and the Claimant thus far has failed to prove that it meets these criteria.[8]

13. A mere incorporation is not sufficient to qualify for a "seat" in Cyprus, according to the Respondent. In this respect, the Respondent draws the Tribunal's attention to a number of facts that it considers *prima facie* undermine the Claimant's assertion that it is seated in Cyprus. These include (i) the fact that the Claimant has not shown that it has any address

[5] Request, ¶ 162.
[6] Reply, ¶¶ 3-4.
[7] Reply, ¶¶ 17-22, 24.
[8] Request, ¶¶ 12-18.

in Cyprus, (ii) indications that the Claimant's contact details and web page were established just days before the Request for Arbitration, (iii) the fact that at least some contact details provided by Claimant lead to a nominal shareholder in Bulgaria; and (iv) that shareholders' meetings have taken place outside of Cyprus on several occasions.[9]

14. The Respondent finds support for its contention that mere incorporation does not qualify an investor as being seated in the state of incorporation in two investment arbitration awards, *Alps Finance v. Slovakia*[10] and *CEAC v. Montenegro*,[11] and urges the Tribunal to follow the reasoning of these tribunals.[12]

15. The Respondent also draws the Tribunal's attention to the Second Menelaou Witness Statement, which the Claimant submitted with its Statement of Claim. In that Statement, Mr. Menelaou asserts that the Claimant meets the criteria of "physical presence," "business activity," and "substance" under Cypriot law.[13] According to the Respondent, however, the Claimant has furnished "no bit of proof" to support these contentions, and the evidence that has been submitted on two different occasions – a sublease agreement (the "**Sub-Lease Agreement**")[14] – was not entered into by the Claimant, but by another legal entity with a different name, leading the Respondent to accuse the Claimant, and Mr. Menelaou, of producing false evidence.[15]

16. The Respondent also argues that its objection that the Claimant lacks a seat in Cyprus can be determined by the Tribunal "without prejudicing and entering the merits," and would, if successful, dispose of the totality of the Claimant's claims.[16]

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[9] Request, ¶¶ 20-28.
[10] RLA-15, *Alps Finance and Trade AG v. The Slovak Republic* (UNCITRAL), Award, 5 March 2011, ¶ 216 .
[11] RLA-17, *Central European Aluminum Company (CEAC) v. Montenegro*, ICSID Case No. ARB/14/8, Award, 26 July 2016, ¶ 208.
[12] Request, ¶¶ 29-32.
[13] Second Menelaou Witness Statement, ¶ 36.3.
[14] CA-35.
[15] Request, ¶¶ 34-44.
[16] Request, ¶ 45.

2. The Claimant's Position

17. The Claimant concedes that that the seat objection is "capable in principle of being brought in a manner which does not involve the underlying merits of the case," but contends that the Respondent has not done so; to the contrary, it has brought its case in a manner which involves "heavy allegations on the facts," and which "challenges the "*bona fides* of the Claimant." In the Claimant's view, this objection is therefore as unsuitable for either a summary procedure or bifurcation as are the Respondent's several objections based on fraud, which are discussed further below.[17]

18. Furthermore, the Claimant points out that the BIT does not – unlike other BITs – contain any requirement that an investor have substantial business activities in its home state; it merely requires that a legal person is incorporated in compliance with the law of the home state, which the Claimant unarguably is.[18]

19. The Claimant also distinguishes the two awards relied upon by the Respondent. In *Alps Finance v. Slovakia,* the relevant BIT language in question was different and contained additional requirements. In any event, the *Alps Finance* tribunal's equating of "seat" with "real economic activities" is contrary to well-established case law.[19]

20. In *CEAC v. Montenegro*, the Claimant submits, the facts were different from this case. The definition of seat in that case turned on the claimant's operating a registered office in the home state, and a majority of the tribunal found the claimant did not have "management and control" there. No such requirement exists in the BIT applicable here, the Claimant says. The Claimant also urges the Tribunal to take guidance from the dissenting opinion in *CEAC*, in which Professor William Park argued that the majority ought to have looked at the plain meaning of "registered office," without "importing" additional wording into the treaty definition.[20]

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[17] Reply, ¶¶ 52-57.
[18] Reply, ¶¶ 58-60.
[19] Reply, ¶¶ 66-75, 79, 85, referencing CLA-6, *Tokios Tokeles v. Ukraine*, ICSID ARB/02/18, Decision on Jurisdiction, 29 April 2004; CLA-7, *Lanco International v. Argentina*, ICSID ARB/97/16, Decision on Jurisdiction, 8 December 1998; CLA-8, *Tenaris S.A.* v. *Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, 29 January 2016.
[20] Reply, ¶¶ 81-83.

