

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

**RAYMOND CHARLES EYRE AND
MONTROSE DEVELOPMENTS (PRIVATE) LIMITED**

Claimants

and

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Respondent

ICSID Case No. ARB/16/25

AWARD

Members of the Tribunal

Professor Lucy Reed, President
Professor Julian DM Lew QC, Arbitrator
Professor Brigitte Stern, Arbitrator

Secretary of the Tribunal

Ms Geraldine R. Fischer

Date of dispatch to the Parties: 5 March 2020

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TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS

BIT also UK-Sri Lanka BIT	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Democratic Socialist Republic of Sri Lanka for the Promotion and Protection of Investments
Deed of Transfer	Deed of Transfer of Montrose Land from Electro Holidays to Montrose Developments (Private) Limited, dated 4 August 2010
FCEPO	Greater Colombo Flood Control and Environmental Promotion Office
FCO Memorandum	The United Kingdom Foreign and Commonwealth Office Commentary on the 1972 UK Model BIT
MOU	Memorandum of Understanding between Electro Holiday Resorts and Montrose Global LLP
Montrose	Montrose Developments (Private) Limited
Montrose Global	Montrose Global LLP
Montrose Share	The share used to incorporate Montrose Developments Private Limited as a Sri Lankan private limited company
Montrose Singapore	Montrose Developments Pte Limited
RS	Sri Lankan Rupees
SFRS	Singapore Financial Reporting Standards
SLLRDC	Sri Lanka Land Reclamation and Development Corporation
VCLT	Vienna Convention on the Law of Treaties
UDA	Urban Development Authority of Sri Lanka

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) on the basis of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Democratic Socialist Republic of Sri Lanka for the Promotion and Protection of Investments (the “**BIT**” or the “**UK-Sri Lanka BIT**”) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “**ICSID Convention**”).
2. The Claimants are Mr Raymond Charles Eyre (“**Mr Eyre**”), a British national, and Montrose Developments (Private) Limited (“**Montrose**”), a company incorporated under the laws of Sri Lanka (together, the “**Claimants**”). Mr Eyre has had a long career in international finance, including as Managing Director and Head of Leasing and Capital International Development at Bank of America for 15 years before founding and becoming the Chairman of Montrose Global LLP (“**Montrose Global**”), described by the Claimants as “an alternative asset-based investment and management partnership focused on the leasing and financing of large ticket assets and private equity”.¹
3. The Respondent is the Democratic Socialist Republic of Sri Lanka (“**Sri Lanka**” or the “**Respondent**”).
4. The Claimants and the Respondent are collectively referred to as the “**Parties.**” The Parties’ representatives and their addresses are listed above on page (i).
5. This arbitration concerns a dispute between the Parties arising out of the Claimants’ alleged investment in a plot of land on a lake in Sri Lanka (the “**Montrose Land**”), which the Claimants allege was to be developed into a hotel complex (the “**Hotel Project**”). The Claimants allege that Sri Lanka expropriated the land by dredging along the shoreline and

¹ Claimants’ Memorial (“**Memorial**”), para 6.

restricting access to the Montrose Land without notice and then failing to pay adequate compensation.

6. The subject of this Award is Sri Lanka's Preliminary Jurisdictional Objections brought under Article 41(2) of the ICSID Convention. For the reasons set forth below, the Tribunal has determined that it lacks jurisdiction *ratione materiae* and hence dismisses this arbitration, with reasonable costs to be borne by the Claimants.

II. PROCEDURAL HISTORY

A. THE REQUEST FOR ARBITRATION

7. On 7 July 2016, ICSID received a Request for Arbitration from Mr Eyre and Montrose against Sri Lanka (the "**Request**") together with an affidavit of Mr Eyre dated 30 June 2016 and Exhibits C-001 through C-009.
8. On 4 August 2016, the Acting Secretary-General of ICSID registered the Request, supplemented by letter of 27 July 2016, in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

B. TRIBUNAL CONSTITUTION

9. The Parties agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention, whereby the Tribunal would comprise three arbitrators, one to be appointed by each Party and the presiding arbitrator to be appointed by agreement of the Parties.
10. The Tribunal is composed of Professor Lucy Reed, a US national, President, appointed by agreement of the Parties; Professor Julian DM Lew QC, a British national, appointed by the Claimants; and Professor Brigitte Stern, a French national, appointed by the Respondent.

11. On 6 March 2017, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the “**ICSID Arbitration Rules**”), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms Geraldine Fischer, ICSID Legal Counsel, was designated to serve as the Secretary of the Tribunal.

C. THE WRITTEN AND ORAL PHASES

12. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 1 May 2017 by teleconference.
13. Following the first session, on 1 June 2017, the Tribunal issued Procedural Order No 1. Procedural Order No 1 provides, *inter alia*, that the applicable ICSID Arbitration Rules are those in effect from 10 April 2006, the procedural language is English, and the place of proceeding is London, United Kingdom.
14. In accordance with Procedural Order No 1, the Claimants filed their Memorial on 11 August 2017 (the “**Memorial**”), together with the Witness Statement of Mr Eyre dated 2 August 2017 (the “**First Eyre Statement**”), the Witness Statement of Mr Sanjeewa Wijeratne dated 2 August 2017, the Expert Report of Mr KBV Dharmasiri dated 8 August 2007, the Expert Report of Mr Achin Khanna dated 11 August 2017, Exhibits C-010 through C-087 and Legal Authorities CL-001 through CL-123.
15. On 8 December 2017, Sri Lanka filed its Preliminary Jurisdictional Objections pursuant to Article 41(2) of the ICSID Convention (the “**Preliminary Jurisdictional Objections**”) which contained a request that the Tribunal bifurcate and address the Preliminary Jurisdictional Objections “as a preliminary issue and/or by way of formal stay of the proceedings on the merits” (the “**Respondent’s Request to Bifurcate**”), together with Exhibits R-001 through R-011 and Legal Authorities RL-001 through RL-049.
16. On 29 December 2017, the Claimants filed their Objections to the Respondent’s Request to Bifurcate with a proposed schedule and two Legal Authorities.

17. Further to the Tribunal's instructions, on 10 January 2018, Sri Lanka filed its Response to the Claimants' Objection to the Respondent's Request to Bifurcate together with one Legal Authority.
18. On 17 January 2018, further to the Tribunal's directions, the Claimants filed their Observations on the Respondent's 10 January 2018 Response on the issue of bifurcation.
19. In January and February 2018, the Tribunal consulted with the Parties on the proposed scope of bifurcation and possible hearing dates.
20. On 21 February 2018, the Tribunal issued Procedural Order No 2, granting Sri Lanka's Request to Bifurcate the Preliminary Jurisdictional Objections and setting the procedural timetable for the bifurcated first phase.
21. On 25 April 2018, the Claimants filed their Counter-Memorial on Jurisdiction (the "**Counter-Memorial**") together with the Second Witness Statement of Mr Eyre dated 25 April 2018 (the "**Second Eyre Statement**"), Exhibits C-088 through C-098 and Legal Authorities CL-124 through CL-176.
22. In May 2018, the Parties pursued document production requests. On 30 May 2018, the Tribunal issued Procedural Order No 3 addressing the Parties' contested document production requests.
23. On 18 July 2018, the Respondent filed its Reply on Jurisdiction (the "**Reply**") together with the Expert Report of Ms Narissa Chen dated 18 July 2018, Exhibits R-012 through R-022 and Legal Authorities RL-050 through RL-148.
24. On 31 July 2018, the Secretary-General moved the Tribunal to stay the proceeding pursuant to ICSID Administrative and Financial Regulation 14(3)(d) for non-payment of the required advances. The proceeding was stayed on 1 August 2018. On 9 August 2018, after the Centre received the requested advance from the Respondent, the Tribunal lifted the stay of the proceeding.
25. On 13 August 2018, the Tribunal granted the Claimants' request for an extension to file their Rejoinder on Jurisdiction until 7 September 2018.

26. On 6 September 2018, the Claimants filed their Rejoinder on Jurisdiction (the “**Rejoinder**”) with Legal Authorities CL-177 through CL-235. The Rejoinder also contained Claimants’ application, under ICSID Arbitration Rules 41(1), 26(3) and 27, to exclude three allegedly new jurisdictional objections raised by the Respondent in its Reply (the “**Exclusion Application**”).
27. On 18 September 2018, the Respondent opposed the Claimants’ Exclusion Application and filed an application to adduce two new legal authorities and one new exhibit (the “**New Evidence Application**”). Sri Lanka also requested disclosure of “documents containing and/or evidencing any discussion and/or negotiation concerning the terms of the MOU and any alleged developments and/or changes in those terms, subsequent to the signature of that document” (the “**Disclosure Application**”). As discussed below (at paragraphs 80-86), the “**MOU**” is an undated document headed “Memorandum of Understanding between Electro Holiday Resorts and Montrose Global LLP”, which became the focus of substantial dispute between the Parties.
28. On 24 September 2018, the Tribunal issued Procedural Order No 4, denying the Claimants’ Exclusion Application on grounds that the Claimants had requested and received an extension of time to address the allegedly new jurisdictional objections in their Rejoinder. The Tribunal subsequently allowed the Parties to make substantive submissions on the relevant three jurisdictional objections at the 17-19 October 2018 hearing on jurisdiction in London (the “**Jurisdiction Hearing**”). The Tribunal also granted the Respondent’s New Evidence Application and invited the Claimants to respond to the Respondent’s Disclosure Application by 27 September 2018.
29. On 27 September 2018, the Claimants opposed the Respondent’s Disclosure Application and represented that, in any event, they did not have in their possession or control any responsive documents.
30. On 28 September 2018, the Tribunal held a meeting by teleconference with the Parties to address the organisation for the Jurisdiction Hearing.

31. On 2 October 2018, the Tribunal issued Procedural Order No 5 addressing the organisation of the Jurisdiction Hearing and the Respondent's Disclosure Application. The Tribunal granted the Disclosure Application and directed the Claimants to conduct a further search for "documents containing and/or evidencing any discussion and/or negotiation concerning the terms of the MOU and any alleged developments and/or changes in those terms, subsequent to the signature of that document" and then produce those documents immediately or report the results of the search to the Tribunal by 8 October 2018.
32. On 10 and 11 October 2018, the Parties exchanged correspondence regarding their positions on the Claimants' compliance with the further search directed in Procedural Order No 5. On 11 October 2018, the Tribunal informed the Parties that it would address the issue at the Jurisdiction Hearing. At the opening of the Jurisdiction Hearing, counsel for the Respondent confirmed that they would address the issues during opening submissions, although Sri Lanka was not seeking an order from the Tribunal at this stage.²
33. The Jurisdiction Hearing proceeded on 17-19 October 2018.
34. The following persons were present at the Hearing on Jurisdiction in London:

Tribunal:

Professor Lucy Reed	President
Professor Julian DM Lew QC	Arbitrator
Professor Brigitte Stern	Arbitrator

ICSID Secretariat:

Ms Geraldine R Fischer	Secretary of the Tribunal
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For the Claimants:

Dr Christopher Harris QC	3 Verulam Buildings
Dr Cameron Miles	3 Verulam Buildings
Mr Garreth Wong	Bird & Bird
Ms Rhiannon Price	Bird & Bird
Mr Theo Rees-Bidder	Bird & Bird
Dr Harsha Cabral PC	Chambers of Dr Harsha Cabral
Mr Nishan Premathiratne AAL	Chambers of Dr Harsha Cabral
Ms Marina Litvak	Counsel, Montrose
Mr Raymond Charles Eyre	Montrose

² Transcript ("Tr") Day One 9:10-20.

Mr Sanjeewa Wijeratne

Witness

For the Respondent:

Mr Ricky Diwan QC
Mr John Whittaker
Ms Grace Asemota
Ms Caitriona McCarthy
Ms Sophie Morrison
Mr Andrew Chan Chee Yin
Mr Milinda Gunetilleke
Mr Nirmalan Wigneswaran
Ms Anusha Jayatilake
Mr CB Amerasinghe

Essex Court Chambers
Clyde & Co LLP
Clyde & Co LLP
Clyde & Co LLP
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Allen & Gledhill LLP
Attorney General's Department
Attorney General's Department
Attorney General's Department
Sri Lanka Land Reclamation &
Development Corporation
Sri Lanka Land Reclamation &
Development Corporation

Ms HKKW Ekanayake

Court Reporter:

Ms Diana Burden

Interpreter:

Mr Mohamed Rizvi Rawoof

thebigword

Observer:

Mr Geoffrey Shaw

Temple Bar Scholar (with Dr Christopher Harris QC).

35. On the first day of the Jurisdiction Hearing, counsel presented opening statements. On the first and second days of the Jurisdiction Hearing, the following persons were examined:

On behalf of the Claimants:

Mr Wijeratne
Mr Eyre

On behalf of the Respondent:

Ms Chen

36. On the second and third day of the Jurisdiction Hearing, counsel presented closing arguments. In response to inquiries from the Tribunal as to the possible outcomes stemming from Sri Lanka's various jurisdictional objections, counsel for the Claimants submitted a demonstrative in the form of a Decision Tree. Counsel for both sides addressed the Decision Tree during their closings. At the close of the Jurisdiction Hearing,

the Tribunal requested the Parties to attempt to update and agree on the Decision Tree. The Tribunal also directed the Parties to file post-hearing submissions.

37. On 7 December 2018, as directed, the Claimants filed their Post-Hearing Brief and the Respondent filed its Closing Submissions on Jurisdiction.
38. On 11 December 2018, the Respondents filed an application to exclude two allegedly new substantive issues in the Claimants' Post-Hearing Brief (the "**Post-Hearing Exclusion Application**"). In brief, the alleged new issues were: first, the Claimants' assertion that under Sri Lankan law no express trust arose from the MOU over the profits from the future Hotel Project; and, second, the Claimants' alternative case that a constructive trust was created for Mr Eyre in relation to the Montrose shareholding.
39. By letter dated 14 December 2018, the Claimants' counsel reported to the Tribunal that the Parties had not been able to agree a final version of the Decision Tree. The Claimants submitted a copy of the Decision Tree "in its almost finally agreed form – thereby incorporating a large number of changes proposed by Sri Lanka that the Claimants do not accept".
40. By letter also dated 14 December 2018, Sri Lanka's counsel confirmed that they had been unable to agree with the Claimants' counsel on a final version of the Decision Tree, because the Decision Tree "presents a number of the key issues from the Claimants' perspective in the body of the flow chart with a number of points raised by the Respondent addressed by way of footnote rather than in the chart itself ... and the visual impression created by the Chart reflects the Claimants' position and not the Respondent's position".
41. On 21 December 2018, the Claimants opposed the Respondent's Post-Hearing Exclusion Application. Again in brief, the Claimants argued that, first, the express trust issue had been sufficiently addressed at the Jurisdiction Hearing and, second, any disadvantage to Sri Lanka caused by the late raising of the constructive trust issue could be alleviated by allowing Sri Lanka a supplementary submission.
42. On 18 January 2019, Sri Lanka maintained the arguments in support of its Post-Hearing Exclusion Application.

43. On 6 February 2019, by Procedural Order No 6, the Tribunal (by majority) granted the Respondent's Post-Hearing Exclusion Application, finding that the Claimants had failed to provide satisfactory justification for raising two new issues after the Jurisdiction Hearing.
44. On 20 February 2019, as directed, the Claimants filed their Statement of Costs (the "**Claimants' Costs Statement**") and the Respondent filed its Schedules of Costs Relating to Jurisdiction and to Substantive Proceedings (Excluding Costs of Jurisdiction Application) (the "**Respondent's Costs Statement**").

