INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ENCORE Investment Group Limited (Malta)

v.

Republic of Türkiye

(ICSID Case No. ARB/24/26)

PROCEDURAL ORDER NO. 3
Decision on Bifurcation

Members of the Tribunal
Prof. Gabrielle Kaufmann-Kohler, President of the Tribunal
Prof. George A. Bermann, Arbitrator
Ms. Juliet Blanch, Arbitrator

Secretary of the Tribunal
Ms. Ayong Lim

Assistant to the Tribunal
Dr. Adrien Compain

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26 August 2026

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I. PROCEDURAL BACKGROUND

1. On 4 October 2024, ENCORE Investment Group Limited ("Encore" or the "Claimant") submitted a request for arbitration instituting proceedings against the Republic of Türkiye ("Türkiye" or the "Respondent"; together with the Claimant, the "Parties") under the Agreement between the Government of the Republic of Türkiye and the Government of Malta concerning the Reciprocal Promotion and Protection of Investments (the "Türkiye-Malta BIT" or the "Treaty").

2. On 27 June 2025, the Respondent filed an Application for expedited dismissal of Claimant's claims pursuant to ICSID Arbitration Rule 41 (the "Rule 41 Application").

3. On 18 July 2025, the Tribunal held the first session with the Parties and then issued Procedural Order No. 1 on 22 July 2025.

4. On 8 September 2025, the Claimant filed its Response to Respondent's Rule 41 Objection.

5. On 7 October 2025, the Tribunal denied the Respondent's Rule 41 Application.

6. On 1 April 2026, in accordance with the revised procedural calendar of 3 March 2026, the Claimant filed its Memorial on the Merits.

7. On 1 July 2026, the Respondent filed its Identification of Preliminary Objections and Request for Bifurcation (the "Request").

8. On 29 July 2026, the Claimant filed its Response to the Request (the "Response").

9. Having considered the Parties' submissions, the Tribunal issues this Procedural Order No. 3, setting out its decision on the Request.

II. THE PARTIES' POSITIONS

A. The Respondent's position

1. Introduction

10. The Respondent requests that the Tribunal bifurcate the proceedings and decide its objections to (i) the admissibility of the claims based on abuse of process (the "Admissibility Objection"), and (ii) the Tribunal's jurisdiction *ratione materiae* (the "Jurisdictional Objection") in a preliminary phase separate from the merits. Türkiye submits that the record as it stands makes bifurcation imperative, and that deciding these objections as a preliminary matter would be highly efficient because the arbitration would end if either one of the objections succeeds.[1] While the Respondent divides its first objection in two, both being based on abuse of process but deriving from different transactions, the Tribunal finds it more expedient to analyze the two abuse objections together.

2. Legal Framework

11. The Respondent notes the Request is subject to the ICSID Convention and the ICSID Arbitration Rules (2022) ("ICSID Rules"), specifically the factors provided in Rule 44(2) of the ICSID Rules.[2] With respect to the first factor of a material reduction of time and cost of the proceedings, the Respondent contends that, in assessing whether bifurcation would result in procedural efficiency, the Tribunal must determine whether the objection is *prima facie* serious and substantial, i.e., not frivolous or vexatious.[3] The second factor, namely the disposition of all or a substantial portion of the dispute, should be understood as justifying bifurcation of an objection if it may result in narrowing down the issues remaining for subsequent consideration.[4] On the third factor examining whether the issues

1 Request, paras. 2-5.
2 Request, paras. 7-9.
3 Request, paras. 7-9, 13, referring *inter alia* to *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Procedural Order No. 4 (Decision on Bifurcation), 18 November 2016, **RLA-45**, para. 4.4; *Sauna U.K. BidCo Limited v. Republic of Finland*, ICSID Case No. ARB/24/38, Procedural Order No. 3 (Corrected), 10 November 2025, **RLA-47**, para. 89.
4 Request, paras. 16-17, referring *inter alia* to *Suffolk (Mauritius) Limited et al v. Portuguese Republic*, ICSID Case No. ARB/22/28, Procedural Order No. 3, 1 March 2024, **RLA-55**, para. 93.