21. In the Claimant's submission, there is no independent international law definition of "seat," which means that the Tribunal will have to look to domestic Cypriot law if the Respondent were to pursue this objection. This would likely require expert evidence.[21]

22. Under municipal law, the Claimant submits that it has its seat in Cyprus, and notes that (i) it has physical premises in Cyprus, (ii) it is entitled to use those premises under the Sub-Lease Agreement, (iii) the building is accessible during normal office hours, (iv) books and registers are kept by a secretary at the offices as required by law, and (v) the name of the Claimant is affixed outside the building in a visible manner.[22]

23. The Claimant also contests the Respondent's characterizations of alleged defaults in the Claimant's evidence, pointing out that a change in contact information or corporate domain name cannot make a company lose its legal seat. Nor can holding shareholder meetings outside Cyprus in two isolated instances result in a loss of seat. Finally, the Claimant contends that the Second Menelaou Witness Statement is probative by its nature, as Mr. Menelaou is a practicing lawyer in Cyprus, and the Respondent has not submitted any evidence to disprove anything he says in his statement.[23]

24. The Claimant therefore submits that the Tribunal should dismiss the summary procedure/bifurcation request with respect to the objection that the Claimant lacks a seat in Cyprus. The Claimant has furnished compelling evidence of its seat in Cyprus, and the Respondent has offered no evidence that the Claimant has a seat elsewhere, relying instead on criticized caselaw and unsupported allegations of falsified evidence. The Claimant should not have to face the cost and delay associated with addressing this issue separately.[24]

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[21] Reply, ¶¶ 76-77.
[22] Reply, ¶ 89.
[23] Reply, ¶ 90.
[24] Reply, ¶¶ 91-92.

C. THE "PIERCING OF THE CORPORATE VEIL OBJECTION"

1. The Respondent's Objection

25. The Respondent asks the Tribunal to apply the doctrine of piercing the corporate veil to identify the effective owners of the Claimant, relying on that doctrine "to the extent recognized in customary international law." In the Respondent's submission, both the Claimant and Avia Invest, its alleged investment are beneficially owned and controlled, through various intermediaries, by Mr. Ilan Sor, a Moldovan citizen.[25]

26. The Respondent says that the criteria for piercing the Claimant's corporate veil are met, as (i) there is a unity of interest between the Claimant and its ultimate beneficial owner(s), and (ii) the result of treating the Claimant's actions through Avia Invest as those of only the Claimant would be inequitable, in that the Claimant was created to "perpetuate and conceal [...] illegalities and fraud."[26]

27. With respect to the allegations of illegalities and fraud committed by Mr. Shor and related entities, the Respondent refers back to its Application for Revocation of the Second Emergency Decision of 18 December 2020. The Respondent argues that the individuals who acted for the Claimant when incorporating it in Cyprus and purportedly investing in Avia Invest knew or must have known about these illegalities. According to the Respondent, this fact distinguishes the case from that in *Tokios Tokeles*,[27] where the tribunal opted to not pierce the claimant's corporate veil in the absence of any suggestion of improper actions by the claimant.[28]

28. The Respondent contends that the Tribunal can lift the Claimant's corporate veil without prejudging other issues. Moreover, doing so would render the Claimant without the nationality required under the BIT, and as such would dispose of its claims in their entirety.[29]

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[25] Request, ¶¶ 47-53.
[26] Request, ¶¶ 54-60.
[27] CLA-6, *Tokios Tokeles v. Ukraine*, ICSID ARB/02/18, Decision on Jurisdiction, 29 April 2004.
[28] Request, ¶¶ 61-69.
[29] Request, ¶ 70.

2. The Claimant's Position

29. In its Reply, the Claimant addresses the Piercing of the Corporate Veil Objection together with the following four objections raised by the Respondents, because these objections, in the Claimant's view, all involve fraud allegations against the Claimant. The Claimant labels these five objections the "**Fraud Grounds,**" and the Claimant's position with respect to these grounds are discussed jointly below at paragraphs 44-53.

D. THE "ABUSE OF PROCESS OBJECTION"

1. The Respondent's Position

30. The Respondent contends that the Claimant was incorporated in Cyprus in August 2016 in order to obtain jurisdiction under the BIT, at a time when a dispute already existed and/or was clearly foreseeable. According to the Respondent, it is well-established in international investment law that only *bona fides* investments are entitled to treaty protection.[30]

31. According to the Respondent, there were various criminal investigations against Mr. Shor and other Avia Invest decision-makers at the time the Claimant was incorporated. The Respondent submits that the purported investment (shareholding in Avia Invest) was moved to the Claimant in order to "'clear' the otherwise uncovered investment from its illegal and fraudulent origin," in a manner that amounts to a bad faith attempt to obtain BIT protection over an already foreseeable dispute. Furthermore, both OOO Komaksavia, which sold Avia Invest, and the Claimant, which acquired Avia Invest, are shell companies, the Respondent contends. It submits that the transfer of Avia Invest between them constituted an abuse of process, and was made with the "sole purpose of attracting [...] BIT protection."[31]

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[30] Request, ¶¶ 72-77, referencing RLA-55, *Phoenix Action, Ltd. v. The Czech Republic,* ICSID Case No. ARB/06/5, Award, 15 April 2009; RLA-29, *Transglobal Green Energy, LLC and Transglobal Green Panama, S.A. v. Republic of Panama*, ICSID Case No. ARB/13/28, Award, 2 June 2016; RLA-30, *Renée Rose Levy and Gremcitel S.A. v. Repbulic of Peru*, ICSID Case No. ARB/11/17, Award, 9 January 2015.
[31] Request, ¶¶ 78-81.