III. FACTUAL BACKGROUND

45. The Tribunal sets out below the factual background as relevant to the jurisdictional phase of these proceedings, based on the Parties' documentary and witness evidence. The record reflects several significant factual disputes.
46. As will be seen, the Claimants corrected and supplemented certain aspects of the factual background as they reacted to Sri Lanka's case and as Mr Eyre located additional documents in his personal records. The Tribunal includes the evolving presentation of the facts in this Factual Background section, identified as such.

A. THE MONTROSE LAND AND THE INITIAL DEVELOPMENT PROJECTS

47. The Montrose Land is a plot of land of approximately 3.87 acres on the banks of Lake Diyawanna, approximately eight kilometres to the southeast of downtown Colombo and bordering the township of Kotte. When the Montrose Land was officially surveyed in August 1978, it was owned by Electro Plastics Limited, which had a factory on the site. The then Managing Director of Electro Plastics Limited, Dr Sir Don Buddadasa Wethasinghe, had the idea to redevelop the Montrose Land for a hotel.
48. On 11 September 1979, the Urban Development Authority of Sri Lanka (the "**UDA**") granted preliminary planning approval to Dr Wethasinghe for the proposed hotel on the following terms:

*With reference to your letter dated 21 August 1979, forwarding the preliminary plans submitted by your architects, Messrs Alfred Wong Associates of Singapore, there is no objection to the proposed development from a planning point of view. You will, however, be required to submit detailed drawings to the Local Authority for formal approval. ... It is presumed that you have received the approval of the Ceylon Tourist Board for the Hotel Complex.*³

49. On 13 September 1979, the Ceylon Tourist Board granted Dr Wethasinghe conditional permission to construct a 212-room hotel complex, subject to certain conditions including the provision of detailed cost estimates and an implementation plan within three months of approval and ideally the commencement of construction within six months.
50. Dr Wethasinghe thereafter advanced his plans to develop the hotel. At some point prior to October 1980, the name of Electro Plastics Limited was changed to Electro Holiday Resorts Ltd (“**Electro Resorts**”). In May 1980, a further survey was undertaken of both the Montrose Land and an approximately seven-acre plot on the far side of Lake Diyawanna (later purchased by Mr Eyre and known as the “**Natiso Land**”). The Montrose Land and the Natiso Land are shown as Plots 1 and 2, on the left and right side, respectively, on the survey reproduced below.⁴

³ Memorial, para 15; Exhibit C-11.

⁴ Memorial, para 17.2; Exhibit C-13.

Lot 5 in Plan No. 444
made by
Mr. M. I. Sameer



QAN

Bounded as shown above

Surveyed on 29-5-1980

Licensed Surveyor & Leveller

Kahopolle Engineering Services Company Limited
 Managing Director; Chairman
 Director

51. It was also in 1980 that Dr Wethasinghe met Mr Eyre. Dr Wethasinghe retained Samuel Montagu & Co in London to facilitate financing to develop the Montrose Land hotel, and Mr Eyre was assigned to assist him. Mr Eyre recalls that Dr Wethasinghe considered the hotel development plan to have great potential, because the Sri Lankan government planned to build a new parliament complex on an island in Diyawanna Lake and there would be renewed interest in the Kotte area. Mr Eyre also recalls that he actively approached a number of international banks and there was “an appetite for providing funding” including from Chase Manhattan and Citibank, but works “ground to a halt with the outbreak of civil war in Sri Lanka in July 1983”.⁵ The hotel financing work was put on indefinite hold, but, in the course of their dealings, Dr Wethasinghe and Mr Eyre developed a close friendship. Mr Eyre thereafter attended many Wethasinghe family events including the marriage of Dr Wethasinghe’s son, Mr Ravi Wethasinghe.
52. On 31 October 1991, the UDA granted conditional planning permission to Electro Resorts for “Residential Development” and “Mixed Development of Residential and Commercial Development of Shops & Offices Only” for the Montrose Land and Natiso Land.⁶
53. Dr Wethasinghe died in 1996, after which control of Electro Resorts passed to his son. Ravi Wethasinghe continued efforts to develop the Montrose Land, the Natiso Land and two other nearby parcels known as the “Wethasinghe Land” and the “Tubal Land”.
54. In November 2000, the UDA wrote to Ravi Wethasinghe confirming that it had granted preliminary planning clearance, which would be valid for one year, for the development of the Montrose Land and nearby parcels subject to certain planning guidelines and instructions.
55. Over the next several years, Ravi Wethasinghe was engaged in several business ventures in Sri Lanka. He controlled a Sri Lankan company, La’tec, which built buses for the public transportation system. In or around 2001, when Sri Lanka began to privatise bus routes, Ravi Wethasinghe determined to try to bid on certain bus routes. To obtain the personal

⁵ Witness Statement of Raymond Charles Eyre dated 2 August 2017 (“**First Eyre Statement**”), paras 6-7.

⁶ Memorial, para 17.4; Exhibit C-16.

financing to do so, he turned to Mr Eyre, who was then at Bank of America. Mr Eyre initially refused. In 2003, Ravi Wethasinghe obtained planning permission and financing for the Wethasinghe Land, on which a residential complex ultimately was built.

B. THE LEASE OF THE MONTROSE LAND TO MR EYRE

56. In around 2003, Ravi Wethasinghe bid for a privatised bus route but could not afford to pay the US\$ 1.1 million bond required by the Sri Lankan government. Out of loyalty to Ravi Wethasinghe's father, Mr Eyre reconsidered his original refusal to lend funds to Ravi Wethasinghe and agreed to provide the financing for the bond by way of a personal loan from himself and his wife (a Singapore national) of US\$ 1.1 million, subject to being granted a lease on the Montrose Land as security for the loan. Mr Eyre attributed his decision to make the loan to Ravi Wethasinghe to "loyalty to his late father",⁷ and testified at the Hearing on Jurisdiction as follows:

I was still at Bank of America. At the last minute when he was due to make a bid for the bus companies he called me to say he did not have the money to put up the bid bond and would I help him, which I guess is a phone call I regret to this day, frankly, but it did happen. I lent him I think approximately \$1 million converted into rupees, but it was around \$1 million to go into the bid bond. ... He was the youngest son of a very dear old friend of mine and I agreed to that to try to see if the project could go through.⁸

57. There is no loan agreement or other documentation in the record concerning Mr Eyre's US\$ 1.1 million loan to Ravi Wethasinghe. When asked on cross-examination at the Jurisdiction Hearing whether he had entered into a written loan agreement with Ravi Wethasinghe, Mr Eyre testified: "I am fairly sure we didn't because it was just a rush of time".⁹ Mr Eyre recalled that he paid the total US\$ 1.1 million to Ravi Wethasinghe in more than one sum, but he could not locate any bank documents showing definitively when

⁷ First Eyre Statement, para 10.

⁸ Tr Day One 113:12-114:9.

⁹ Tr Day One 138:11-15.

and how the sums were paid.¹⁰ Nor could Mr Eyre locate any documents concerning the related debt owed to him by Ravi Wethasinghe.¹¹

58. On 11 August 2005, Electro Resorts granted Mr Eyre a lease over the Montrose Land for 25 years expiring on 30 June 2030 (the “**Lease**”).¹² The Lease is written and notarised.¹³ The Lease makes no reference to a US\$ 1.1 million loan from Mr Eyre to Ravi Wethasinghe. The Lease recites that the monthly rental is to be Sri Lankan Rupees (“**Rs**”) 125,000 for a total rental of Rs 30 million over the 25-year lease period, and that:

*the Lessee has deposited with the Lessor a sum of **Rupees Thirty Million (Rs.30,000,000/-)** at the time of execution of these presents (the receipt whereof the Lessor doth hereby admit and acknowledge) to be set off on account of the monthly rental throughout the leasehold period.*¹⁴

59. Mr Eyre testified that he could not remember whether he had in fact made the deposit of Rs 30 million, and suggested that the comparatively low rental fee in relation to the size of his loan to Ravi Wethasinghe might be because he also arranged a mortgage on the Natiso Land.¹⁵
60. At around the same time as the lease in 2005, Ravi Wethasinghe informed Mr Eyre of his plans to develop the Montrose Land and nearby parcels, noting that he had secured approval in late 2000 from the Sri Lankan Board of Investment for a mixed development project with foreign collaboration on the Montrose and Natiso Land. In that connection, Ravi Wethasinghe asked Mr Eyre to contribute US\$ 350,000 in funding for the initial development of the land. Mr Eyre agreed, subject to the requirements, first, that the US\$ 350,000 be distributed over three months and repaid by 31 March 2008 and, second, that he be appointed a director of Electro Resorts.¹⁶ Ravi Wethasinghe agreed to these

¹⁰ Tr Day One 141:18-24, 145:21-146:11.

¹¹ Tr Day One 150:20-24.

¹² Memorial, para 24; Exhibit C-27; First Eyre Statement, para 11.

¹³ Exhibit C-27, pages 6-8.

¹⁴ Exhibit C-27, page 2 (emphasis in original).

¹⁵ Tr Day One 147:9-25, 148:1-19.

¹⁶ Memorial, para 26; First Eyre Statement, para 13.

requirements, which were recorded, not at the time, but some two years later in an Agreement to Finance dated 13 December 2007.¹⁷ Mr Eyre testified that he could not locate bank records documenting when and how he made the US\$ 350,000 loan to Ravi Wethasinghe.¹⁸

C. THE INCORPORATION OF MONTROSE DEVELOPMENTS (PRIVATE) LIMITED AND THE SALE OF THE MONTROSE LAND

61. In early 2010, Ravi Wethasinghe proposed to transfer title to the Montrose Land to Mr Eyre rather than repay the loans. Mr Eyre decided that his “best option was to progress the hotel development and recoup the loaned sums from its eventual sale”, and so he agreed with Ravi Wethasinghe to take the title and “transfer an additional sum as consideration for the Montrose Land”.¹⁹
62. On 27 July 2010, the board of Electro Resorts resolved to sell the Montrose Land to Mr Eyre for the “negotiated sum” of Rs 100 million (approximately US\$ 887,000).²⁰
63. On 3 August 2010, Montrose Developments Private Limited (again, the second Claimant, “**Montrose**”) was incorporated as a Sri Lankan private limited company with one share (the “**Montrose Share**”), to hold legal title to the Montrose Land. According to Mr Eyre, his “understanding at the time was that it was necessary for a Sri Lankan company to have a Sri Lankan national as the initial subscriber of shares and company director in order to comply with local legal requirements”.²¹ At the suggestion of a business associate in the tourism business, Mr Wijeratne, Mr Joseph Ranjan Fernando was named the nominee shareholder and director of Montrose. Mr Eyre testified repeatedly that Montrose was to be only the legal owner of the Montrose Land, while he was to be the beneficial owner and Mr Fernando was to act only on his instructions. According to Mr Eyre:

¹⁷ Memorial, para 26; Exhibit C-29.

¹⁸ Tr Day One 133:2-6.

¹⁹ First Eyre Statement, paras 14-15.

²⁰ First Eyre Statement, para 16; Exhibit C-33.

²¹ First Eyre Statement, para 18.

*The intention and understanding of all concerned was that at all times that I would retain full beneficial ownership and control over the company.*²²

64. At the hearing, Mr Eyre testified on cross-examination that he did not use or understand the phrase “beneficial interest”.²³
65. There was no written agreement between Mr Eyre and Mr Fernando. The Claimants’ evidence is that, to ensure Mr Fernando could be removed as the sole director of Montrose at any time, Mr Eyre (through Mr Wijeratne) obtained a signed and undated resignation letter from Mr Fernando, a copy of which is in the record.²⁴ At the Jurisdiction Hearing, Mr Wijeratne testified that Mr Fernando also provided a signed blank share transfer form, but no copy of that form was entered in the record.²⁵
66. Sri Lanka disputes Mr Eyre’s testimony on the reason for having Mr Fernando serve as the nominee shareholder and director of Montrose. According to Sri Lanka, there were no legal restrictions at the time precluding foreign shareholders or directors from acquiring Sri Lankan land, but Section 58(1) of the Finance Act No 11 of 1963 (the “**Sri Lankan Finance Act**”) did give rise to a statutory obligation on a foreign citizen purchasing Sri Lankan land to pay a tax equivalent to the full value of the property.²⁶ Sri Lanka argues that the real purpose for Mr Eyre to incorporate Montrose with Mr Fernando as sole shareholder and director must have been to evade this 100% tax on the purchase of the Montrose Land from Electro Resorts.²⁷

²² First Eyre Statement, para 18.

²³ Tr Day One 196:11-15, 204:25, 205:1-2.

²⁴ Memorial, para 29; Exhibit C-85.

²⁵ Tr Day One 235:3-7.

²⁶ Respondent’s Preliminary Jurisdictional Objections Pursuant to Article 41(1) of the ICSID Convention (“**Preliminary Objections**”), para 20; Finance Act No 11 of 1963 (RL-2).

²⁷ Preliminary Objections, paras 20-22.

67. On 4 August 2010, one day after Montrose was incorporated, Electro Resorts transferred ownership of the Montrose Land to Montrose by a Deed of Transfer.²⁸ The Deed of Transfer, which is notarised by Ms Sarjonie Mudalige, provides in relevant part:

AND WHEREAS the VENDOR has agreed with MONTROSE DEVELOPMENTS (PRIVATE) LIMITED a company duly incorporated in the Democratic Republic of Sri Lanka ... (hereinafter called and referred to as the PURCHASER ...) for the absolute sale and conveyance to the PURCHASER all that allotment of land depicted in Plan No.1700 ... free of all encumbrances and charges whatsoever at or for the price of sum of RUPEES ONE HUNDRED MILLION ONLY (Rs100,000,000/-) of lawful money of the said Republic of Sri Lanka.

NOW KNOW YE AND THESE PRESENTS WITNESS that in pursuance of the said agreement and in consideration of the said sum of RUPEES ONE HUNDRED MILLION ONLY (RS.100,000,000/-) of lawful money of the said Republic of Sri Lanka well and truly paid to the VENDOR by the PURCHASER (the receipt whereof the VENDOR doth hereby expressly admit and acknowledge) the VENDOR doth hereby sell grant convey transfer assign set over and assure unto the PURCHASER all that allotment of land depicted in Plan No.1700

68. The notary added at the end of her certification:

*I further certify and attest that the within mentioned consideration was not passed in my presence.*²⁹

69. The Claimants admit that there was no written sale contract for the Montrose Land:

*The Claimants have never relied on a written contract of sale because no such contract exists. As Mr Eyre says, the Montrose Land was transferred by way of a Deed of Transfer, which has already been disclosed.*³⁰

²⁸ Memorial, para 32; Exhibits C-7 and C-35.

²⁹ Exhibit C-7.

³⁰ Claimants' Rejoinder on Jurisdiction ("Rejoinder"), para 188.

70. In their Memorial, the Claimants describe the payment for the sale of the Montrose Land as coming some eight months later, on 4 April 2011. According to Mr Eyre in his First Witness Statement:

*Shortly before 4 April 2011, I transferred the additional sums in respect of the purchase price from another company, Montrose Developments Pte Limited (Montrose Singapore) (which is owned 99% by me), to a bank account held by Electro Holidays [footnote to Exhibit C-44].*³¹

71. In their Memorial, the Claimants rely on a written receipt from Electro Resorts to Montrose Developments Pte Limited (“**Montrose Singapore**”) dated 4 April 2011, which is Exhibit C-44, as proof of this payment. Exhibit C-44, which became the focus of substantial discussion and dispute between the Parties, merits quoting in full. The document is on Electro Resorts letterhead, is dated 4 April 2011, is headed “Receipt”, and is signed by “Director for Electro Holiday Resorts Ltd” (apparently Ravi Wethasinghe).