raised by the objection are intertwined with the merits, the Respondent argues that only a substantial overlap of issues would constitute an obstacle to bifurcation, which remains appropriate when the questions at the preliminary stage differ from those at the merits stage.[5]

3. Objections

12. The Admissibility Objection seeks a declaration of inadmissibility on the ground of abuse of process because the Claimant allegedly acquired its purported investment, an indirect shareholding in Muradiye Elektrik Üretim A.Ş. ("Muradiye") owned through its participation in Buray Enerji Yatırımları A.Ş. ("Buray"), following two transactions "designed to internationalize a reasonably foreseeable dispute":[6] (i) the acquisition of the Buray shares by the BVI company Webster & Porter from Mr. Dedeman, a Turkish national, in 2018 (the "First Transaction"), and (ii) the transfer of the Buray shares from Webster & Porter to the Claimant in 2020 (the "Second Transaction").

13. Türkiye submits that all the factors justifying bifurcation of the Admissibility Objection are present. First, the record "casts serious doubt on the legitimacy of [the Claimant's] alleged investment in Türkiye", which the Claimant has failed to dispel by credible evidence. The First Transaction has "the hallmarks of a sham investment" designed to "internationalize an asset ahead of a reasonably foreseeable dispute".[7]

14. The Second Transaction also shows "the hallmarks of an illusory transaction", the "only reasonable explanation" for it being the intention to bring the Buray shares under the protection of the Treaty at a time when a dispute with the State was "not just reasonably foreseeable but virtually certain", because a series of Turkish court decisions had made it clear that the shares could be [redacted] at any time.[8] The objection is therefore serious and substantial, says the Respondent, and it must be addressed before the Respondent is

5 Request, paras. 18-19, referring *inter alia* to *Volga-Dnepr Airlines LLC v. Canada*, PCA Case No. 2025-09, Procedural Order No. 3 on Bifurcation (Redacted), 9 August 2025, **RLA-60**, para. 32.
6 Request, para. 22.
7 Request, paras. 29-30, 58.
8 Request, paras. 59-60, 65, 66-67.

compelled to expend considerable resources both in terms of time and costs to defend itself against the claims.

15. Türkiye stresses that if the First Transaction and/or the Second Transaction are found to be abusive, that finding would dispose of the entire case, as its shares in Buray are the Claimant's sole alleged investment. The Respondent further submits that the objection is not intertwined with the merits, as it turns on the timing, purpose, and structure of Encore's alleged investment, which are factual matters distinct from the merits, particularly given that the Claimant advances claims only in relation to the 2023 court decision ordering the final [redacted] of the shares.[9] It adds that arbitral tribunals have "consistently held that abuse of process objections are suitable for bifurcation precisely because of this temporal and logical separation".[10]

16. The Respondent further asks that the Tribunal bifurcate its objection to jurisdiction *ratione materiae*, arguing that the Claimant's alleged investment does not meet the objective definition of an investment under the ICSID Convention and the Treaty. Specifically, Türkiye claims that Encore's alleged investment fails to meet elements required under the double keyhole test, namely contribution and risk, as well as contribution to the economic development of the host State. It emphasizes that these issues are serious and substantial.[11] It further points out that, if upheld, the objection would dispose of all the claims.[12] Moreover, according to the Respondent, the objection is not substantially intertwined with the merits, as the question whether Encore's alleged investment satisfies the elements of contribution, risk, and contribution to the economic development of the host State relates to the character, structure, and economic substance of the alleged investment, not the lawfulness of the Respondent's conduct.[13]

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9 Request, paras. 87-88.

10 Request, para. 89, referring *inter alia* to *Suffolk (Mauritius) Limited, Mansfield (Mauritius) Limited and Silver Point Mauritius v. Portuguese Republic,* ICSID Case No. ARB/22/28, Procedural Order No. 3 on Bifurcation, 1 March 2024, **RLA-55**, para. 114; *Glencore Finance (Bermuda) Limited v. Plurinational State of Bolivia*, PCA Case No. 2016-39, Procedural Order No. 2 (Decision on Bifurcation), 31 January 2018, **RLA-62**, paras. 43–44.