32. Similar to its other objections, the Respondent argues that the Abuse of Process Objection can be decided without prejudging the merits of the case, and that it would dispose of the entire case if successful.[32]

2. The Claimant's Position

33. The Claimant's position with respect to this objection is discussed below at paragraphs 44-53, together with the other Fraud Grounds.

E. THE "NO INVESTMENT OBJECTION"

1. The Respondent's Position

34. The Respondent argues that the Claimant has failed to establish that its purported investment meets the cumulative jurisdictional criteria of Art 1.1 of the BIT, which require an "asset invested [...] in accordance with the legislation [of the host state]."[33]

35. The Respondent contends that the Claimant has not in fact invested anything, but rather that it has – even on its own submissions – merely *agreed to purchase* shares in Avia Invest. In this respect, the Respondent notes that the Claimant claimed in its Request for Arbitration to have purchased, and paid for, 95% of the shares in Avia Invest, but the Claimant's subsequent Statement of Claim now says that it has agreed to purchase, and agreed to pay for, the shares. With no evidence submitted to show that the Claimant in fact paid anything for the shares, the Claimant has failed to show that it has made any capital contribution in the Republic of Moldova, the Respondent says. On the contrary, the Respondent submits, there is *prima facie* evidence that the Claimant did not pay for the shares, as the balance sheet of the selling entity (OOO Komaksavia) does not reflect any money received from the sale, strongly suggesting a scam transaction.[34]

36. Furthermore, the Respondent argues that Article 1 of the BIT does not contain a substantive definition of what is a protected investment, but rather enumerates non-exhaustively the forms which investments may take. In the Respondent's submission, the Tribunal should

[32] Request, ¶ 82.
[33] Request, ¶¶ 84-88.
[34] Request, ¶¶ 90-96.

therefore look beyond this illustrative list, and instead inquire whether the Claimant's alleged investment meets the "inherent definition" of investment, including elements of contribution, risk and duration, which the Respondent says it does not. The Respondent maintains that there is extensive recognition of these elements, in ICSID and non-ICSID jurisprudence alike.[35]

37. Applying these elements to the present case, it is clear to the Respondent that the Claimant (i) has made no capital contribution, as it appears not to have paid anything for the Avia Invest shares, (ii) has by definition assumed no risk, not having made any contribution, and (iii) has by definition not established any duration of its purported investment, since it has not made a capital contribution.[36]

38. As a consequence, the Claimant's alleged investment does not meet the *ratione materiae* definition of investment, rendering the Tribunal without jurisdiction. Similar to its other objections, the Respondent argues that the No Investment Objection can be decided without prejudging the merits of the case, and that it would dispose of the entire case if successful.[37]

2. The Claimant's Position

39. The Claimant's position with respect to this objection is discussed below at paragraphs 44-53, together with the other Fraud Grounds.

F. THE "ILLEGALITY OBJECTION"

1. The Respondent's Position

40. The Respondent contends that the Claimant's purported investment has not been invested in accordance with Moldovan law, as expressly required by Article 1.1 of the BIT. The fact that there is such an explicit requirement in the BIT must be given effect, which has been recognized by multiple investment arbitration tribunals, the Respondent says.[38]

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[35] Request, ¶¶ 100-110, with footnotes 64-66 referencing various cases concerning the so-called *Salini* criteria.
[36] Request, ¶¶ 111-114.
[37] Request, ¶ 116.
[38] Request, ¶¶ 119-125, with footnotes 75-81 referencing a number of awards to that effect.

41. According to the Respondent, the burden of proof to demonstrate that the purported investment is made in accordance with Moldovan law is on the Claimant. This means, in this case, showing that the various transactions predating the Claimant's alleged investment were not scam transactions, despite the extensive *prima facie* evidence to that effect, which the Respondent already has submitted.[39]

2. The Claimant's Position

42. The Claimant's position with respect to this objection is discussed below at paragraphs 44-53, together with the other Fraud Grounds.

G. THE "INADMISSIBILITY OBJECTION"

1. The Respondent's Position

43. Relatedly but alternatively to the Illegality Objection, the Respondent also argues that the Claimant's claims are "inadmissible," even if the Tribunal were to find jurisdiction under the BIT. In the Respondent's view, even if, *arguendo*, a protected investment has been made, the Claimant still made such investment in disregard of the legislation of the host state. This would be contrary to the clean hands doctrine and to the principle of *nemo auditor turpitudinem allegans*, and would render the claims inadmissible, as recognized by the tribunals in *Fraport v. Philippines II*,[40] *Plama v. Bulgaria*,[41] and *Inceysa v. El Salvador*,[42] the Respondent argues.[43]

2. The Claimant's Position

44. In its Reply, the Claimant addresses the Piercing of the Corporate Veil Objection, the Abuse of Process Objection, the No Investment Objection, the Illegality Objection and the

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[39] Request, ¶¶ 127-134.
[40] RLA-24, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines [II]*, ICSID Case No. ARB/11/12, Award, 10 December 2014.
[41] RLA-27, *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008.
[42] RLA-54, *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006.
[43] Request, ¶¶ 135-141.