*We do hereby acknowledge receipt of US\$ 1000,000/-(US Dollars One Million Only) from Montrose Developments (PVT) Ltd being the purchase price of land depicted in plan no 1700 dated 14th February 1978 made by S.J.Setunga Licensed Surveyor containing in extent THREE ACRES THREE ROODS AND TWENTY FIVE PERCHES (A3.R3.P25) and situated at Kotuwegoda in the district of Colombo which [sic – is] more fully described in the schedule to the Deed of Transfer No 2207 dated 04th August 2010 attested by C.K.I.P.A. Mudalige, Notary Public.*³²

72. In its Preliminary Jurisdictional Objections, Sri Lanka describes Exhibit C-44 as a “curious document” in that it refers to receipt from Montrose Singapore of US\$ 1 million, rather than Rs 100 million or the US dollar equivalent of US\$ 887,000 described by Mr Eyre.³³ Further, Montrose Singapore was not incorporated until September 2011, some five

³¹ First Eyre Statement, para 20.

³² Exhibit C-44.

³³ Preliminary Objections, para 17.

months later.³⁴ At the Jurisdiction Hearing, Mr Eyre testified that he wanted to correct the original reference of “(Montrose Singapore)” in Exhibit C-44 to “(Montrose Sri Lanka)”.³⁵

73. In their Counter-Memorial, having undertaken a further document search and obtained records from BNP Paribas Wealth Management (among other banks at which Mr Eyre had accounts), the Claimants withdrew their reliance on Exhibit C-44 as evidence of payment for the Montrose Land and corrected the evidentiary record. They explain in the Counter-Memorial that Montrose Aircraft Leasing Pte Limited (“**Montrose Aircraft Leasing**”), a Singapore company within the Montrose Group of companies owned 99% by Mr Eyre (the “**Montrose Group**”), made a payment on 5 July 2012 of US\$ 400,055 to Latec International Logistics and Shipping Pte Ltd (“**Latec International**”), a company of which Ravi Wethasinghe was a 50% shareholder and a director.³⁶ The Claimants rely on contemporaneous emails between Mr Eyre and Ravi Wethasinghe in June and July 2012 to confirm that the US\$ 400,055 was a contribution in respect of the Montrose Land. In those emails, Ravi Wethasinghe provided Mr Eyre with reports on the Montrose Land title search; Mr Eyre agreed to release US\$ 400,000 “as a sign of good faith and to keep the approvals process going”;³⁷ Ravi Wethasinghe asked that the payment be made into the Latec International account; Mr Eyre so directed the payment; and Ravi Wethasinghe acknowledged receipt of the payment.³⁸

74. In its Reply, Sri Lanka accuses the Claimants of retreating from reliance on the 4 April 2011 Electro Resorts receipt in Exhibit C-44 “because its contents are untrue, i.e. it was manufactured for some ulterior reason”.³⁹ The Claimants object to this characterisation in their Rejoinder, stating that “Mr Eyre relied on this receipt as he could not precisely recall the payment in question [which] was in the context of a personal transaction, managed

³⁴ Preliminary Objections, para 17.

³⁵ Tr Day One 109:3-12.

³⁶ Claimants’ Counter-Memorial on Jurisdiction (“**Counter-Memorial**”), para 11; Exhibit C-91.

³⁷ Counter-Memorial, para 11.4.1; Witness Statement of Raymond Charles Eyre dated 25 April 2018 (“**Second Eyre Statement**”), para 20(b); Exhibit C-89.

³⁸ Counter-Memorial, paras 11.4.2-11.4.4; Exhibits C-90–C-92 and R-12.4.

³⁹ Respondent’s Reply on Jurisdiction (“**Reply**”), para 4.

without the corporate infrastructure of the Montrose Group”.⁴⁰ Further, say the Claimants, the receipt was not generated by Montrose but by Electro Resorts. In his Second Witness Statement, Mr Eyre explains that, despite significant efforts, he had “not been able to find the relevant entry for the payment to Electro Holidays” of the purchase price for the Montrose Land.⁴¹

75. There is an entry on the 2012 Montrose books indicating that the sum of Rs 100 million payable to Electro Resorts was settled directly by Mr Eyre, and so was treated as a loan repayable by Montrose to Mr Eyre.⁴² In specific, the Notes to the Financial Statement in the Independent Auditor’s Report of 14 August 2013 record the sum of Rs 100 million as payable to Electro Resorts in 2010/2011 and to Mr Eyre in 2011/2012, followed by:

*Note: The amounts payable to Electro Holiday Resorts (Pvt) Ltd on land acquisition, had been settled by the director Mr.R C Eyre. Accordingly the company has to pay that amount to Mr.R C Eyre.*⁴³

76. The Claimants deny that any such loan was made by Mr Eyre. They explain that “this was nothing more than a book debt reflecting the anticipated payment of the purchase price of the Montrose Land by Mr Eyre on Montrose’s behalf”,⁴⁴ which did not occur.
77. The Claimants confirm in their Counter-Memorial that further document searches did not uncover any documents concerning Mr Eyre’s original loans to Ravi Wethasinghe of US\$ 1.1 million and US\$ 350,000. Counsel for the Claimants assert that this is “unsurprising, as the transactions occurred over 10 years ago, and the payment records associated are not easily obtainable from the banks involved”.⁴⁵
78. In the Preliminary Jurisdictional Objections, Sri Lanka points out that Mr Eyre fails to mention in his evidence that, based on Minutes of the Montrose Board of Directors, Mr

⁴⁰ Rejoinder, para 185.

⁴¹ Second Eyre Statement, para 18.

⁴² Preliminary Objections, para 25; Exhibit R-5.

⁴³ Exhibit R-5, page 11.

⁴⁴ Counter-Memorial, para 18.

⁴⁵ Counter-Memorial, para 13.

Fernando transferred the Montrose Share to Mr Eyre on 11 October 2010, which was subsequent to the 4 August 2010 Deed of Transfer of the Montrose Land and prior to the alleged payment for the Montrose Land by Montrose Singapore on 4 April 2011.⁴⁶ In their Counter-Memorial, the Claimants explain that the 11 October 2010 transfer was defective under Sri Lankan law because of the lack of a completed share transfer form by which Mr Eyre consented to the transfer, and hence the transfer was never reported to the Registrar of Companies.⁴⁷ The transfer was eventually regularised, say the Claimants, by the transfer of the Montrose Share from Mr Fernando to Montrose Singapore in March 2012.

79. In response to criticism by Sri Lanka concerning the late discovery of certain documents and the absence of other documents underpinning various loans and payments, counsel for Mr Eyre emphasised that “Mr Eyre’s activities in Sri Lanka were very much of a personal character” outside his busy professional finance practice.⁴⁸ Mr Eyre testified that he did not conduct document searches on his personal computer and in fact he had changed computer systems at some point, but he personally did manual document searches “over several weekends”.⁴⁹ At the Jurisdiction Hearing, when asked in cross-examination what he thought of the criticisms made of the limited documentation of his alleged investment in Sri Lanka, Mr Eyre testified:

Well, I think in response to that I would like to say that this was not a business for me. This was really a personal favour I was doing and I was really trying to collect my debts. I was at the time this initially started as I just mentioned in the global leasing group at Bank of America. That was a \$25 billion portfolio. I had 250 people working for me around the world. This event was a very small piece of my time.

When I joined Montrose from Bank of America we had a 12 billion-dollar portfolio which was probably around 170 aircraft globally. Unfortunately, after the tragic events of 9/11, a number of those

⁴⁶ Preliminary Objections, para 26.

⁴⁷ Counter-Memorial, para 20; Second Eyre Statement, para 22.

⁴⁸ Counter-Memorial, para 4.

⁴⁹ Tr Day One 152:5-23.

*aircraft were parked, so my so-called semi-retirement job became a full-time job and that continued. So this was really a very small element of my time. It was an annoyance. It was an embarrassment to me that I had lent money to this guy but really he had just treated me in this manner.*⁵⁰

80. In its Reply, Sri Lanka relies heavily on the Memorandum of Understanding between Montrose Global and Electro Resorts (again, the “**MOU**”), which the Claimants produced after Mr Eyre’s further document searches but did not mention or discuss in their Counter-Memorial.⁵¹ The MOU is undated, but, alleges Sri Lanka, presumably was signed sometime in late July 2010 before the 4 August 2010 Deed of Transfer.⁵² To situate the MOU in time, the Respondent relies on an email dated 23 July 2010 from Ravi Wethasinghe to Mr Eyre with the Subject heading of “MOU”.⁵³ The email reads in relevant part:

With your approval and agreement we can implement this without delay.

A-1. Register Montrose Developments Ltd in Sri Lanka and Electro Holiday Resorts transfers ownership of this land to Montrose Developments Ltd.

2. Value of the property for the deed will be US\$ 1 Million, Montrose will pay US\$ 1,000,000 (less any deposits paid) at the time of development of the hotel project.

3. Stamp duty will be payable on the US\$ 1 Million of the deed value of the property. That will come to approximately US\$ 30,000.
B-1. As per MOU between Montrose and Electro Holiday Resorts/Ravi agreement property value has been estimated at:

<i>US\$ 18,000</i>	<i>per perch</i>
<i>US\$ 11,250,000</i>	<i>for 625 perches</i>
<i>US\$ 1,000,000</i>	<i>deed value that is deducted from final price</i>

US\$ 10,250,000 total land value

⁵⁰ Tr Day One 116:4-23.

⁵¹ Reply, para 7; Exhibit R-12.3.

⁵² Reply, para 7.

⁵³ Exhibit R-12.2.

Total land value will be payable when the development/sale commences and will be jointly agreed by both parties.

81. The MOU sets out terms for the sale of the Montrose Land by Electro Resorts to Montrose Global, as follows:

As consideration for the land, Montrose Global LLP ('Montrose') hereby agrees to pay US\$1 million for the land upon completion of an appropriate Purchase and Sale Agreement and no later than 36 months from the date of the Purchase and Sale Agreement 30th September 2010.

This land together with the land recently acquired by Natiso (Pvt) Ltd will form the basis of land for the Development Project ('DP').

DP will consist of the building of a new apartment block together with a Five Star hotel and associated serviced apartments, conference facilities and shopping centre.

In relation to DP, Montrose will be responsible for all cost in relation to the negotiation for planning and actual implementation of DP. Montrose will be solely responsible for all negotiations relative to DP but will report to Electro at least once a month by written form.

The DP to be 100% owned by Montrose but where a 50% beneficial interest on the profit will be maintained for Electro in addition to payment for the land itself of US\$5million.⁵⁴

82. The MOU was signed by Mr Eyre as Managing Director of Montrose Global and Ravi Wethasinghe as Director of Electro Resorts.⁵⁵ It is not notarised.
83. The Respondent characterises the MOU as a binding agreement under Sri Lankan law for Electro Resorts to sell the Montrose Land to Montrose Global, creating a constructive trust for Electro Resorts over the Montrose Land or at least over 50% of future profits from the hotel development on the Montrose Land as part of the overall development project (the

⁵⁴ Exhibit R-12.3.

⁵⁵ Exhibit R-12.3.

“**Development Project**”). The Respondent emphasises the similarity between the terms in the MOU and those in the 4 April 2011 Electro Resorts receipt (Exhibit C-44), in particular the reference to US\$ 1 million as a payable amount.⁵⁶

84. The Claimants vigorously object to Sri Lanka’s characterisation of and reliance on the MOU. In summary, their position is:

*[T]he MOU is not a binding document under English law, which governs it. Instead, the MOU was intended simply to document the status at that point in time of negotiations between the parties concerning the transfer of the Montrose Land. As is common in such discussions, the parties’ negotiations evolved. The Montrose Land was not transferred under the arrangement contemplated in the MOU. This is clear from the transaction that actually took place, which was on markedly different terms. Sri Lanka’s hypothesised joint venture between Electro and Montrose Global did and does not exist.*⁵⁷

85. In his testimony at the Jurisdiction Hearing, Mr Eyre stated that he did not mention the MOU in his Witness Statements because he did not consider it significant:

*I had not forgotten about it but, as I have tried to explain consistently, there were any number of discussions, promises, with Mr Wethasinghe. By this stage it was somewhat of a nonsense, frankly, to think that something was actually going to happen with Mr Wethasinghe. If I may just finish, I signed probably 100 MOUs a year, and probably 95 per cent of those don’t happen for whatever reason. It is a very common technique we use in aircraft asset financing to describe a potential transaction, but unfortunately very rarely does that turn out to be [sic] true transaction.*⁵⁸

86. Sri Lanka requested production of related documents subsequent to the MOU. As noted in the Procedural History section above, the Tribunal ordered a further search for and production of such MOU-related documents. The Claimants reported that none could be found.

⁵⁶ Reply, para 12; Exhibit C-44.

⁵⁷ Rejoinder, para 194.

⁵⁸ Tr Day One 158:3-14.

D. THE MONTROSE LAND DEVELOPMENT PLANNING

87. With improved prospects for Sri Lankan tourism following the end of the civil war in 2009, Mr Eyre took steps to explore development of the Montrose Land as a 250-room “mid-market” hotel, in conjunction with a luxury serviced apartment complex to be constructed on the Natiso Land.⁵⁹
88. As he lacked personal experience in property development, Mr Eyre reached out to expert consultants. He retained HVS Hospitality Services, which reported in a November 2010 feasibility study and development strategy paper that the Montrose Land Hotel Project likely would be successful, at a development cost of approximately US\$ 53 million inclusive of land cost of US\$ 21,159,178.⁶⁰ Mr Eyre also retained the international firm Woods Bagot, assisted by the Sri Lankan firm Arch International (Pvt) Limited, to provide architectural and design consultancy services and, on 18 May 2011, Woods Bagot delivered a “Masterplan Initial Concepts: Developed Building Concepts” proposal including a hotel with spa and fitness centre, residential and serviced apartments, and retail space.⁶¹ As he planned to involve an international hotel group in the project, Mr Eyre also approached various well-known hotel groups, which led to “an overwhelmingly positive response” as evidenced by meetings and site visits.⁶² The Starwood, Hyatt, Marriott and Langham hotel groups all made initial proposals.⁶³
89. As for financing the estimated development costs of approximately US\$33 million (excluding the land cost), Mr Eyre approached various professional contacts at international banks with a presence in Sri Lanka, and found HSBC, Standard Chartered and CIMB to be preliminarily receptive.⁶⁴ Mr Eyre testified about his financing plans as follows:

I planned to part-fund the hotel development using my own resources or the resources of Montrose Global and to obtain

⁵⁹ Memorial, para 34; First Eyre Statement, para 23.

⁶⁰ Memorial, para 35.4; Exhibit C-37, page 8.

⁶¹ Memorial, paras 36-38; Exhibits C-39 and C-45.

⁶² Memorial, para 40; First Eyre Statement, para 28.

⁶³ Memorial, para 41; Exhibits C-41-43, C-46 and C-50.