11 Request, paras. 91-104.

12 Request, para. 105.

13 Request, paras. 106-107.

17. For the reasons so summarized, the Respondent requests the Tribunal to order the bifurcation of its Admissibility and Jurisdictional Objections.[14]

B. The Claimant's position

1. Introduction

18. The Claimant asks the Tribunal to deny the Respondent's request for bifurcation, arguing that it fails at every level of the relevant analysis and that bifurcating the Respondent's preliminary objections would undermine rather than serve procedural efficiency.

2. Legal Framework

19. The Claimant agrees with the Respondent that Rule 44(2) of the ICSID Rules governs the Request. However, it underlines that bifurcation is the exception rather than the rule, the key considerations being procedural economy and the efficient and fair resolution of the dispute.[15] It disputes that the relevant inquiry under Rule 44(2)(a) is merely whether the objection is not frivolous, as argued by Türkiye; the objection must be "serious and substantial and sufficiently self-contained to justify the very real risk of additional cost, duplication, and delay if the objection ultimately fails".[16] This standard, so it says, necessitates not only that the objection be serious and substantial but also that its resolution in a separate jurisdictional phase is "likely to produce genuine procedural savings".[17]

20. Further, the Claimant submits that, under Rule 44(2)(b) of the ICSID Rules, the fact that an objection is theoretically capable of disposing of all or part of the dispute is relevant but never determinative.[18] With respect to the links between objection and merits under Rule 44(2)(c), the Claimant asserts that a jurisdictional objection is impermissibly intertwined

[14] Request, para. 109.
[15] Response, paras. 12-14, 80.
[16] Response, para. 16.
[17] Response, para. 22.
[18] Response, para. 35.

with the merits where resolving it would require the Tribunal to engage with substantial portions of the factual record which it would in any event examine at the merits stage.[19]

3. Objections

21. The Claimant submits that bifurcating the preliminary objections would save neither time nor costs because the objections are closely intertwined with the merits, as their determination will require a "merits-scale examination of substantially the same factual record, witnesses, expert evidence and legal issues that would in any event have to be considered at the merits stage".[20] Additionally, the fact that if successful the objections would put an end to the entirety of the arbitration is outweighed by the real prospect of duplication, delay, and additional costs if they fail.[21] The Claimant adds that fairness considerations, i.e., whether bifurcation would advance the fair administration of the proceedings, also weigh against bifurcation.[22]

22. Furthermore, Encore argues that neither the Admissibility Objection nor the Jurisdictional Objection can be characterized as serious and substantial.[23] With respect to the first, Türkiye fails to demonstrate a realistic prospect of satisfying the "exceptionally high threshold" applicable to its abuse of process claims, resorting instead to a "scattergun" attempt to manufacture suspicion through a collection of purported "red flags" and speculation that do not amount to evidence capable of satisfying such threshold.[24] To the contrary, the record shows that "the acquisition and subsequent restructuring of the Muradiye shares occurred at a time when no actual dispute existed and no specific future dispute was foreseeable with the degree of certainty required".[25] In addition, even if there

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19 Response, paras. 37-42, referring *inter alia* to *Westwater Resources, Inc. v. Republic of Türkiye*, ICSID Case No. ARB/18/46, Procedural Order No. 2, 28 April 2020, **CL-108**, paras. 21, 31, 40; *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Procedural Order No. 2 (Decision on Respondent's Request for Bifurcation), 14 December 2017, **CL-102**, paras. 102, 108-109; *MetLife, Inc., MetLife Servicios S.A. and MetLife Seguros de Retiro S.A. v. Argentine Republic*, ICSID Case No. ARB/17/17, Procedural Order No. 2 on Decision on Bifurcation, dated 21 December 2018, **CL-103**, paras. 16-19.