Inadmissibility Objection jointly as the Fraud Grounds. In the Claimant's view, all of these objections are "manifestly unsuited to either summary procedure or bifurcation."[44]

45. The Claimant's primary argument is that these issues, which it says are all related to Avia Invest being granted the Concession, seem to constitute the Respondent's "entire case in this arbitration on the merits."[45]

46. The Fraud Grounds are serious allegations which the Respondent has yet to prove, the Claimant argues. The Claimant says it should not have to face these allegations in a summary procedure, nor in any manner separated from the merits of the case. Furthermore, neither type of procedure would improve the efficiency of the arbitration, the Claimant says, as the Fraud Grounds are intertwined with the merits to a high degree. Moreover, the Claimant argues, it appears that the Fraud Grounds are really the Respondent's entire case, despite the fact that the Respondent styles them as objections against jurisdiction and admissibility.[46]

47. In the Claimant's view, the Respondent has not distinguished between the different sub-provisions of Article 39(2) of the SCC Rules in its Request. Article 39(2)(i) concerns allegations which are material to the outcome but manifestly unsustainable, which is not applicable here as the Fraud Grounds do not concern any allegations made by the Claimant. Article 39(2)(ii) concerns matters which, even if true, would not be able to lead to an award, which is similarly inapplicable in the present scenario, as the Fraud Grounds do not concern any factual allegations made by the Claimant. This leaves only available Article 39(2)(iii), under which the Tribunal has general discretion to proceed by way of summary procedure.[47]

48. The Claimant says that the Tribunal should not proceed in this manner. Any determination of the Fraud Grounds would necessarily involve extensive document production and

[44] Reply, ¶ 25.
[45] Reply, ¶¶ 26, 43.
[46] Reply, ¶¶ 28-35.
[47] Reply, ¶ 36.

witness evidence, which would not lend itself well to either a summary procedure or resolution in a bifurcated stage.[48]

49. Furthermore, the Respondent is required by Article 39(3) of the SCC Rules to specify the form of the proposed summary procedure, which the Respondent does simply by proposing that the same procedural calendar be followed as that currently provided (in the annex to Procedural Order No. 2) to apply in the event of a successful bifurcation request. The effect of this, the Claimant says, would be to force the Claimant to address the wide-ranging Fraud Grounds in a very expedited timetable, which would be "manifestly inappropriate" given the nature of the allegations.[49]

50. The Claimant also says that the Respondent's objections on these grounds are inconsistent with commentary on summary procedure under both the SCC Rules and more generally in international arbitration law. For example, commentators emphasize the need to consider the Parties' opportunities to present their cases, but in this case the summary procedure requested by the Respondent would not be appropriate, given the need for extensive disclosure and witness examination. Commentators have also stated that summary procedure ought to be used when it is manifest, or obvious, that a claim lacks legal basis, which is not the case here.[50]

51. As for the requirement that summary disposition deal with matters which are "material to the outcome of the case," the Claimant submits that the Tribunal is in no position to determine materiality at this stage, and that the Respondent has failed to show why its allegations are material to the outcome of the Arbitration.[51]

52. The only fraud-related objection which may in principle be capable of resolution in isolation, the Claimant submits, is the "No Investment Objection." However, in the Claimant's view, this objection is "factually incoherent." The Respondent relies on fraud accusations in bringing this objection as well, necessitating factual inquiry by the Tribunal. Furthermore, the Claimant fails to understand how it could not be considered to have made

[48] Reply, ¶ 38.
[49] Reply, ¶¶ 39-41.
[50] Reply, ¶ 44.
[51] Reply, ¶ 45.

an investment in Cyprus, as the Respondent has never contested the Claimant's 95% ownership of Avia Invest. The Claimant also repeats its arguments from the Statement of Claim as to why the *Salini* criteria are irrelevant in the present case, which is heard outside of the ICSID Convention. Finally, the Claimant says that it has other protected investments, which the Respondent ignores in its Request.[52]

53. In summary, the Claimant submits that the request for a summary procedure and/or for bifurcation of the Fraud Grounds should be dismissed.

H. THE "COOLING OFF OBJECTION"

1. The Respondent's Position

54. The Respondent also claims that the Tribunal lacks jurisdiction because the Claimant did not respect the BIT's provision on amicable settlement. Article 10(2) provides that an investor may submit a dispute to arbitration if the dispute cannot be settled "within a period of six months from the date on which either party requested amicable settlement." In the Respondent's view, the Claimant has "obviously" not complied with this requirement, because of defects inherent in the Claimant's Notice of Dispute dated 2 October 2019. Only one alleged investor signed the Notice, and the alleged investment was not described at all, preventing the Respondent from engaging in meaningful consultations during the cooling-off period, the Respondent says.[53]

55. In any event, the Respondent says the Notice of Dispute was "not valid" as it was signed by a person who was neither the Director of the Claimant, nor exhibited any power of attorney showing his ability to represent it, and because it did not contain addresses or contact details.[54]

56. The Respondent also says that the October 2019 Notice predated the Notification of Termination of the Concession, and also predated other measures which the Claimant now