⁶⁴ Memorial, para 43; First Eyre Statement, para 26.

funding for the remainder of the development costs of the hotel from elsewhere. I intended to secure funding from a number of sources, including international and domestic banks, the International Finance Corporation (the IFC) and international hotel groups, the latter of which would contribute funds toward the development costs in exchange for an agreement that they would operate and manage the hotel in due course. I also intended to agree deferred payment mechanisms with the contractors working on the project in lieu of upfront payments. My plan was for [sic] to retain the completed hotel for a period of two to three years or until it was financial [sic] advantageous to sell it.⁶⁵

E. THE DREDGING AND COMPULSORY STATE ACQUISITION OF THE MONTROSE LAND

90. In September 2011, Woods Bagot informed Mr Eyre that the Sri Lanka Land Reclamation and Development Corporation (the “SLLRDC”) was conducting dredging works in Lake Diyawanna close to the western boundary of the Montrose Land. Despite entreaties to the UDA by Montrose’s Sri Lankan counsel, Ms Mudalige, the dredging continued and resulted in approximately three acres of the Montrose Land being submerged in Lake Diyawanna. The dredging also affected the nearby Tubal Land.
91. Mr Eyre nonetheless remained optimistic about development, thinking that the Montrose Land could be drained or the Hotel Project could be re-designed to be built on stilts. He and Ms Mudalige devoted substantial efforts in seeking assistance from the then-President of Sri Lanka, the UDA and the SLLRDC. At a meeting on 17 February 2012, attended by Mr Shafiq Iqbal as a representative of the Tubal Group, the Additional Secretary for Urban Development reportedly relayed strong government support for the Montrose Land development and suggested that the hotel plans be amended for construction on stilts in light of environmental concerns.⁶⁶
92. On 12 March 2012, an amended application for preliminary planning clearance was submitted to the UDA on behalf of Montrose, which application was suspended and has not been processed.⁶⁷

⁶⁵ First Eyre Statement, para 25 (emphasis in original).

⁶⁶ Memorial, para 50; Exhibit C-56.

⁶⁷ Memorial, para 51; Exhibit C-55.

93. On 4 May 2012, the Greater Colombo Flood Control and Environmental Promotion Office (the “FCEPO”) issued a notice pursuant to the Sri Lankan Land Acquisition Act authorizing FCEPO to enter the Montrose Land for the purpose of surveying it to determine whether the land was suitable for a public purpose.⁶⁸
94. On 30 November 2012, Mr Eyre and Mr Iqbal arranged a meeting with the Secretary of Defence and Urban Development, which was attended by Ms Mudalige, the British High Commissioner and the Deputy British High Commissioner on behalf of Mr Eyre and Montrose. The dredging was discussed but no conclusion was reached.⁶⁹
95. On 30 January 2013, Sri Lanka issued a Gazette Notice confirming that it was proceeding to acquire the Montrose Land.⁷⁰
96. On 10 July 2013, a Gazette Notice recorded that the Montrose Land was needed for a public purpose and was being compulsorily acquired under Section 5 of the Land Acquisition Act.⁷¹
97. On 10 April 2015, a Gazette Notice published under Section 7 of the Sri Lankan Land Acquisition Act requested all persons interested in the Montrose Land to notify a certain Mr C.W. Abeysuriya of the nature of their interest and be prepared to appear on 15 May 2015.⁷² Mr Wijeratne notified Mr Abeysuriya of Montrose’s interest in the Montrose Land and requested compensation of Rs 2,749,700.000 (approximately US\$ 20,705,241). Ms Mudalige appeared on behalf of Montrose and confirmed Montrose’s title to the land.
98. On 3 July 2015, Mr Wijeratne wrote to Mr Abeysuriya and requested compensation of 5 million RS per perch.⁷³ No offer of compensation was forthcoming.

⁶⁸ Memorial, para 55; Exhibit C-60.

⁶⁹ Memorial, para 57; Exhibit C-63.

⁷⁰ Memorial, para 58; Exhibit C-64.

⁷¹ Memorial, para 58; Exhibit C-68.

⁷² Memorial, para 59; Exhibit C-71.

⁷³ Memorial, para 60; Exhibit C-73.

99. Mr Eyre directed Mr Wijeratne to make a claim to the Land Acquisition Board for compensation. To that end, Mr Wijeratne commissioned a report from a retired former Sri Lankan government chief valuer, who valued the Montrose Land, under restrictions the Claimants understood to be applicable in Sri Lankan compensation proceedings, at Rs 1,891,000,000 (approximately US\$ 13,218,090).⁷⁴ (Apparently this report was initially put under Ravi Wethasinghe's name, which Mr Wijeratne explained was a mistake resulting from Ravi Wethasinghe having used the same former government chief valuer to value Electro Resorts' neighbouring plot of land.⁷⁵) Mr Wijeratne included the Montrose Land valuation report in the claim made to the Land Acquisition Board on 5 December 2016.
100. On 8 December 2016, the Land Acquisition Board awarded Montrose the sum of Rs 123,738,500 (approximately US\$ 838,947) as compensation for the Montrose Land.⁷⁶
101. On 4 January 2017, on Mr Eyre's instructions, this compensation award was appealed to the Land Acquisition Board of Review. According to counsel for both the Claimants and the Respondent, the appeal remained pending as of the Jurisdiction Hearing.⁷⁷
102. No entity other than Montrose, including Electro Resorts and Ravi Wethasinghe, submitted any notification of an interest in the Montrose Land in response to the 10 April 2015 Gazette Notice.
103. Much of Mr Eyre's correspondence with Sri Lankan government officials over the course of this land acquisition and compensation process, as with his correspondence with hotel development consultants before the Montrose Land was dredged, was on letterhead and under email addresses of Montrose Global rather than Montrose itself. The Claimants

⁷⁴ Memorial, para 63; Exhibit C-81.

⁷⁵ Tr Day One 242:6-14; Tr Day Two 446:5-447:1.

⁷⁶ Memorial, para 64; Exhibit C-82.

⁷⁷ Tr Day One 60:2-16.

explain this as normal commercial practice for the head of a closely-held corporate group of companies such as the Montrose Group.⁷⁸

F. MONTROSE DEVELOPMENTS PTE LTD

104. According to Mr Eyre, when he was exploring possible financing for the Montrose Land Hotel Project in the spring of 2012, “concerns ... had been raised by financial institutions ... in respect of the legal ownership of the [Montrose] share”.⁷⁹ To alleviate such concerns, Mr Eyre directed that legal title to the Montrose Share be transferred from Mr Fernando to Montrose Singapore, as another company in the Montrose Group owned 99% by him.

105. On 31 March 2012, a share transfer form was executed and the Montrose share ledger was updated to reflect that the Montrose Share was owned by Montrose Singapore.⁸⁰ On 19 June 2012, a share certificate was issued in favour of Montrose Singapore.⁸¹ Mr Fernando resigned his directorship of Montrose, and Mr Eyre and Mr Wijeratne became directors of Montrose.

106. The Parties dispute the terms on which Montrose Singapore holds the Montrose Share. The Claimants’ evidence is that Mr Eyre, through the transfer from Mr Fernando, remains the beneficial owner of Montrose. Sri Lanka points to Montrose Singapore’s Financial Year 2014 year-end accounts, which expressly describe Montrose Singapore as the equity owner of Montrose, with total assets valued at US\$ 1,474,063 including the Montrose Land.⁸²

IV. THE PARTIES’ REQUESTS FOR RELIEF

A. THE RESPONDENT’S REQUEST FOR RELIEF

107. In its Reply on Jurisdiction, the Respondent requests that the “Claimants’ claims ... be dismissed on each, alternatively any, of the jurisdictional grounds” raised by the

⁷⁸ For example, Second Eyre Statement, para 12.

⁷⁹ Memorial, para 52; First Eyre Statement, para 21.

⁸⁰ Memorial, para 53; Exhibit C-58.

⁸¹ Memorial, para 53; Exhibit C-61.

⁸² Preliminary Objections, para 29; Exhibit R-4, page 4.

Respondent and that the Claimants “should pay the Respondent’s costs of these jurisdictional proceedings”.

B. THE CLAIMANTS’ REQUEST FOR RELIEF

108. In their Rejoinder on Jurisdiction, the Claimants request that the Tribunal:

DISREGARD OR DEEM WAIVED those jurisdictional objections that Sri Lanka could have but failed to raise in the Preliminary Objections on the basis set out in Rules 41(1), 26(3) and 27 of the ICSID Rules – particularly the objections set out in §§B, D and E of the Reply and those objections which depend on the reasoning set out therein;

OTHERWISE DISMISS Sri Lanka’s jurisdiction objections as reflected in the Preliminary Objections and the Reply;

CONFIRM its jurisdiction over this dispute;

MAKE such other or further orders as it sees fit; and

ORDER that Sri Lanka pay the Claimants’ costs of this jurisdiction phase of the proceedings in any event and immediately, without awaiting the conclusion of the merits phase.

V. RESPONDENT’S JURISDICTIONAL OBJECTIONS: IN SUMMARY

109. Just as the factual background presented by the Claimants evolved over the course of the proceedings, so did the focus and organisation of the Respondent’s Preliminary Jurisdictional Objections, particularly in relation to the MOU. The Preliminary Jurisdictional Objections are set out below in their three major iterations, which the Tribunal found to complicate the necessary understanding and analysis of the objections.

110. To establish certain parameters at the start, it is undisputed that: (a) Montrose has legal title to and owns the Montrose Land; and (b) Montrose Singapore has equity title to and owns the Montrose Share, and hence directly owns Montrose. Although the Claimants originally asserted that Mr Eyre beneficially owns the Montrose Land, their position changed to a claim that Mr Eyre has a beneficial ownership interest not in the Montrose Land but in the Montrose Share through his 99% ownership of Montrose Singapore.

A. THE RESPONDENT’S INITIAL JURISDICTIONAL OBJECTIONS

111. In its initial Preliminary Jurisdictional Objections, Sri Lanka sought dismissal of the Claimants’ claims on several grounds under three main headings.
112. First, Sri Lanka alleged that neither Mr Eyre nor Montrose has standing as a protected “investor” to invoke the offer to arbitrate in Article 8(2) or, alternatively, in Article 8(1) of the BIT. As to Article 8(2), the Claimants’ alleged investment in the Montrose Land through Montrose as a Sri Lankan incorporated company gives rise to exclusive application of Article 8(2), and neither of the Claimants can satisfy Article 8(2) because the shareholding in Montrose was at all material times directly owned by Montrose Singapore, which has no standing under the UK-Sri Lanka BIT. As to Article 8(1), if there is a jurisdictional basis to circumvent Article 8(2), it is necessary to establish that the alleged investor actively made the investment within the meaning of Article 8(1), which Mr Eyre cannot satisfy because it was only Montrose Singapore that took on the risk, funding and decision-making roles in relation to the Montrose Land.
113. Secondly, Sri Lanka alleged that there has been no “investment” within the meaning of Article 1(a) of the BIT and Article 25 of the ICSID Convention, because: (a) there is no evidence that the Claimants actually paid for the Montrose Land; (b) the Claimants did not make any commitment of any duration or take any risk to develop the Montrose Land, having undertaken only pre-investment activity; and/or (c) the acquisition of the Montrose Land *per se* did not contribute to the economic development of Sri Lanka. Further, the claims advanced do not “directly arise” out of any alleged investment as required by Article 25 of the ICSID Convention, because the alleged investment is the alleged acquisition of the Montrose Land and not the “future aspirational hotel development plans in respect of which there was no contractual commitment at the time of making the investment”.⁸³
114. Thirdly, Mr Eyre’s claim to have a beneficial interest in Montrose, by way of a trustee/nominee relationship both when Mr Fernando was the legal owner and when

⁸³ Preliminary Objections, para 13.

Montrose Singapore was the legal owner, does not assist in giving him standing under the BIT, because the alleged beneficial interest: (a) does not provide a basis for circumventing Article 8(2) of the BIT; (b) fails under Sri Lankan law; and (c) is not entitled to protection under the BIT, as an invalid investment under Sri Lankan law.

B. THE RESPONDENT’S PRELIMINARY JURISDICTIONAL OBJECTIONS IN ITS REPLY ON JURISDICTION

115. In its Reply on Jurisdiction, in part due to the evolving presentation of facts and legal argument in the Claimants’ Counter-Memorial on Jurisdiction, Sri Lanka articulated nine separate Preliminary Jurisdictional Objections under the following headings:

Objection 1: The Tribunal lacks jurisdiction *ratione materiae*, or subject matter jurisdiction, in respect of Mr Eyre’s shareholding in Montrose Singapore, because Article 1(a) of the BIT does not extend to “indirect shareholdings”.

Objection 2: The Tribunal lacks jurisdiction *ratione personae*, or personal jurisdiction, over: (a) Montrose, because it does not constitute a company of the United Kingdom; and (b) Mr Eyre, because he is not the owner of the Montrose Share.

Objection 3: The Tribunal lacks jurisdiction *ratione materiae*, because a shareholder lacks standing to claim under the BIT for alleged loss of shareholder value reflective of alleged loss of corporate value.

Objection 4: The Tribunal lacks jurisdiction *ratione materiae*, because Article 1(a)(ii) of the BIT does not extend to an alleged beneficial interest.

Objection 5: The Tribunal lacks jurisdiction *ratione materiae*, because Mr Eyre has no beneficial interest in the shares of Montrose in any event.

Objection 6: The Tribunal lacks jurisdiction because the Claimants cannot make claims in respect of Electro Resorts, which holds the Montrose Land on constructive trust.

Objection 7: The Tribunal lacks jurisdiction *ratione materiae* because there was no investment under either Article 1 of the BIT or Article 25(1) of the ICSID Convention, because no payment was made for the Montrose Land.

Objection 8: The Tribunal lacks jurisdiction because Mr Eyre made no contribution and took no action that would confer upon him the status of an investor pursuant to the BIT.

Objection 9: The Tribunal lacks jurisdiction because, if the Montrose Share was held on trust for Mr Eyre, then it was not for a lawful purpose and constituted illegitimate tax avoidance, and Sri Lanka did not agree to give investment protection in these circumstances.

C. THE RESPONDENT’S PRELIMINARY JURISDICTIONAL OBJECTIONS AT THE JURISDICTION HEARING AND IN ITS CLOSING SUBMISSIONS

116. At the Jurisdiction Hearing, counsel for Sri Lanka presented the Preliminary Jurisdictional Objections not in the order utilised in the Reply but instead, “because we say you have to build up”, first under the category of the “Montrose Land level” and then under the category of the “shareholder level”.⁸⁴ The Respondent used essentially the same order in its Closing Submissions, as set out below.

117. At the Montrose Land level, Sri Lanka challenges jurisdiction on two overlapping bases focused on investment treaty interpretation principles:

Objection A: Based on the MOU, Montrose cannot claim in respect of Electro Resorts’ beneficial interest in the Montrose Land and its profit-earning capability and/or the Montrose Land does not constitute an investment of Montrose under Article 1(a)(ii) and Article 8(1) of the BIT.

Objection B: Applying the *Salini* principles,⁸⁵ the Montrose Land is not an investment under Article 1 of the BIT and Article 25(1) of the ICSID Convention,

⁸⁴ Tr Day One 55:2-57:3.

⁸⁵ *Salini Construttori SpA & Italstrade SpA v Kingdom of Morocco*, ICSID Case No ARB/00/04, Decision on Jurisdiction, 23 July 2001 (“*Salini*”), para 38 (CL-26).

because Montrose and Mr Eyre did not make any contribution to acquire the Montrose Land and took no investment risk.

118. At the shareholder level, Sri Lanka challenges jurisdiction on six bases:

Objection C: Any alleged shareholder claim by Mr Eyre is dependent upon the Montrose Land constituting an asset of Montrose, which it is not.

Objection D: Indirect shareholders are not covered by Article 1(a)(ii) of the BIT and, under Article 8(2) of the BIT, a locally incorporated company does not take the nationality of an indirect shareholder.

Objection E: A beneficial interest in shares is not covered by Article (1)(a)(ii) of the BIT and in any event Mr Eyre did not have a beneficial interest in the Montrose Share.

Objection F: Mr Eyre's alleged beneficial interest is not in accordance with law and good faith, and is void under Sri Lanka law.