20 Response, para. 7.

21 Response, paras. 73-75.

22 Response, paras. 80-85.

23 Response, para. 87.

24 Response, paras. 88-96, 97-98.

25 Response, paras. 97-142.

were a "second prong" to the abuse of process test regarding the purpose of the transaction, which the Claimant denies, it would not be satisfied either . Indeed, according to the Claimant, Türkiye fails to show that the transactions were undertaken for anything other than legitimate commercial reasons.[26]

23. The Claimant asserts that the Jurisdictional Objection likewise falls short of the "serious and substantial" threshold, as the Claimant plainly fulfils the criteria of contribution, risk, and contribution to the host State's economy challenged by the Respondent, whose arguments rely on the implausible proposition that an investment acquired and maintained through substantial and documented contributions somehow ceases to be an investment.[27]

24. On this basis, the Claimant requests that the Tribunal:

> "(a) dismiss Türkiye's request for bifurcation;
>
> (b) direct the Parties to comply with the procedural timetable reflecting the Tribunal's decision to join the preliminary objection to the merits, as set out in Scenario 2 of the revised Procedural Timetable dated 3 March 2026; and
>
> (c) grant such additional and other relief as may be just."[28]

III. ANALYSIS

A. Legal Framework

25. In the silence of the Treaty, Article 41(2) of the ICSID Convention empowers the Tribunal to decide on the Request. Pursuant to ICSID Arbitration Rule 44(2), that decision must take into account all the relevant circumstances and in particular the following:

> "In determining whether to bifurcate, the Tribunal shall consider all relevant circumstances, including whether:
>
> a. bifurcation would materially reduce the time and cost of the proceeding;

[26] Response, paras. 143-155.
[27] Response, paras. 8, 162-181.
[28] Response, para. 183.

> b. determination of the preliminary objection would dispose of all or a substantial portion of the dispute; and
>
> c. the preliminary objection and the merits are so intertwined as to make bifurcation impractical".

26. As it arises from this list, the primary test in determining whether to bifurcate is procedural efficiency. All three subparagraphs serve that same purpose, envisaged from different perspectives. Subparagraphs (a) and (b) offer two objective manners in which to measure the efficiency that bifurcation can achieve. By contrast, subparagraph (c) presents an objective measure of the inefficiencies that bifurcation may cause, if the same facts and evidence must be examined twice. This being so, the factors set forth in subparagraphs (a) to (c) are not exhaustive, as Rule 44(2) directs the Tribunal to consider "all relevant circumstances".

27. Efficiency ultimately depends on whether a preliminary objection is successful or not, which calls for some assessment of the weight or value of an objection. Rule 44(2) does not expressly mention that criterion, but it is generally accepted and common ground here is that this aspect is relevant to the bifurcation test. This being said, the Parties have divergent views of the applicable standard. The Respondent argues that it is sufficient that the objection is not frivolous or vexatious, while the Claimant submits that the objection must be sufficiently serious and likely to produce genuine procedural savings to make bifurcation worthwhile.

28. Both approaches appear problematic: the first implies a finding that the objection was brought for an improper purpose; the second requires the Tribunal to determine the likelihood of success of the objection. At this early stage of the proceedings, it would be premature for the Tribunal to engage in such determinations of the merits of the objection. It seems more appropriate to assess as a matter of procedure whether, based on the current record including the Parties' fact allegations and legal arguments, an objection raises a serious issue requiring consideration in a separate procedural phase. Thereby, the Tribunal makes a procedural decision about the most efficient management of the proceedings.

29. The Parties largely agree on the elements of the bifurcation test. In particular in respect of the intertwined nature of the objection and the merits, the Respondent accepts that a substantial overlap of issues is an obstacle to bifurcation and that bifurcation is inappropriate when the issues raised by the objection include major aspects of the merits of the dispute.[29] For its part, the Claimant submits that the relevant test is whether determining the objection as a preliminary matter would require the Tribunal to engage with substantial portions of the factual record which it would need to review on the merits.[30] These descriptions ultimately amount to the same test, namely whether there is a substantial overlap between the issues raised by the objection and the merits resulting in procedural inefficiency. Such overlap carries the additional risk that, in the event of a bifurcation, the Tribunal may be required to make findings of fact on matters relevant to both the objection and liability before having heard all of the evidence.