[52] Reply, ¶ 49.
[53] Request, ¶¶ 142-1446
[54] Request, ¶¶ 147-151.

challenges in this Arbitration. Consequently, the Claimant cannot have initiated the cooling-off period with respect to those measures through sending the Notice of Dispute.[55]

57. The Respondent answered the Notice of Dispute on 16 December 2019, in a letter addressed not to the Claimant but to Avia Invest, which the Respondent now says that the Claimant ignores. No meaningful consultations have taken place between the Parties, the Respondent says, meaning that the Claimant has failed to comply with the cooling-off clause and therefore that the Tribunal lacks jurisdiction under Article 10 of the BIT.[56]

58. The analysis of this claim will be straight-forward and sufficiently separate from the meris to be heard in a summary procedure, according to the Respondent.[57]

2. The Claimant's Position

59. The Claimant deems the Cooling Off Objection "hopeless," pointing out that it already addressed the point in its Comments on the Respondent's Answer, yet the Respondent has not engaged with the Claimant's arguments (which the Claimant "repeats and incorporates" in its Reply), nor added any further points.[58]

60. In any event, the Claimant says, the successful outcome of this Objection would lead only to the Claimant re-submitting its Notice, an outcome which does not justify use of either a summary procedure or bifurcation.[59]

I. THE "BIT CLAUSE INVITATION"

1. The Respondent's Position

61. The Respondent finally "invite[s]" the Tribunal to rule, in a summary procedure, on whether it has jurisdiction under Article 10(2)(d) of the BIT, in light of specific wording

[55] Request, ¶ 153.
[56] Request, ¶ 154.
[57] Request, ¶ 155.
[58] Reply, ¶¶ 94-96.
[59] Reply, ¶ 97.

in that Article providing that arbitration may be submitted to "[t]he Arbitration Institute of the Arbitral Tribunal of the Chamber of Commerce in Stockholm."[60]

2. The Claimant's Position

62. The Claimant says that it does not understand the point made by the Respondent in this objection, nor whether it even is an objection. The Respondent might be arguing, the Claimant suggests, that the SCC is incorrectly identified in the BIT clause, in a manner that would deprive the SCC of jurisdiction. If so, the Claimant points out that prior to the Tribunal being appointed, the SCC has already decided that it does not manifestly lack jurisdiction.[61]

III. TRIBUNAL'S ANALYSIS

63. The Tribunal has carefully reviewed and considered the Parties' arguments. The fact that this Decision may not expressly reference all points made does not mean that such points were not considered. Further, this Decision relates exclusively to the Respondent's Request, and is without prejudice to the Tribunal's eventual decision on the substance of the Respondent's various objections.

A. SUMMARY PROCEDURE OR BIFURCATION

64. As a threshold matter, the Tribunal considers the summary procedure mechanism referenced in Article 39 of the SCC Rules to be inappropriate for resolving the type of objections the Respondent has raised. That mechanism is meant to be used in very limited situations, such as where issues can be resolved without evidentiary investigation – essentially, on the basis of facts as pleaded (Article 39(2)(ii)) – or where a proposition of fact or law is so "manifestly unsustainable" (*i.e.*, obviously defective on its face) that little procedure is required at all to address it (Article 39(2)(i)). While the SCC Rules contain a further catch-all authorization – that a tribunal may use a summary procedure to resolve any other issue that "is, for any other reason, suitable to determination by way of summary

[60] Request, ¶¶ 157-158.
[61] Reply, footnote 2.

procedure" (Article 39(2)(iii)) – this discretion is to be exercised within the framework of the inherent meaning of a "summary procedure," namely a procedure that is abbreviated in one form or another. The SCC Rules refer to this as a procedure that is implemented "without necessarily undertaking every procedural step that might otherwise be adopted for the arbitration" (Article 39(1)).

65. It is plain that many of the Respondent's objections would, however, require some degree of evidentiary inquiry to allow them to be addressed. Some of that inquiry promises to be substantial, such as for the Respondent's various allegations regarding fraud or other forms of illegality in connection with the investment. For other objections, where the evidentiary inquiry appears more discrete, this inquiry would still seem to require the same types of procedural steps used for the arbitration, meaning written submissions by the Parties, accompanied by documentary evidence or witness/experts statements to the extent appropriate, the possibility of requests for disclosure of additional documents, and an oral hearing to examine that evidence and pose questions to counsel.

66. In these circumstances, the Tribunal considers it more appropriate to evaluate the Request through the traditional rubric of bifurcation, which offers the possibility for tribunals to accelerate determination of particular issues, while still providing the customary procedural steps. Tribunals operating under the SCC Rules have discretion to order bifurcation, as part of their plenary discretion to "conduct the arbitration in such manner as [they] consider appropriate, subject to these Rules and any agreement between the parties" (Article 23(1)).[62]

67. The SCC Rules do not set forth any particular standard applicable to consideration of bifurcation, which means that the decision is left to the good faith judgment of a tribunal regarding the best interests of a given case, in light of its particular circumstances. Prior tribunals in investment arbitration proceedings under other rules (UNCITRAL and ICSID) have identified a number of criteria that may be relevant to assessing the suitability of bifurcation in any particular case. These include, *inter alia*, whether the objection is