Objection G: Mr Eyre does not have a claim as indirect legal title holder to the Montrose Land.

Objection H: Mr Eyre's reflective loss claim is not permitted under Article 5(2) of the BIT.

119. For the sake of good order and clarity, the Tribunal summarises the Parties' positions on the jurisdictional objections below using the framework of the Respondent's Closing Submissions – identified immediately above as Preliminary Jurisdictional Objections A through H – as closely as possible. Thereafter, as noted above, the Tribunal will analyse the Preliminary Jurisdictional Objections in a different structure focusing on core issues of jurisdiction *ratione personae* and *ratione materiae*.

VI. PRELIMINARY JURISDICTIONAL OBJECTIONS: THE MONTROSE LAND LEVEL

A. PRELIMINARY JURISDICTIONAL OBJECTION A: MONTROSE CANNOT CLAIM IN RESPECT OF THE MONTROSE LAND AND/OR THE ENTIRETY OF ITS ALLEGED PROFIT-EARNING CAPABILITY

(1) The Respondent's Position

120. The Respondent's primary Preliminary Jurisdictional Objection goes to jurisdiction *ratione materiae*. Sri Lanka argues that Montrose, although it is the legal owner of the Montrose Land, cannot claim under the BIT because, based on the MOU, the beneficial interest in the Montrose Land is vested in Electro Resorts. Sri Lanka argues that the Montrose Land was transferred pursuant to the signed MOU,⁸⁶ which was a "contractual memorandum of understanding" entered into "sometime in late July 2010 between Electro Resorts and Montrose Global LLP (not Mr Eyre), prior to the Deed of Transfer".⁸⁷ This is evident, argues Sri Lanka, from the email of 23 July 2010 from Ravi Wethasinghe to Mr Eyre allegedly preceding the signing of the MOU, "which contemplated signing the MOU on Monday 26 July 2010".⁸⁸

121. As set out in the Factual Background section above, the MOU envisioned the following: (i) Montrose Global would pay Electro Resorts US\$ 1 million for the Montrose Land upon completion of a Purchase and Sale Agreement, and no later than 36 months from 30 September 2010; (ii) the Montrose Land and the Natiso Land would form the basis for the land for the Development Project of hotel, apartments, conference facilities and shopping centre; (iii) Montrose Global would own 100% of the Development Project, but "a 50% beneficial interest on the profit will be maintained for Electro in addition to payment for the land itself of US\$ 5 million".⁸⁹ However, according to Sri Lanka, the initial consideration of US\$ 1 million was not paid.⁹⁰

⁸⁶ Exhibit R-12.3,

⁸⁷ Reply, para 7.

⁸⁸ Exhibit R-12.2.

⁸⁹ Reply, para 8.

⁹⁰ Respondent's Closing Submissions, para 19.

122. The Respondent contends that the MOU “has significant jurisdictional implications in and of itself apart from other fundamental jurisdictional obstacles”.⁹¹ In specific, the Tribunal has no jurisdiction over any part of the claim or, alternatively, “only has jurisdiction over the alleged claim less, at the very minimum according to the MOU, 50% of the alleged future profits and less USD 5 million and less USD 1 million; meaning that the maximum claim that can be put forward is USD 4,758,028.5[0]”.⁹²
123. The Respondent bases its position on the application of the well-established principle of international law as set out in, for example, *Occidental v Ecuador*.⁹³ This, says Sri Lanka, necessarily excludes any claim in respect of the profit-earning capability of the Montrose Land based on the Hotel Project. Independent of this, and again on the principle in *Occidental v Ecuador* and in *Impregilo v Pakistan*, Montrose cannot claim under the BIT in respect of Electro Resorts’ beneficial interest in the profit-earning capability of the Montrose Land, to the extent the MOU entitles Electro Resorts to 50% of such profits and US\$ 5 million.⁹⁴
124. Sri Lanka argues that the Claimants cannot avoid this impact of Electro Resorts’ beneficial interest on their claim by arguing that principles of customary international law are not applicable to the BIT. Applying the decision in *ELSI*,⁹⁵ as exemplified in *Occidental v Ecuador*, clear wording in the BIT would be required for such an exclusion.
125. Nor can the Claimants rely on the discussion of legal title in *Saba Fakes v Turkey* to support their claim, because the tribunal in that case did not have the benefit of the applicable rule of customary international law cited to it and therefore started on the premise that legal title of the relevant asset had to be excluded.⁹⁶ Further, on the facts, the

⁹¹ Reply, para 9.

⁹² Reply, para 295.

⁹³ *Occidental Petroleum Corp. v Republic of Ecuador*, ICSID Case No ARB/06/11, Decision on Annulment, 2 November 2015 (“*Occidental*”), paras 258-266 (RL-49).

⁹⁴ *Ibid*; *Impregilo S.p.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/03, Award on Jurisdiction, 22 April 2005, paras 151-155 (RL-132).

⁹⁵ *ELSI (United States v Italy)* (1989) ICJ 15 (RL-82).

⁹⁶ *Saba Fakes v Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010 (“*Saba Fakes*”), para 134 (CL-75).

tribunal concluded that the claimant Mr Fakes, as the alleged legal title holder, was not the true owner but only a nominal owner.⁹⁷

126. Further, and/or alternatively, Sri Lanka submits that the Montrose Land is not an “investment” of Montrose under Article 1(a) and 8(1) of the BIT, because Montrose is merely the trustee under Sri Lankan law (see below). For this treaty argument, Sri Lanka relies on *Blue Bank v Venezuela*, where the tribunal interpreted the relevant BIT and concluded, on the basis of the Barbados Trust Act, that the trustee had title of the relevant assets but did not own the assets in any relevant sense, and so the trustee could not claim.⁹⁸ Here, under section 3(a) of the Sri Lankan Trust Ordinance, ownership is only nominally vested in the trustee, and so Montrose is not the owner of the Montrose Land in the true sense.⁹⁹ Sri Lanka disagrees with the Claimants that *Blue Bank v Venezuela* turned on specific wording in the relevant BIT, that an asset had to be “invested by the investor”, for two reasons. First, citing *Poštová Banka v Hellenic Republic*, Sri Lanka says that this wording merely makes express what is implicit in all definitions of “investment”.¹⁰⁰ Secondly, citing *Standard Chartered Bank v Tanzania* (“*SCB v Tanzania*”), the UK-Sri Lanka BIT here conveys the same requirement by requiring in Article 8(1) that the investment be an investment “of” the investor.¹⁰¹

127. Applying the facts to its BIT interpretation points, Sri Lanka argues that Montrose owns the Montrose Land only on constructive trust to the benefit of Electro Resorts under Sri Lankan law.

128. Under section 83 of the Sri Lankan Trust Ordinance, a constructive trust is created where it cannot reasonably be inferred consistently with the attendant circumstances that the

⁹⁷ *Saba Fakes*, para 137.

⁹⁸ *Blue Bank International v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Award, 26 April 2017 (“*Blue Bank*”), paras 162, 168-169 (CL-232).

⁹⁹ An Ordinance to Define and Amend the Law Relating to Trusts, 16 April 1918 (“**Sri Lankan Trust Ordinance**”), section 3(a) (RL-42).

¹⁰⁰ *Poštová Banka, a.s. and Istrokapital SE v Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015 (“*Poštová Bank*”), paras 230-246 (RL-100).

¹⁰¹ *Standard Chartered Bank v United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012 (“*SCB v Tanzania*”), paras 198-201 (RL-1).

owner of the property intended to dispose of the beneficial ownership therein.¹⁰² The intention of the owner is to be ascertained objectively, with greater reliance on written evidence than oral evidence, and it is not necessary to establish a binding contract.¹⁰³ Whether or not consideration has passed is a highly relevant circumstance.¹⁰⁴ Section 83 of the Sri Lankan Trust Ordinance includes the Pallant-type trust, recognising that a constructive trust arises by operation of law when the circumstances render it unconscionable for a party to claim the entire beneficial interest in the relevant property and/or the proceeds of the property and deny the interest of another.¹⁰⁵ The consequence of such a constructive trust is that any pecuniary advantage, including profits, is held on trust.¹⁰⁶ A trust being a concept of equity, equity will disregard any attempt to evade its application, for example by piercing the corporate veil if the veil is being abused to frustrate the law.¹⁰⁷ Also consistent with the notion of equity, a party is able to go behind the terms of a notarised deed to challenge the alleged payment of consideration. Proviso 1 of Section 92 of the Sri Lankan Evidence Ordinance expressly states that parole evidence is admissible to demonstrate the want or failure of consideration,¹⁰⁸ and even the attestation of a notary that consideration has been paid does not establish the truth of payment, which still has to be proven.¹⁰⁹

129. Examining the circumstances of the ownership of the Montrose Land against these principles of Sri Lankan law, Sri Lanka submits that, on both the Respondent's case and the Claimants' case, "[t]he critical point is that there was an agreement to pay for the Land

¹⁰² Sri Lankan Trust Ordinance, section 83.

¹⁰³ *Sudarshani v MHMG Somawathi*, SC Appeal/173/2011, 6 April 2017 ("*Sudarshani*"), pages 14-16 (RL-136).

¹⁰⁴ *WCK Kulasuriya v Harischandra*, SC Appeal No 157/2011, 4 April 2014, page 9 (RL-135).

¹⁰⁵ *Peter Farrar v David Miller*, [2018] EWCA Civ 172, paras 21 and 42 (RL-143), citing *Pallant v Morgan* [1953] Ch 43.

¹⁰⁶ Sri Lankan Trust Ordinance, section 90.

¹⁰⁷ *Prest v Prest* [2013] 2 AC 415, paras 27, 35-36, 57-58, 61, 81-82, 96-97, 103-104 (RL-139).

¹⁰⁸ Proviso 1 to section 92 of the Evidence Ordinance (RL-151); authorities include *Sudarshani*, pages 12-13.

¹⁰⁹ *Menika v Menike*, CA 846/96 (2013), headnote (5) (RL-153).

(whether binding or informal) and payment was never made” and “[t]his automatically gives rise to a constructive trust”.¹¹⁰ On this point, the Respondent argues:

*First, the true position – though not material for present purposes – is that the Land was transferred pursuant to the signed MOU; a document that was disclosed late in the day and constitutes the relevant attendant circumstance. Under the terms of the MOU, the consideration to be paid for the Land was USD 1 million. What is more, as Mr Eyre acknowledged, and is obvious from the email of 23 July 2010 preceding the signing of the MOU (which contemplated signing the MOU on Monday 26 July 2010), the Land was transferred following the signing of the MOU: Tr. Day 1/p.157/17-21.*¹¹¹

130. Sri Lanka firmly rejects the “unfounded allegation in the Rejoinder that the MOU was subject to subsequent on-going negotiation” and maintains its objection that Mr Eyre’s unsupervised manual searches for emails around the MOU were inadequate.¹¹² Sri Lanka asks that adverse inferences be drawn “to the extent necessary to rebut any allegation that the MOU is not the relevant attendant circumstance and to rebut any allegation – were it to be advanced – that there was no agreement (formal or otherwise) to pay for the Land”.¹¹³

131. In any event and even without more documentation, argues Sri Lanka, the same constructive trust arises out of the Claimants’ pleaded case and witness evidence. Mr Eyre in his First Witness Statement, and the Claimants in their Memorial, specifically referred to an agreement by Electro Resorts to sell the Montrose Land to “Mr Eyre for Rs 100,000,000 (approximately USD 1 million)”, which was reiterated in the Rejoinder.¹¹⁴ The Electro Resorts board resolved on 27 July 2010 to sell the Montrose Land to Mr Eyre.¹¹⁵ Montrose was incorporated as the holding vehicle for the sale, with Mr Eyre retaining full beneficial ownership.¹¹⁶ Further, even though the Claimants originally relied

¹¹⁰ Respondent’s Closing Submissions, para 13.

¹¹¹ Respondent’s Closing Submissions, para 14 (emphasis in original, footnotes omitted).

¹¹² Respondent’s Closing Submissions, paras 15-16.

¹¹³ Respondent’s Closing Submissions, para 17.

¹¹⁴ Memorial, para 30; First Eyre Statement, paras 15-16; Rejoinder, para 215.

¹¹⁵ Exhibit C-33.

¹¹⁶ First Eyre Statement, paras 17-18.

on the receipt of 4 April 2011 from Electro Resorts as proof of payment of US\$ 1 million, they later had to acknowledge that payment had not in fact been made. Mr Eyre testified that he could not locate a bank statement or equivalent showing the transfer of that sum in 2010, that Rs 100,000,000 or US\$ 1 million was not paid in one lump sum “for sure”, and that he did not know whether or not the sum had ever been paid.¹¹⁷

132. In these circumstances and applying the relevant Sri Lankan legal principles, the Respondent describes this as “a classic case of Electro retaining the beneficial interest in the Land, by reason of a constructive trust being automatically imposed pursuant to section 83 of the Trust Ordinance”.¹¹⁸ The critical attendant circumstance to the transfer of the Montrose Land was Mr Eyre’s agreement to pay Rs 100 million/US\$ 1 million, which the Claimants have not proven was ever paid. It is undisputed that payment of this consideration was a binding commitment, whether under the MOU or otherwise, but in any event a constructive trust arises from an informal promise. The Claimants are wrong to submit that a party cannot go around the notarised Deed of Transfer for the Montrose Land sale to challenge alleged payment of consideration, especially as Ms Mudalige, in notarising the Deed of Transfer, added “the mentioned consideration was not passed in my presence”.¹¹⁹

133. Nor does it help the Claimants to suggest that Electro Resorts has not enforced the trust by failing to file a claim for the Montrose Land with the government after the dredging, because, under Section 57 of the Land Acquisition Act, Electro Resorts is entitled to recover directly from Montrose any compensation paid to Montrose.¹²⁰ To the extent relevant, because the trust attaches to the Montrose Land, equity would disregard the separate corporate personality of, first, Montrose Global as the party to the MOU and, second, Montrose, because Mr Eyre controls them both and used this control to evade Sri Lankan tax law. Even on the Claimants’ case, says Sri Lanka:

¹¹⁷ Tr Day One 118:23-25; 119:1-5; 128:7-11.

¹¹⁸ Respondent’s Closing Submissions, para 22.

¹¹⁹ Exhibit C-7.

¹²⁰ Land Acquisition Act (Law No. 9 of 1950), 9 March 1950, section 57 (CL-2).

*the arrangement was with Mr Eyre personally, which reinforces the artificiality of distinguishing the corporate personality of the entities involved. Indeed, Montrose Global LLP described itself as having acquired the Land in its letter to the President of Sri Lanka of 10 October 2011.*¹²¹

134. To the extent the Claimants rely on the alleged historical payments of US\$ 1 million and US\$ 350,000 by Mr Eyre to Ravi Wethasinghe, Sri Lanka considers those alleged loans to be irrelevant to the constructive trust. There is no evidence in the record documenting that Mr Eyre made those loan payments or that Mr Eyre treated the amounts as part of the consideration for the transfer of the Montrose Land.
135. Moving beyond the Montrose Land itself to the profit-earning capability of the Montrose Land, the Respondent relies on operation of either a constructive trust or an express trust in favour of Electro Resorts. Under section 6 of the Sri Lankan Trust Ordinance, an express trust is created by words or acts through which the author of the trust indicates with reasonable certainty an intention to create a trust.¹²² As with a constructive trust, the requirement is reasonable certainty rather than a binding contract.
136. The Respondent emphasises that the MOU was the basis on which Electro Resorts on 4 August 2010 transferred the Montrose Land to Montrose and the Natiso Land to Natiso, both companies of Mr Eyre. The Montrose Land and the Natiso Land, respectively, were to be used for the Development Project of the linked hotel and residential complex, in which Electro Resorts – as recited expressly in the MOU – was to have a 50% beneficial interest in profits and receive a later payment of US\$ 5 million for the land. As Mr Eyre acknowledged, Electro Resorts proceeded to play an active role in seeking to obtain planning permission for the Development Project.¹²³
137. Sri Lanka argues that this arrangement gives rise to an express trust by its plain terms or, alternatively, a constructive trust for Electro Resorts in respect of 50% of the profit-earning capability of the Montrose Land plus US\$ 5 million.