B. Objections

30. The Tribunal analyzes below whether the preliminary objections warrant bifurcation, noting that this analysis is limited to the satisfaction of the bifurcation criteria and does not prejudge its assessment of the merits or demerits of the objections at a later stage of the proceedings.

1. The Admissibility Objection

31. The Admissibility Objection is an objection to the admissibility of the claims for abuse of process, asserting that the two transactions in 2018 and 2020 involving the Claimant's indirect shareholding in Muradiye were designed to internationalize a reasonably foreseeable domestic dispute with Türkiye and thereby gain Treaty protection. As a result, says the Claimant, the claims constitute an abuse of the Treaty's dispute resolution mechanism.

32. While it is unclear at this preliminary stage how the First Transaction between a Turkish national and a BVI company could amount to an abuse of the Türkiye-Malta BIT's dispute

[29] Request, paras. 18, 20.
[30] Response, paras. 37-45.

resolution mechanism, the Tribunal cannot rule out that the Admissibility Objection may raise a serious issue, at least with respect to the Second Transaction. It is also true that it would dispose of the entire dispute if it were successful.

33. At the same time, the Tribunal is of the view that bifurcating the Admissibility Objection would not serve procedural efficiency because the objection is too closely linked with the merits. Indeed, to rule on the objection, the Tribunal must determine whether the transactions took place at a time when a dispute was objectively foreseeable (it being noted that the Claimant seems to dispute that the purpose of the transaction is a relevant factor in assessing an abuse of process). [redacted] The determination of the objection is therefore likely to substantially overlap with the merits. As a result, if the objection is bifurcated and ultimately denied, the Tribunal would be required to re-examine a large part of the dispute at the merits stage, leading to procedural inefficiencies and additional costs. On the other hand, if the objection is not bifurcated, the matters pertaining exclusively to the merits appear to be relatively limited, such that the absence of bifurcation should not materially increase the time and costs of the proceedings.

2. The Jurisdictional Objection

34. The Jurisdictional Objection is an objection to the Tribunal's jurisdiction *ratione materiae*. The Respondent argues that Encore's alleged investment, i.e., its 31.86% shareholding in Buray and the resulting indirect participation in Muradiye, does not satisfy the objective definition of an investment under the ICSID Convention and the Treaty, as it lacks the elements of contribution of resources, risk, and contribution to the economic development of the host State.

35. Should the Tribunal determine that Encore's alleged investment accordingly does not qualify for protection under the ICSID Convention and the Treaty, that ruling would put an end to the arbitration. The objection may also appear to raise a serious issue.

36. However, certain issues relevant to the objection, such as whether a contribution was made, may require the analysis of facts and evidence that are also relevant to the merits and to the Admissibility Objection. Considering that the latter is joined to the merits, the overall efficiency of the proceedings appears better served by also joining the Jurisdictional Objection to the merits.

37. In this context of overall efficiency, the Tribunal is mindful of the relatively modest amount of the claims, which represents an additional relevant circumstance to be taken into consideration pursuant to ICSID Arbitration Rule 44(2). The Claimant's alleged losses are currently valued between approximately USD 3.0 million and USD 6.1 million (excluding interest). These amounts must be weighed against the additional costs and delay that could arise from bifurcating either one of the objections if it were ultimately rejected. The Tribunal is of the view that it is not justified to incur the risk of such extra costs and time given the amounts at stake. Added to the other reasons discussed above, this element also militates in favor of joining the objections to the merits.

IV. DECISION

38. For the foregoing reasons, the Tribunal decides as follows:

i. The Respondent's request for bifurcation is denied;

ii. The proceedings shall continue in accordance with Scenario 2 entitled "Request for bifurcation filed but denied" of the revised procedural calendar of 3 March 2026;

iii. Costs are reserved for a later stage of the proceedings.

On behalf of the Tribunal,

[signed]

Prof. Gabrielle Kaufmann-Kohler
President of the Tribunal
Date: 26 August 2026