[62] Article 44 of the SCC Rules also authorizes arbitral tribunals to decide issues in dispute separately through separate awards. *See generally* J. Ragnwaldh, F. Andersson & C. Salinas Quero, *A Guide to the SCC Arbitration Rules*, p. 38 (2020).

substantial and/or not frivolous; whether the objection has the potential to dispose of the entire case, or at least to result in a material reduction of scope in the next phase of proceedings; and whether the jurisdictional issue is sufficiently discrete from the factual and legal issues that would need to be heard in later phases, so that it may be resolved without the parties being put to the burden and expense of potentially duplicative presentations.[63] More generally, in addressing the overarching question of procedural efficiency, tribunals consider whether the "costs and time required of a preliminary proceedings … will be justified in terms of the reduction in costs at the subsequent phase of proceedings."[64] The Tribunal agrees that these are all relevant considerations.

68. Yet, while the jurisprudence identifies certain relevant considerations, it does not suggest that there is a rigid or mandatory formula regarding the process of weighing these considerations. As the *Gran Colombia* tribunal recently noted, there is no consensus in the jurisprudence as to whether these considerations "are to be considered holistically or sequentially (much less in what sequence); whether any particular factor is mandatory; or whether certain factors should be weighted more heavily than others for purposes of reaching an eventual result."[65] The Tribunal agrees that given the absence of narrowly defined standards in the applicable rules, no "'one-size-fits-all' analytical structure [should] be imposed on the reasoning process, leaving each tribunal free to consider all factors that it considers relevant in the particular circumstances of its case."[66]

69. The Tribunal also agrees with *Gran Colombia* that a useful "starting point" is that jurisdictional objections "must not be frivolous on their face: it is self-evident that a frivolous objection would not warrant bifurcation and the attendant delay in proceeding to

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[63] *See, e.g., Glamis Gold, Ltd., Claimant v. The United States of America*, UNCITRAL, Procedural Order No. 2, 31 May 2005, ¶ 12 ("***Glamis Gold***"); *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case 2012-12, Procedural Order No. 8 Regarding Bifurcation of the Procedure, 14 April 2014, ¶ 109.

[64] *Glamis Gold*, ¶ 12; *see also Apotex Holdings Inc, Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Procedural Order Deciding Bifurcation and Non-Bifurcation, 25 January 2013, ¶ 10 (considering the exercise one of "weighing for both sides the benefits of procedural fairness and efficiency against the risks of delay, wasted expense and prejudice").

[65] *Gran Colombia Gold Corp. v. Republic of Colombia*, , ICSID Case No. ARB/18/23, Procedural Order No. 3 Decision on the Respondent's Request for Bifurcation of 17 January 2020, ¶ 26 ("***Gran Colombia***").

[66] *Gran Colombia*, ¶ 26; *see also Gavrilović and Gavrilović d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Decision on Bifurcation, 21 January 2015, ¶ 66 ("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").

determination of the merits."[67] But, as that tribunal also noted, "this does not mean that every jurisdictional objection that surpasses that low threshold presumptively warrants bifurcation."[68] Rather, a tribunal must still "assess … the procedural framework that best serves the overall interests of the case," giving "appropriate attention to concerns about fairness and efficiency, including whether granting bifurcation on balance is likely to conserve time and resources or to impose burdens that otherwise could be minimized or avoided."[69] That assessment must be made holistically and not mechanically.

B. EVALUATION OF THE BEST INTERESTS OF THIS CASE

70. In this case, the Tribunal sees some value to resolving, early in the proceedings, those objections by the Respondent which are well suited to determination as preliminary issues, because they present discrete questions which – although not pure issues of law – involve only limited factual inquiry, discrete from the facts of the underlying dispute, and may be capable of resolving the entire case (depending upon the outcome).

71. This applies to three of the Respondent's objections: the "Seat Objection," the "No Investment Objection," and the "Cooling Off Objection." Without prejudice to further briefing of these objections, they each appear to be appropriately narrow:

    a. The "Seat Objection" seemingly presents a combination of a discrete legal question regarding how Article 1.3(b)(ii) of the BIT (requiring *inter alia* a "seat in the territory of the Republic of Cyprus") should be interpreted, and a limited factual inquiry into the Claimant's connections with Cyprus *versus* other potential jurisdictions, to determine whether the applicable requirements for a "seat" are satisfied;

    b. The "No Investment Objection" presents similarly narrow legal questions, focused on whether the reference in Article 1.1 of the BIT to an "asset invested" in Moldova requires proof that the Claimant paid any real consideration to acquire its shares in

[67] *Gran Colombia*, ¶ 27.
[68] *Ibid.*
[69] *Ibid.*

Avia Invest, or might be satisfied instead by the Claimant's alleged "agreement to pay" in future for such shares, or alternatively by the seemingly undisputed fact that Claimant is the registered holder of the shares (and thus arguably owns an "investment" in Moldova, even if it may not have "made" any active investment of its own);

c. Finally, the "Cooling Off Objection" appears to present the narrow questions of (i) what content and degree of specificity is required in a Notice of Dispute to trigger the running of the applicable cooling off period, (ii) whether additional State measures taken during the cooling-off period may be included in the eventual pleadings without the need to file an additional Notice of Dispute, and (iii) whether active efforts at amicable consultation are required during the cooling-off period, beyond the simple lodging of a Notice of Dispute.