¹²¹ Respondent's Closing Submissions, para 22(e) (emphasis in original).

¹²² Sri Lankan Trust Ordinance, section 6 (RL-42).

¹²³ Tr Day One 169:11-18.

138. Sri Lanka describes the Claimants' efforts to rebut the binding nature of the MOU as unavailing. Sri Lanka's case for a constructive trust on the profit-earning capability of the Montrose Land is not dependent on a binding agreement, because a reasonable certainty suffices. Further, the fact that the parties to the MOU agreed that there would be further documentation of the arrangement was not a condition precedent to the binding nature of the MOU and, indeed, the parties progressed the Development Project immediately after signing the MOU. Most important, because of the limitations in their search for MOU-related documents following the Tribunal's order, the Claimants cannot be heard to contend that the MOU was subject to ongoing negotiation and further documentation.
139. Overall, according to Sri Lanka, this arrangement resonates with a Pallant-type trust, and Montrose cannot claim for the entire beneficial interest in the proceeds of the Montrose Land and deny Electro Resorts its interest. As a consequence of this express trust or, alternatively, constructive trust, Sri Lanka submits that the Claimants are not entitled to claim the full alleged earning potential of the Montrose Land.

(2) The Claimants' Position

140. The Claimants firmly reject the Respondent's reliance on the MOU to defeat jurisdiction. The Claimants contend that, to accept Sri Lanka's MOU-based argument that Electro Resorts is the real owner of the Montrose Land by operation of a Sri Lankan law trust, the Tribunal would have to ignore Mr Eyre's testimony, ignore the Deed of Transfer, ignore the fact that Electro Resorts has not challenged the Claimants' ownership of the Montrose Land for almost a decade, and "be forced to rely on the MOU, which amounts to nothing more than an undated and non-binding agreement to agree set down on a single piece of A4 paper, to which neither Claimant is even a party".¹²⁴ According to the Claimants:

it is obvious that the MOU offers little more than a snapshot into the status of the ongoing and evolving negotiations between the parties concerning the Montrose Land. The MOU was never legally binding and was in fact superseded in the normal way by the parties' subsequent negotiations, which ultimately concluded in a

¹²⁴ Claimants' Post-Hearing Brief, para 3.

*significantly different structure and outcome than envisaged in the MOU.*¹²⁵

141. Citing the Sri Lanka Supreme Court case of *Sudarshani v Herath*, the Claimants allege that Sri Lanka bears the burden of proving Electro Resorts’ alleged interest in the Montrose Land *via* constructive trust, which it has failed to do.¹²⁶ Sri Lanka is mistakenly relying only on the MOU in support of a constructive trust allegedly held by Electro Resorts over the Montrose Land and/or the sums of US\$ 5 million and 50% of the expected profits.¹²⁷
142. The Claimants’ primary defence is that the MOU carries no weight whatsoever and, in any event, is negated by the 4 August 2010 Deed of Transfer.
143. Under English law, which is the governing law of the MOU, the MOU is a non-binding “agreement to agree”:¹²⁸ it is undated and not notarised; it is entitled “Memorandum of Understanding” rather than “agreement”; it expressly anticipates the conclusion of a purchase and sale agreement, which never materialised; it provides that “all documentation in relative to the [Development Project] ... will be completed by 30 September 2010”, anticipating further agreements, which never materialised; and “it is simply not credible that an agreement intended to govern a development project worth millions of US\$ was concluded on a single piece of A4 paper”.¹²⁹ The Claimants contend that the non-binding nature of the MOU is consistent with Mr Eyre’s testimony that many MOUs are executed but rarely lead to actual transactions.¹³⁰ Further, even if it were binding, the MOU was executed by Electro Resorts and Montrose Global, and Sri Lanka has not explained how it could bind the Claimants or overcome the clear and contrary language of the Deed of Transfer.

¹²⁵ Rejoinder, para 206.

¹²⁶ *Sudarshani*, page 15 (RL-136).

¹²⁷ The Claimants included arguments against the Respondent’s alternative argument of an express trust in favor of Electro Resorts over 50% of the expected profits in their Post-Hearing Brief. The Tribunal does not address these arguments as they were excluded as untimely in Procedural Order No 6.

¹²⁸ Rejoinder, paras 201-206.

¹²⁹ Claimants’ Post-Hearing Brief, para 13; Exhibit R-12.3.

¹³⁰ Tr Day One 158:3-14.

144. According to the Claimants, the 4 August 2010 Deed of Transfer, in comparison to the MOU, is a dated and fully notarised document which “transferred absolute, unencumbered title to the Montrose Land and reflects the true basis on which the land was transferred to Montrose Sri Lanka”.¹³¹ In the Deed of Transfer, Electro Resorts stated that it did “hereby expressly admit and acknowledge” that Montrose had “well and truly paid” the purchase price for the Montrose Land of Rs 100 million, and that it was transferring the Montrose Land to Montrose “free of all encumbrances and charges whatsoever”.¹³²
145. Given the undisputed validity of the Deed of Transfer, the Claimants reject Sri Lanka’s argument that the MOU is an “attendant circumstance” supporting creation of a constructive trust to Electro Resorts’ benefit under section 83 of the Trusts Ordinance, because the Claimants allegedly never paid the purchase price under the MOU. The Claimants rely on Sri Lankan evidence law, under which “a notarised deed represents near-incontrovertible proof of the facts set out there in”.¹³³ In support, the Claimants again cite *Sudarshani v Herath*:

*a declaration of Trust can be granted only if the Court finds that title was not transferred absolutely and that the parties always intended that the beneficial interest in the property will remain with the transferor. In other words, the Court has to determine that there was no true sale and that, therefore the deed of transfer is of no force or effect – i.e. that the deed of transfer is void.*¹³⁴

146. The Claimants contend that Sri Lanka has not presented anywhere near “incontrovertible proof” of a constructive trust. Instead, say the Claimants, the evidence before the Tribunal shows that the joint venture contemplated by the MOU was never implemented, while the Claimants did pay for the Montrose Land in accordance with the Deed of Transfer. The documentary evidence includes: (i) the 27 July 2010 Electro Resorts board resolution recording the sale and transfer of the Montrose Land for Rs 100 million, with no mention

¹³¹ Claimants’ Post-Hearing Brief, para 18 (emphasis in original).

¹³² Exhibit C-7.

¹³³ Claimant’s Post-Hearing Brief, para 21; Tr Day Three 536:21-538.

¹³⁴ Claimants’ Post-Hearing Brief, para 21; *Sudarshani*, page 8 (emphasis from the Claimants).

of the MOU;¹³⁵ (ii) the express disavowal in the Deed of Transfer of any intention by Electro Resorts to retain a beneficial interest in the Montrose Land or any profits arising therefrom;¹³⁶ (iii) the recording in the Montrose audited company accounts of Mr Eyre's having paid Rs 100 million for the Montrose Land, which debt is still recorded in the Montrose accounts;¹³⁷ (iv) Electro Resorts not having made any claim for the Montrose Land, despite obtaining a valuation and making a claim for flooded land it owned nearby;¹³⁸ and (v) Electro Resorts' failure to challenge the validity of the Deed of Transfer or Montrose's unencumbered title to the Montrose Land, or to seek payment for the land, for more than eight years since the date of the Deed of Transfer.

147. The Claimants describe Mr Eyre's witness evidence as consistent with the documentary record. Whilst he could not recall exactly how the purchase price for the Montrose Land had been paid, he testified adamantly that a significant portion of that payment was *via* his US\$ 1,450,000 in debt forgiveness to Ravi Wethasinghe, with those debts being evidenced and secured by the Lease of 11 August 2005 and the Agreement to Finance of 13 December 2007.¹³⁹

148. Even if the Tribunal were to find that the purchase price under the Deed of Transfer was not paid to Electro Resorts, the Claimants argue against the imposition of a constructive trust. This is because Electro Resorts expressly stated in the Deed of Transfer that it intended title to the Montrose Land to pass to Montrose "free of all encumbrances and charges whatsoever", thereby disavowing any interest in the Montrose Land and being estopped from any claim otherwise.¹⁴⁰ At most, Electro Resorts could attempt a claim for non-payment of the purchase price, which it would also be estopped from pursuing in light

¹³⁵ Exhibit C-33.

¹³⁶ Exhibit C-7.

¹³⁷ Exhibit R-4.

¹³⁸ Tr Day One 240:17-242:16.

¹³⁹ Exhibits C-27 and C-29.

¹⁴⁰ Exhibit C-7.

of its express admission and acknowledgement that it had been “well and truly paid” the purchase price of Rs 100 million.¹⁴¹

149. In contrast, argue the Claimants, Sri Lanka has failed to identify any evidence that the MOU was the basis for the transfer of the Montrose Land. Sri Lanka has failed to point to any document post-dating the MOU in which the MOU is mentioned, and the deal contemplated in the MOU was superseded by the different deal documented in the Deed of Transfer. As for the 23 July 2010 email from Ravi Wethasinghe to Mr Eyre referencing an MOU, which Sri Lanka alleges must have been sent before the MOU was signed, the Claimants contend that the context – in particular, use of the present tense in mentioning an MOU – suggests that the email actually post-dates the executed MOU (in the record) and was anticipating a further MOU. That further MOU apparently was not concluded and, instead, Ravi Wethasinghe and Mr Eyre proceeded to conclude the Deed of Transfer on 4 August 2010.

150. The Claimants also refute Sri Lanka’s suggestion that, despite their allegedly owing Electro Resorts some US\$ 1 million, the Claimants are collaborating with Ravi Wethasinghe behind the scenes in relation to the Hotel Project. The Claimants explain the limited ongoing connections between Mr Eyre and Ravi Wethasinghe as the result, not of the MOU, but of their owning neighboring plots of land subject to similar treatment in Sri Lanka. For example, Mr Wijeratne explained that the former government official retained by Montrose to value the Montrose Land for purposes of its claim under the Land Acquisition Act originally mistakenly put the report under Ravi Wethasinghe’s name, because Ravi Wethasinghe had retained the same person to value a neighbouring plot owned by Electro Resorts. The Claimants assert that, assuming *arguendo* Sri Lanka is right that Ravi Wethasinghe has an ongoing interest in the Montrose Land under the MOU, “it would be bizarre for him to allow the valuation to be issued without that interest being recorded”.¹⁴²

¹⁴¹ Exhibit C-7.

¹⁴² Claimants’ Post-Hearing Brief, para 33.2.

151. Finally, the Claimants take the position that, even if Electro Resorts is found to have a beneficial interest in the Montrose Land *via* the MOU, they would still have valid claims under the BIT, for two main reasons.
152. First, argue the Claimants, while Mr Eyre could not bring a claim on behalf of Electro Resorts as a joint venture partner, Montrose – which has legal title to the Montrose Land – has independent legal personality and is not precluded from bringing a claim in its own right. It does not assist Sri Lanka to rely on cases like *Impregilo v Pakistan*, which involved joint ventures lacking such separate legal personality.¹⁴³
153. Secondly, citing *Saba Fakes v Turkey*, the Claimants insist that bare legal title to an asset – here, Montrose’s legal title to the Montrose Land – is an investment for purposes of Article 1(a) of the BIT, falling within the definition of “investment” as “every kind of asset”.¹⁴⁴ As exemplified in *Occidental Petroleum v Ecuador*, rules of customary international law granting standing only to the beneficial owner of an investment do not apply to the *lex specialis* regime in the UK-Sri Lanka BIT, and Sri Lanka is wrong to argue otherwise.¹⁴⁵ Sri Lanka is also wrong to argue that cases such as *Blue Bank v Venezuela*, where specific treaty language – in that case, that an asset had to be “invested by the investor” – excluded trustees from bringing claims related to assets they held in trust, are applicable in the instant case.¹⁴⁶ That case must be distinguished because the facts there involved a professional trustee that had not made an investment in its own right, which is different from the situation of Montrose here.¹⁴⁷

¹⁴³ Rejoinder, paras 235-238; Tr Day Three 560:12-561:13.

¹⁴⁴ *Saba Fakes*, para 134; Rejoinder, paras 239-242.

¹⁴⁵ *Occidental*, para 134; Tr Day 3 561:14-24.

¹⁴⁶ *Blue Bank*, paras 161-173.

¹⁴⁷ Tr Day Three 563:1-566:9.

B. PRELIMINARY JURISDICTIONAL OBJECTION B: THE MONTROSE LAND IS NOT AN INVESTMENT UNDER ARTICLE 1 OF THE BIT AND ARTICLE 25(1) OF THE ICSID CONVENTION, BECAUSE THE CLAIMANTS DID NOT MAKE ANY CONTRIBUTION OR TAKE ANY INVESTMENT RISK

(1) The Respondent's Position

154. The Respondent argues that the Montrose Land – as bare land – is not a protected investment for purposes of Article 1 of the BIT and Article 25(1) of the ICSID Convention, and therefore the Tribunal lacks jurisdiction *ratione materiae* of Montrose's claim based on the Montrose Land.

155. Sri Lanka bases its analysis on the ordinary meaning of the term “investment”, utilising the *Salini* criteria and the more recent case of *Orascom v Algeria*, with focus on the attributes of contribution and risk.¹⁴⁸ Sri Lanka rejects the Claimants' reliance on the analysis in *Philip Morris v Uruguay*, in which the tribunal, in Sri Lanka's view, erroneously relied on the fact that the term “investment” in Article 25(1) of the ICSID Convention was compromise language amongst the treaty parties and went on to infer that there should be wide leeway to find jurisdiction.¹⁴⁹ Citing to Professor Schreuer's commentary, Sri Lanka says that the reason the compromise language was introduced into Article 25(1) was because the treaty parties could not agree on a definition.¹⁵⁰ Under the circumstances, the correct approach is to interpret Article 25(1) applying the principles of Article 31 of the Vienna Convention on the Law of Treaties (the “VCLT”) in order to give the term “investment” its ordinary meaning without speculating on the treaty parties' intentions.

156. Sri Lanka also rejects the Claimants' assertion that they do not have to prove contribution to the Montrose Land, as it is sufficient to prove contribution to the Hotel Project under principles of unity of investment. Sri Lanka describes this as “misconceived”, because to rely upon principles of unity of investment, the Claimants would have to prove that the

¹⁴⁸ *Salini* (CL-26); *Orascom v Algeria*, ICSID Case No ARB/12/35, Award, 31 May 2017, paras 370-371 (RL-79).

¹⁴⁹ Respondent's Closing Submissions, para 32; *Philip Morris v Oriental Republic of Uruguay*, ICSID Case No ARB/10/07, Decision on Jurisdiction, 2 July 2013 (“*Philip Morris*”), para 198 (CL-96).