72. In the view of the Tribunal, these are all discrete issues that can be resolved through focused submissions and a targeted evidentiary inquiry, none of which would require the Tribunal to delve into broader issues of the Parties' underlying dispute. It is appropriate in the circumstances to bifurcate these issues and address them at a preliminary stage.

73. By contrast, the Tribunal sees little efficiency to be gained from bifurcating the Respondent's other objections (the "Piercing of the Corporate Veil Objection," "Abuse of Process Objection," "Illegality Objection," and "Admissibility Objection"). Each of these objections appears to require a deeper understanding of the underlying facts, including the relationship between various individuals and entities involved in the history of the Concession Agreement and the periodic restructuring of shareholding in Avia Invest. Some of these objections (such as the "Abuse of Process Objection") would also require inquiry into the events and measures at issue in dispute, in order to determine when various disputes arose or at least became reasonably foreseeable. In the view of the Tribunal, such detailed inquiries are not suitable for accelerated determination in advance of a merits phase. It would be inefficient to hear these objections in a preliminary phase if, for example, a significant subset of the same witnesses would need to be examined anyway regarding

additional events, on whatever claims would proceed thereafter to a subsequent hearing on the merits.

74. Finally, with respect to the Respondent's "BIT Clause Invitation," the Tribunal observes that the Respondent has simply "invited [it] to rule on whether it has jurisdiction" in light of the reference in Article 10(2)(d) of the BIT to "[t]he Arbitration Institute of the Arbitral Tribunal of the Chamber of Commerce in Stockholm."[70] It is not clear if the Respondent contends the Tribunal does not have jurisdiction, and therefore whether it is actually raising an objection on this basis. The Respondent does not state, for example, that it considers Article 10 to refer to any institution other than the SCC (and if so, which), or that it considers Article 10 to be fatally vague, resulting in a pathological arbitration clause which may not be enforced. If the Respondent is indeed pursuing any such contentions, it is incumbent upon it to say so, not simply to "invit[e]" the Tribunal in the abstract to address an issue which has not yet been placed in dispute. The Tribunal accepts, however, that if the Respondent truly intends to pursue an objection on this basis, that objection would be suitable to resolve on a bifurcated basis, in the same stage of the proceedings as being adopted to resolve the "Seat Objection," the "No Investment Objection," and the "Cooling Off Objection."

C. THE PROCEEDINGS GOING FORWARD

75. Having decided to bifurcate the case to consider the Respondent's "Seat Objection," "No Investment Objection," and "Cooling Off Objection" – and potentially its "BIT Clause Invitation," if pursued as an actual objection – the Tribunal determines that the case will proceed according to the general procedural structure and intervals provided in Part B of the Annex to Procedural Order No. 2, updated (as per the attached Annex) to account for (i) the one-week extension previously granted to the Claimant to complete the briefing of the Respondent's Request, and (ii) the further commensurate one-week extension for the Respondent's next memorial on which the Respondent conditioned its consent to the extension granted to Claimant. This means that the next filing will be the Respondent's Memorial on Bifurcated Jurisdictional Issues (addressing *only* these objections), which

[70] Request, ¶ 157.

should be filed by 7 May 2021 (not 23 April 2021 as previously provided), along with supporting witness statements, expert reports, and other documentary evidence. The schedule thereafter will continue according to the attached Annex.

76. Because of certain unexpected scheduling complications, the Tribunal no longer is available on 9-10 November 2021 as previously provided in Part B of the Annex to Procedural Order No. 2, so the attached Annex now proposes a hearing on the bifurcated jurisdictional objections (the "**Hearing on Bifurcated Jurisdictional Issues**") on 10-11 January 2022.[71] The Parties are requested to confirm availability on those dates within one week, *i.e.*, by 2 April 2021. As stated in Part B of the Annex to Procedural Order No. 2, in the event jurisdiction is affirmed on these bases following a bifurcated proceeding, the Tribunal will issue a further procedural calendar following consultation with the Parties, setting forth the next steps in the arbitration with respect to a consolidated briefing and determination of the remaining jurisdictional and admissibility objections, together with all issues of liability (and potentially quantum, to be determined).

77. With respect to the Hearing on Bifurcated Jurisdictional Issues proposed for 10-11 January 2022, the Tribunal reminds the Parties of Article 7.2 of Procedural Order No. 1, which reserved the possibility of "conducting individual meetings hearings … remotely by videoconference, …, if deemed appropriate to the circumstances in the judgment of the Tribunal after consultation with the Parties." Given the slow pace of vaccination roll-out in certain jurisdictions, as well as the current uncertain spread and risk posed by multiple COVID-19 variants, it is premature at this point to commit to an in-person Hearing on Bifurcated Jurisdictional Issues. The Tribunal therefore continues to reserve the possibility of conducting that hearing remotely by videoconference if necessary. The Tribunal proposes to revisit the hearing modality in the autumn of 2021, based on circumstances then prevailing in the relevant jurisdictions.

78. In the meantime, the Tribunal suggests that the Parties make a contingency booking with a suitable hearing venue that could host an in-person gathering on 10-11 January 2022. While

[71] The alternative schedule in Part A of the Annex to Procedural Order No. 2 is accordingly released, including the previously reserved liability hearing dates of 16-24 May 2022.

the seat of the arbitration remains Stockholm, the Tribunal suggests that this short hearing could equally be held in either London or Paris, which may better suit the convenience of various hearing participants, and which both offer the services of highly experienced hearing providers (*e.g.*, the International Dispute Resolution Centre in London or the ICC Hearing Centre in Paris). The Tribunal requests the Parties to consult with each other within the next two weeks, to seek to reach agreement on one or the other venue and to jointly arrange a contingency booking. The Parties may wish to investigate and take into account which venue would provide greater flexibility to cancel a booking without onerous cancellation fees, in the event a decision is made this summer to proceed by remote videoconference rather than by an in-person session. The Tribunal requests that the Parties provide an update on their progress in this regard no later than two weeks from issuance of this Procedural Order No. 5, *i.e.*, by 9 April 2021.

IV. DECISION AND ORDER

79. For the reasons stated above, and having duly considered the Parties' views and all relevant factors, the Tribunal:

a) DENIES the Respondent's request for a summary procedure pursuant to Article 39 of the SCC Rules;

b) GRANTS the Respondent's alternative request for bifurcation, to resolve its "Seat Objection," "No Investment Objection," and "Cooling Off Objection," together (possibly) with its "BIT Clause Invitation" if the Respondent opts to pursue that issue as an actual jurisdictional objection;

c) DETERMINES that the Arbitration will proceed according to the procedural schedule set forth in the attached Annex; and

d) INVITES the Parties to confirm their availability by 2 April 2021 for a proposed Hearing on Bifurcated Jurisdictional Issues on 10-11 January 2022, and to provide a status report by 9 April 2021 regarding their efforts to reach agreement on a venue and a contingency booking for such Hearing, in the event that the Tribunal in due

course were to determine it to be safe and appropriate to proceed with an in-person hearing, as opposed to a remote hearing by videoconference.

Seat of Arbitration: Stockholm, Sweden

Jean E. Kalicki

Ms. Jean Kalicki
(Chair)

On behalf of the Tribunal

Annex

Description	By	Interval	Old Dates	New Dates
Memorial on Bifurcated Jurisdictional Issues, with supporting witness statements, expert reports, and other documentary evidence relied upon	Respondent	5 weeks from Decision on Bifurcation (+1 week extension per the Tribunal's email of 24 February 2021)	23 April 2021	7 May 2021
Counter-Memorial on Bifurcated Jurisdictional Issues, with supporting witness statements, expert reports, and other documentary evidence relied upon	Claimant	6 weeks	4 June 2021	18 June 2021
Document Production (limited to Bifurcated Jurisdictional Issues)				
(a) Document production requests between Parties	Claimant / Respondent	2 weeks	18 June 2021	2 July 2021
(b) Objection to document production requests (if any) and production of documents to which the Party does not object	Claimant / Respondent	2 weeks	2 July 2021	16 July 2021
(c) Reply to objection to document production requests and request for Tribunal's ruling	Claimant / Respondent	1 week	9 July 2021	23 July 2021
(d) Tribunal's ruling on document production requests	Tribunal	2 weeks	23 July 2021	6 August 2021
(e) Production of documents whose production has been ordered by the Tribunal	Claimant / Respondent	2 weeks	6 August 2021	20 August 2021
Reply on Bifurcated Jurisdictional Issues, with supporting witness statements, expert reports, and other documentary evidence relied upon	Respondent	3 weeks from final document production; 12 weeks from Counter-Memorial on Bifurcated Jurisdictional Issues	27 August 2021	10 September 2021

Rejoinder on Bifurcated Jurisdictional Issues, with supporting witness statements, expert reports, and other documentary evidence relied upon	Claimant	4 weeks	24 September 2021	8 October 2021
Notification of names of witnesses (if any) to be cross-examined	Claimant / Respondent	1 week	1 October 2021	15 October 2021
Pre-Hearing Conference	All	At least 2 weeks before hearing	8 October 2021	TBD
Agreed Hearing Bundle	Claimant / Respondent	At least 2 weeks before hearing	15 October 2021	TBD
Hearing on Bifurcated Jurisdictional Issues	All	Approx. 3 weeks from the Agreed Hearing Bundle	9-10 November 2021	10-11 January 2022
Post-Hearing Submissions on Bifurcated Jurisdictional Issues (if any)	Claimant / Respondent	TBD	TBD	TBD
Cost Submissions	Claimant / Respondent	TBD	TBD	TBD

In the event jurisdiction is affirmed in whole or in part following a bifurcated proceeding, the Tribunal will issue a further procedural calendar setting forth the next steps in the arbitration, with respect to determinations of the remaining (non-bifurcated) jurisdiction and admissibility issues, liability and quantum (if applicable).