¹⁵⁰ C Schreuer, *The ICSID Convention: A Commentary* (2nd ed, 2009) (“*Schreuer*”), page 128 (RL-7).

overall Hotel Project constituted a qualifying investment under Article 1 of the BIT and Article 25(1) of the ICSID Convention, which they cannot do because the Montrose Land remains bare land.¹⁵¹ The Claimants neither had planning permission nor had entered into any contractual commitments for development of the land. If they had had such contractual commitments, they perhaps could have relied on them as constituting an investment under Article 1(a)(iii) of the BIT as a claim to money or performance and also under Article 25(1) of the ICSID Convention, and then relied on that investment as subsuming within it the sub-components for the Hotel Project. Sri Lanka challenges the Claimants' reliance on *Inmaris v Ukraine*, on grounds that, in that case, the relevant overall operation of a Bareboat Charter Contract constituted an investment as "claims to performance" under the relevant treaty, with the various sub-contracts being subsumed in the operations.¹⁵²

157. With only aspirational intentions for the Hotel Project, the Claimants' activities constituted only pre-investment activities. Citing *Romak v Uzbekistan*, Sri Lanka argues that, by definition, the Claimants took no investment risk with respect to such aspirational hotel development because they had not yet paid for or committed to pay any funds.¹⁵³

158. Further, Sri Lanka argues on several grounds that the Claimants did not make any contribution to the Montrose Land and hence incurred no investment risk.

159. First, Montrose itself made no payment to acquire the land.

160. Secondly, to rely on the alleged historical loan payments made by Mr Eyre to Ravi Wethasinghe as a contribution to the Montrose Land, the Claimants would need to demonstrate that: (a) the loans had actually been made and not repaid; and (b) there was an agreement that the debts arising would be part of the consideration for the Montrose Land. Sri Lanka contends that the Claimants can demonstrate neither. As to the alleged payment of US\$ 350,000 pursuant to a financing agreement of 13 December 2007, there

¹⁵¹ Respondent's Closing Submissions, para 33; *Inmaris Perestroika Sailing Maritime Services GmbH & Ors v Ukraine*, ICSID ARB/08/08, Decision on Jurisdiction, 8 March 2010 ("*Inmaris*"), para 92 (CL-72).

¹⁵² Respondent's Closing Submissions, para 33;

¹⁵³ *Romak SA Switzerland v Republic of Uzbekistan*, UNCITRAL, PCA Case No AA/280, Award, 26 November 2009 ("*Romak*"), paras 228-231 (RL-25).

is no evidence of a drawdown request, payment or any chaser for payment. As to the alleged loan of US\$ 1 million in 2003, there is no evidence of the terms, payment or any chaser for payment and, insofar as Mr Eyre relies on the 2005 lease agreement, the terms reflect that only Rs 30 million (less than US\$ 200,000) was paid and even that payment is not correlated to the alleged US\$ 1 million loan amount. Relying again on the MOU and the anticipatory email of 23 July 2010, Sri Lanka argues that the only relevant evidence before the Tribunal demonstrates that these alleged loan payments formed no part of the consideration for the Montrose Land.

161. Thirdly, Sri Lanka denies that the US\$ 400,000 paid by Mr Eyre (through Montrose Aircraft Leasing) to Ravi Wethasinghe on 5 July 2010 can constitute consideration for the Montrose Land, because it was paid in the context only of the planning approval process for the Hotel Project and so was not related to the Montrose Land. Sri Lanka asserts further that the planning approval process could require US\$ 400,000, and so suggests that the payment was more likely a “personal fund to Mr Wethasinghe as a quid pro quo for Mr Wethasinghe assisting in getting a clean title report”.¹⁵⁴

162. Finally, Sri Lanka alleges that Montrose “was merely the holding vehicle established to avoid paying 100% sales tax otherwise payable for the acquisition of the Land” and therefore “was in no sense the active investor”.¹⁵⁵ Applying the test developed by the President of the tribunal in *SCB v Tanzania* that Article 8(1) of the United Kingdom-Tanzania BIT required “an active relationship between the investor and the investment”, the Montrose Land was not a protected investment of Montrose under Article 8(1) of the BIT.¹⁵⁶

163. Sri Lanka flatly rejects the Claimants’ justification based on the “economic reality” of the transaction, charging a “double standard”:

The Respondent fails to understand how a good faith interpretation of the BIT permits the Claimant to evade sales tax by not overtly

¹⁵⁴ Respondent’s Closing Submissions, para 38.

¹⁵⁵ Respondent’s Closing Submissions, para 39.

¹⁵⁶ Respondent’s Closing Submissions, para 39; *SCB v Tanzania*, paras 199 and 230.

*presenting itself as a foreign national, and at the same time rely upon the alleged economic reality of the foreign actor behind the company to then gain the benefit of the BIT.*¹⁵⁷

(2) The Claimants' Position

164. The Claimants describe as “untenable” Sri Lanka’s arguments that, first, they have not made active contributions to the Montrose Land and assumed risk in Sri Lanka so as to have made an investment within the meaning of Article 25(1) of the ICSID Convention, applying the relevant *Salini* criteria and, second, they are not active investors under Article 8(1) of the BIT within the meaning of *SCB v Tanzania*.¹⁵⁸

165. Although the Claimants included the *Salini* factors in the jurisdictional case in their Memorial, they nonetheless argue that the “so-called ‘*Salini* factors’ are a treaty interpretation dead-end that should never have been implied into the ICSID Convention”.¹⁵⁹ According to the Claimants, to the extent the term “investment” has any autonomous meaning in Article 25(1) of the ICSID Convention, it is merely to exclude obviously absurd claims of investment.¹⁶⁰ Citing *Philip Morris v Uruguay*, the Claimants explain that the drafters of the ICSID Convention left “investment” undefined, due to the difference of views between capital-importing and capital-exporting States.¹⁶¹ Accordingly, the Tribunal should respect the broad definition of “investment” in Article 1(a) of the BIT and recognise the Claimants’ investment in the Montrose Land.

166. As for the active investment test in *SCB v Tanzania*, the Claimants contend that the reasoning of the President of the tribunal in that case was wrong, “relying on a stilted reading of the word ‘of’ as it appears [in the phrase ‘disputes ... concerning an investment of’ a foreign national or company] in Article 8(1) of the BIT to imply a requirement of ‘active’ investment as a precondition to the Tribunal’s jurisdiction *ratione personae*”.¹⁶²

¹⁵⁷ Respondent’s Closing Submissions, para 40(a).

¹⁵⁸ Claimants’ Post-Hearing Brief, para 60; Rejoinder, paras 274-278.

¹⁵⁹ Rejoinder, section VIII.C(1); Tr Day Three 517:1-520:3; Claimants’ Post-Hearing Brief, para 62.

¹⁶⁰ Counter-Memorial, paras 91-92.

¹⁶¹ Counter-Memorial, para 92; *Philip Morris*, para 198.

¹⁶² Claimants’ Post-Hearing Brief, para 63; Counter-Memorial, paras 59-67.

The correct position, argue the Claimants, is that of the *CEMEX v Venezuela* tribunal, which interpreted the word “of” to connote mere possession of an investment, including indirect investment.¹⁶³

167. In any event, argue the Claimants, there is ample evidence in the record that they made active contributions and incurred risk sufficient to meet both the *Salini* factors and the *SCB v Tanzania* test.¹⁶⁴ Mr Eyre was the directing mind behind the incorporation of Montrose to purchase and hold the Montrose Land and serves as director; and he liaised with advisors in Sri Lanka, financial institutions, hotel management companies, hotel planning consultants and architects to implement the Hotel Project on the Montrose Land.¹⁶⁵ Mr Eyre paid: (a) US\$ 1,450,000, by way of debt forgiveness to Ravi Wethasinghe, as consideration for the Montrose Land; (b) stamp duty and professional fees in relation to the transfer of the Montrose Land to Montrose; and (c) the US\$ 400,000 through Montrose Aircraft Leasing to procure clean title to the Montrose Land.¹⁶⁶ Montrose also contributed to the Montrose Land by entering into the Deed of Transfer, owning the Montrose Land over an extended period of time, serving as the entity through which the Hotel Project was implemented, and pursuing the claim for compensation for the Montrose Land after it was flooded.¹⁶⁷

168. The Claimants charge Sri Lanka with disconnecting these substantial contributions from economic reality. Insofar as Sri Lanka contends that it was Montrose Global and Montrose Aircraft Leasing, rather than the Claimants, which made the relevant contributions, the Claimants explain that, as is common in business, Mr Eyre uses Montrose Global as “corporate shorthand for his name and activities” and as a “common corporate brand that

¹⁶³ *CEMEX Caracas Investments BV & CEMEX Caracas II Investments BV v Bolivarian Republic of Venezuela*, ICSID Case No ARB/08/15, Decision on Jurisdiction, 30 December 2010, para 157 (CL-151).

¹⁶⁴ Rejoinder, paras 309-313.

¹⁶⁵ Claimants’ Post-Hearing Brief, para 65, citing Exhibits C-37 through C-40, C-59, C-94, C-98; First Eyre Statement, paras 22-32; Counter-Memorial paras 69-70, 82-86, 108; Rejoinder, sections VIII.B and VIII.C(2); Tr Day Two 436:4-447:24; Tr Day Three 514:22-515:2, 520:10-23.

¹⁶⁶ Claimants’ Post-Hearing Brief, para 65, citing Exhibits C-7, C-27, C-89 to C-92, R-12.5; First Eyre Statement, paras 19-20; Tr Day One 176:20-177:11.

¹⁶⁷ Claimants’ Post-Hearing Brief, para 66, citing Exhibits C-7, C-73, C-82, C-84, R-12.6; Counter-Memorial, para 108; Rejoinder, paras 216, 347-351; Tr Day Two 436:4- 447:24; Tr Day Three 515:3-14.

may have given greater credibility to the Hotel Project than if Mr Eyre presented himself to third parties as a private individual”.¹⁶⁸ Given that Mr Eyre owns every entity in the Montrose Group, “from the economic standpoint that the BIT prioritizes over corporate personality, Mr Eyre can claim contributions made by Montrose Global as his own”.¹⁶⁹

169. Insofar as Sri Lanka identifies many of the contributions, in particular the US\$ 400,000 payment related to the title search, as not going towards the Montrose Land but rather to the Hotel Project, the Claimants contend that the Tribunal must consider their investments as a whole. Relying on *Inmaris v Ukraine* in support of the concept of “unity of investment” for jurisdictional purposes, the Claimants argue that the Montrose Land and the Hotel Project cannot be treated as separate investments.¹⁷⁰ As proof that their intention at all stages was to acquire the Montrose Land for the purpose of the Hotel Project, the Claimants quote the statement of purpose in the Montrose Articles of Association: “To carry on the business of hotels and hotel services” and “To carry on the development of hotels and managing hotels”.¹⁷¹

VII. PRELIMINARY JURISDICTIONAL OBJECTIONS: THE SHAREHOLDER LEVEL

A. PRELIMINARY OBJECTION C: ANY ALLEGED SHAREHOLDER CLAIM IS DEPENDENT UPON THE LAND CONSTITUTING AN ASSET OF MONTROSE, WHICH IT IS NOT

170. The Respondent’s main argument at the “shareholder level” is that the shareholder claims are “parasitical” to the claim by Montrose as the company through which a shareholder must claim, “whether as indirect shareholder, alleged beneficiary of shares, and/or otherwise”.¹⁷² The shareholder claims are necessarily jurisdictionally dependent upon the extent to which the Montrose Land constitutes a protected investment of Montrose – which, for the reasons supporting its Preliminary Jurisdictional Objections A and B, it is not.

¹⁶⁸ Claimants’ Post-Hearing Brief, para 67; Tr Day Two 341:22-348:8.

¹⁶⁹ Claimants’ Post-Hearing Brief, para 67 (footnote omitted); First Eyre Statement, paras 7-10.

¹⁷⁰ Claimants’ Post-Hearing Brief, para 68; Counter-Memorial, paras 102-108; *Inmaris*, para 92.

¹⁷¹ Exhibit C-88.

¹⁷² Respondent’s Closing Submissions, para 41.

171. Sri Lanka rejects the Claimants’ defensive assertion, made without any authority, that this objection goes only to the value of the shareholder claims and hence is a matter only of admissibility. As it is well-established in principle, in for example, *Poštová Banka v Hellenic Republic*, that a shareholder cannot make a claim in respect of the assets of the relevant company, it must follow that a shareholder lacks standing to claim for alleged loss of shareholder value that is not based on company assets.¹⁷³

B. PRELIMINARY JURISDICTIONAL OBJECTION D: INDIRECT SHAREHOLDERS ARE NOT COVERED BY ARTICLE 1(A)(II) OF THE BIT; A LOCALLY INCORPORATED COMPANY DOES NOT TAKE THE NATIONALITY OF THE INDIRECT SHAREHOLDER UNDER ARTICLE 8(2) OF THE BIT

(1) The Respondent’s Position

172. The Respondent fundamentally disagrees with the Claimants’ jurisdictional claim that, because Article 1(a) of the BIT refers to “every kind of asset”, any asset whether directly or indirectly held and whether or not listed in Article 1(a)(i)-(v), falls within the definition. Again relying on *Poštová Banka v Hellenic Republic* for propositions of treaty interpretation under the VCLT, Sri Lanka argues that, despite the broad asset-based definition of investment in the BIT, the list of categories following that broad definition must be given specific meaning to avoid redundancy.

173. The relevant category here is Article 1(a)(ii) of the BIT, which includes in the definition of investment “Shares, stock and debentures of companies or interests in the property *of such companies*” (emphasis added). Sri Lanka argues that, on proper interpretation of the clause, the “shares, stock and debentures of companies or interests in the property” must be directly “*of such companies*” (emphasis added). As the word “companies” is defined in Article 1(d)(ii) of the BIT as the relevant locally incorporated company, the protected shares must be shares of Montrose as a Sri Lankan company. Further, given that Article 1(a)(ii) specifically covers an “interest in *property* of such companies”) but not an interest in *shares* of such companies” (emphasis added), the Article necessarily here excludes Mr Eyre’s indirect shareholding interest in Montrose (through Montrose Singapore) because such shareholding reflects only his *interest in* the Montrose Share as opposed to ownership

¹⁷³ Respondent’s Closing Submissions, para 42; *Poštová Banka*, paras 230-246.

of the Montrose Share itself. It is Montrose Singapore that owns the Montrose Share, and Montrose Singapore is not a qualifying investor.

174. The Respondent urges the Tribunal, under Article 32 of the VCLT, to have regard here to supplementary means of interpretation to confirm the meaning of Article 1(a)(ii) of the BIT under Article 31. In specific, Sri Lanka relies heavily on a Foreign Commonwealth Office (“**FCO**”) Memorandum of 21 February 1973 (“**FCO Memorandum**”) commenting on the 1972 UK Model BIT, which the Parties agree was the model for the BIT.¹⁷⁴ The definition of investment in Article 1(a)(ii) of the 1972 UK Model BIT differs, by referring to:

*Shares, stock and debentures of companies **wherever incorporated**
or interests in the property of such companies.*¹⁷⁵

175. The FCO commented that the words “wherever incorporated” were included to cover shareholders in companies “incorporated in any third State”, because customary international law does not provide the United Kingdom the right to protect shareholders incorporated in third states, as opposed to UK shareholders in UK companies and companies in the other Contracting State, absent specific drafting protection. Sri Lanka contends that, in making this reference to the customary international law position in 1973, the FCO clearly had the recent judgment in *Barcelona Traction* in mind and, contrary to the Claimants’ suggestion, *Barcelona Traction* cannot be ignored as a diplomatic protection case.¹⁷⁶ If indirect shareholdings were already covered, says Sri Lanka, then the specific words “wherever incorporated” would not have been necessary in the UK 1972 Model BIT.

176. The United Kingdom and Sri Lanka did not include the allegedly critical words “wherever incorporated” in Article 1(a)(ii) of the BIT. Sri Lanka contends that this implies that the concept – the extension of protection to investments of companies incorporated in third

¹⁷⁴ FCO Commentary on the 1972 UK Model BIT, under cover of FCO Memo dated 21 February 1973 (“**FCO Memorandum**”) (RL-54).

¹⁷⁵ Final Model IPPA under cover of FCO Memorandum dated 7 July 1972 (RL-53) (emphasis added).

¹⁷⁶ Respondent’s Closing Submissions, para 54; *Barcelona Traction Light and Power Co. Ltd. (Belg. v. Spain)*, 1970 ICJ 3, 5 February 1970 (2nd Phase) (RL-57).

states – was rejected. This adds further support to Sri Lanka’s interpretation of Article 1(a)(ii), because:

*it is unrealistic to suppose that the wording to extend the catchment area of the BIT was dropped because it was not needed: the UK thought it was needed so why on earth would Sri Lanka agree to its removal on the basis that it was not needed as opposed to not agreeing to extend the catchment area.*¹⁷⁷

177. The Respondent goes on to argue that this interpretation is reinforced by reference to Article 5(2) and Article 8(2) of the BIT, which the Respondent says provide context for the interpretation of Article 1(a)(ii). These Articles provide:

Article 5(2)

*Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and **in which** nationals or companies of the other Contracting Party **own** shares, it shall ensure that the provisions of paragraph (1) are applied to the extent necessary to guarantee prompt, adequate and effective compensation in respect of the investment to such nationals or companies of the other Contracting Party who are **owners** of those shares. (Emphasis added)*

Article 8(2)

*A company which is incorporated or constituted under the law in force in the territory of one Contracting Party and **in which** before such dispute arises the majority of shares are **owned** by nationals or companies of the other Contracting Party shall in accordance with article 25(2)(b) of the [ICSID] Convention be treated for the purposes of the Convention as a company of the other Contracting Party. (Emphasis added)*

178. Sri Lanka states that Article 5(2) was “drafted with specific regard to the limited exception envisaged by *Barcelona Traction* in which a shareholder in the company could bring an indirect claim in respect of the expropriation of the assets of the company”.¹⁷⁸ Sri Lanka

¹⁷⁷ Respondent’s Closing Submissions, para 54(d).

¹⁷⁸ Reply, para 63.

emphasises that Article 5(2) refers to assets of a company “*in which*” a person or entity “*owns* shares” and is the “*owner* of those shares”; while Article 8(2) refers to the majority of shares in a company “*in which*” shares “*are owned*” by nationals or companies of the other Contracting Party. Looking at ordinary meaning, the Respondent contends that these two provisions only confer (in the case of Article 5(2)) rights and (in the case of Article 8(2)) nationality for purposes of Article 25(2)(b) of the ICSID Convention on the person or entity who actually *owns* the shares *in* the relevant company. Citing to Professor Douglas, Sri Lanka takes the position that an indirect shareholder does not *own* shares in the company and so, here, Mr Eyre does not *own* the Montrose Share, even if his indirect shareholding provides him with control of Montrose.¹⁷⁹

179. The Respondent puts particular emphasis on Article 8(2) of the BIT, which it says defines the circumstances in which the Contracting States consented to a locally incorporated company taking the nationality of the other Contracting State for purposes of Article 25(2)(b) of the ICSID Convention. Citing to *Vacuum Salt v Ghana*, Sri Lanka takes the position that Article 25(2)(b) sets an “objective limit (of foreign control) beyond which ICSID jurisdiction cannot exist” and, here, Sri Lanka and the United Kingdom “did not opt for the outer limit of control by simply agreeing to Article 25(2)(b) but chose a narrower definition of equity ownership”.¹⁸⁰ Given that the UK-Sri Lanka BIT does not use the language of “ownership or control (directly or indirectly)” used in other treaties, for example, the Romania-Sweden BIT interpreted by the tribunal in *Micula v Romania*, the Claimants’ reliance on awards interpreting such broader language cannot assist their jurisdictional case under the more limited BIT language here.¹⁸¹

180. Nor, argues Sri Lanka, are the Claimants assisted by the case they must rely upon in this context, *SCB v Tanzania*. The United Kingdom-Tanzania BIT in that case does include in the definition of “investment” the same category of “Shares, stock and debentures of

¹⁷⁹ Respondent’s Closing Submissions, para 48; Z Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009) pages 197-198 (CL-196).

¹⁸⁰ Respondent’s Closing Submissions, para 49(b); *Vacuum Salt Products Ltd v Republic of Ghana*, ICSID Case No ARB/92/01, Award, 16 February 1994 (“*Vacuum Salt*”), para 36 (CL-128).

¹⁸¹ Respondent’s Closing Submissions, paras 49-50; *Micula v Romania*, ICSID Case No ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008 (RL-97).

companies or interests in the property of such companies” as appears in Article 1(a)(ii) of the UK-Sri Lanka BIT here, but Sri Lanka disputes that the tribunal in *SCB v Tanzania* determined that an *indirect* shareholding was covered by this definition. Sri Lanka emphasises that the tribunal left open that question without analyzing any of the specific terms in the definition:

*For good order, the Tribunal clarifies that it does **not** find that the UK-Tanzania BIT applies only to direct as opposed to indirect investments. Emphasis added. Such a conclusion is not necessary to the decision here. The Tribunal leaves the question to be addressed by a tribunal in a case in which the issue is essential to the decision to be made.*¹⁸²

(2) The Claimants’ Position

181. The Claimants maintain their position that, with a proper interpretation under Article 31 of the VCLT, the ICSID Convention and the BIT, Montrose and Mr Eyre have standing as qualifying investors.¹⁸³

182. The Claimants describe Sri Lanka’s overall objection that Article 1(a) of the BIT does not protect Mr Eyre’s indirect legal ownership of the Montrose Share as misconceived, and contrary to the many tribunal decisions recognising indirect shareholder claims where the relevant treaty defines “investment” broadly as “every kind of asset”.¹⁸⁴ The Claimants criticise Sri Lanka for offering interpretations of the BIT that are based on “misconceived references to Sri Lankan law derived from the ICJ’s judgment in *Barcelona Traction*, which is irrelevant in the investment treaty context”; that are an “anathema to the object and purpose of the BIT”; and that violate the general rule of international law that a tribunal should not import a requirement limiting its jurisdiction when the parties have not specified such a requirement in the relevant treaty.

183. As for Article 1(a) of the BIT, the Claimants’ primary response is that Sri Lanka is wrong to focus on the *illustration* of an “investment” in Article 1(a)(ii) – “Shares, stock and

¹⁸² Respondent’s Closing Submissions, para 51; *SCB v Tanzania*, paras 240, 266.

¹⁸³ Counter-Memorial, para 29.

¹⁸⁴ Claimants’ Post-Hearing Brief, para 5.

debentures of companies or interests in the property of such companies” – to assert that the concept of indirect shareholding is missing. Instead, argue the Claimants, the focus must remain on the *definition* of “investment” itself in the opening language of Article 1(a) – “every kind of asset” – without any qualifier that an asset be “directly” held. Such a broad definition must include assets held directly or indirectly, to fulfill the purpose of investment treaties “to give investors the widest possible protection”.¹⁸⁵ In support, the Claimants cite to a statement by the United Kingdom’s FCO that this language “is deliberately non-exhaustive so that the [BIT] will have the widest possible coverage” and this is “essential” to the functioning of the treaty.¹⁸⁶

184. Given the Claimants’ focus on the definition of “investment” in Article 1(a) of the BIT rather than the illustrative example in Article 1(a)(ii), they give short shrift to the Respondent’s reliance on the FCO Memorandum of 21 February 1973 commenting on Article 1(a)(ii) in the 1972 UK Model BIT. Further, even if the United Kingdom provided the 1972 UK Model BIT to Sri Lanka during the BIT negotiations and it became part of the *travaux préparatoires*, the Claimants assert that the same cannot be said for the FCO Memorandum. Even if the FCO Memorandum could properly be used to interpret the BIT under Article 31 and, as a supplementary interpretation tool, Article 32 of the VCLT, it is “not a direct source for understanding the object and purpose of the BIT” and is “a partisan document separate from the BIT and indeed drafted some seven years prior to the execution of the BIT”.¹⁸⁷

185. In any event, argue the Claimants, Sri Lanka has “clearly misunderstood the FCO Memorandum” in contending that it shows that the 1972 UK Model BIT attempted to codify customary international law, given that the purpose of a BIT is to create a *lex*

¹⁸⁵ Rejoinder, para 25.

¹⁸⁶ Rejoinder, para 26; Letter from the FCO to Clifford Chance LLP (16 November 2007), cited in C Brown and A Sheppard, “United Kingdom”, in C Brown (ed), *Commentaries on Selected Model Bilateral Investment Treaties* (OUP 2013) 697, 711 (CL-93) (emphasis from Claimants).

¹⁸⁷ Rejoinder, para 36 (emphasis from Claimants).

specialis.¹⁸⁸ Further, Sri Lanka has made a “fundamental error” in “conflat[ing] the rule in *Barcelona Traction* with the concept of indirect shareholder claims”.¹⁸⁹

186. The Claimants similarly reject Sri Lanka’s arguments based on Article 5(2) of the BIT, which were also based on *Barcelona Traction* and the FCO Memorandum to the effect that Article 5(2) limits Mr Eyre’s ability to bring an indirect claim arising from losses suffered by Montrose. The Claimants disagree and rely on the FCO Memorandum to support their position that Article 5(2) is designed to protect against the indirect expropriation of an investment vehicle whether or not that vehicle is itself the investment, leaving the shares functionally worthless even though the investor retains title to the shares.¹⁹⁰

187. The Claimants further rely on *RosInvest v Russia*, where they say the tribunal found that the sole purpose of Article 5(2) (in that case, in the United Kingdom-United Soviet Socialist Republic BIT) is to clarify that indirect expropriation claims are available to shareholders in relation to their shares when company assets are expropriated.¹⁹¹ The Claimants contend this was also decided in *AAPL v Sri Lanka*, in which a shareholder brought a reflective loss claim “in precisely the circumstances that Sri Lanka now attempts to exclude” and was compensated for the lost value of its 48% shareholding in the Sri Lankan company destroyed in the Sri Lanka civil war.¹⁹²

188. The Claimants similarly reject Sri Lanka’s argument that Montrose cannot be deemed a UK national under Article 8(2) of the BIT because Mr Eyre does not directly own the Montrose Share. In the Claimants’ words:

Article 8(2) merely allows a locally incorporated investment vehicle – which may have suffered a distinct loss from its direct or indirect owner – to bring a claim in its own right in conjunction with Article

¹⁸⁸ Rejoinder, para 49, and paras 48-50.

¹⁸⁹ Rejoinder, para 55, and paras 51-57.

¹⁹⁰ Rejoinder, paras 73-74; FCO Memorandum, para 10 (RL-54).

¹⁹¹ Rejoinder, para 146; *RosInvestCo UK Ltd v Russian Federation*, SCC Case No V079/2005, Final Award, 12 September 2010 (“*RosInvest*”), para 608 (CL-79).

¹⁹² Rejoinder, para 147; *Asian Agricultural Products Ltd v Democratic Socialist Republic of Sri Lanka* (1990) 4 ICSID Rep 245, Award, 27 June 1990 (“*AAPL*”), paras 95-108 (CL-182).

*25(2)(b) of the ICSID Convention. It says nothing about whether the BIT protects indirect shareholders nor restrict their claims.*¹⁹³

189. The Claimants maintain the position taken in their Memorial that the purpose of Article 8(2) is to serve as a declaration for purposes of Article 25(2)(b) of the ICSID Convention.¹⁹⁴

190. The Claimants firmly disagree with the Respondent's argument that Article 25(2)(b) sets a lower limit or floor on ICSID jurisdiction, contending that it rather "is intended to expand the scope of ICSID jurisdiction, not to narrow it".¹⁹⁵ Article 25(2)(b), the Claimants say, is designed to avoid having an investment vehicle incorporated in the host State, but controlled by a national of the other Contracting State, from being treated as a national of the host State, which would be an exercise of "prioritising corporate form over economic reality".¹⁹⁶ Article 25(2)(b) gives ICSID Member States the capacity to consent – as Sri Lanka and the United Kingdom did here, in the BIT – that a company incorporated in one may be considered to hold the nationality of the other, "so long as an autonomous and objective standard of '*foreign control*' inherent to Article 25(2)(b) is met".¹⁹⁷ The Claimants cite Professor Schreuer in support:

*Whereas the first part of Art. 25(2)(b) merely refers to an investor's nationality, the second part specifically refers to control. This would indicate an approach that is governed less by formal aspects of corporate nationality than by economic realities. Therefore, on balance, the better approach would appear to be a realistic look at the true controllers thereby blocking access to the Centre for juridical persons that are controlled directly or indirectly by nationals of non-Contracting States or nationals of host States.*¹⁹⁸

191. Further, the Claimants disagree with the Respondent's position that control must be exercised by the majority shareholder that directly owns the relevant shareholding. They

¹⁹³ Rejoinder, para 91.

¹⁹⁴ Counter-Memorial, para 38.

¹⁹⁵ Counter-Memorial, para 32 (emphasis in original).

¹⁹⁶ Counter-Memorial, para 32.

¹⁹⁷ Counter-Memorial, para 32.

¹⁹⁸ Schreuer, page 323.

argue that the requirement of *direct* ownership and control is not found in the text of Article 8(2) of the BIT, and therefore the Contracting States did not intend to exclude indirect ownership of a controlling interest by a UK national like Mr Eyre from the scope of Article 8(2). The tribunal in *Plama v Bulgaria*, in interpreting the words “investment [...] owned” in Article 17(1) of the Energy Charter Treaty, held that:

*ownership includes indirect and beneficial ownership; and control includes control in fact, including an ability to exercise substantial influence over the legal entity’s management, operations, and the selection of members of its board of directors or any other managing body.*¹⁹⁹

For the Tribunal here to read a requirement of only direct ownership into the BIT would be contrary to the “well-known” rule of international law, as set out in *Bear Creek Mining v Peru*, that a tribunal should not import a requirement limiting its jurisdiction when the parties have not specified that requirement.²⁰⁰

192. In this regard, the Claimants reject Sri Lanka’s interpretive argument that the words “in which” in Article 8(2) provide the same meaning as the word “directly”. As a matter of ordinary meaning, the words “in which” do not change the fact that, to fulfill the purpose of Article 8(2), the shares may be directly or indirectly “owned”.²⁰¹ In this context, the Claimants agree with the Respondent that *SCB v Tanzania* is of little use to the Tribunal in interpreting Article 8(2).

193. The Claimants describe it as “common ground” that Mr Eyre exercised legal and factual control over Montrose, given his 99% stake in Montrose Singapore (with his wife holding the other 1%), which was the legal owner of the Montrose Share when this arbitration was commenced. This is effectively the 100% foreign ownership that the tribunal in *Vacuum*

¹⁹⁹ *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case ARB/03/24, Decision on Jurisdiction, 8 February 2005 (“*Plama*”), para 170 (CL-43).

²⁰⁰ Claimants’ Post-Hearing Brief, para 5; Rejoinder, paras 136-139; *Bear Creek Mining Corp v Republic of Peru*, ICSID Case No ARB/14/21, Award, 30 November 2017 (“*Bear Creek Mining*”), para 320 (CL-176).

²⁰¹ Counter-Memorial, para 39.

Salt v Ghana found, in the context of Article 25(2)(b) of the ICSID Convention, “almost certainly would result in foreign control, by whatever standard”.²⁰²

194. In sum, the Claimants argue that Article 25(2)(b) of the ICSID Convention and Article 8(2) of the BIT must be interpreted to prevent corporate legal personality from interfering with the real economic interests of the investment – and “the ‘real’ economic interest behind Montrose Sri Lanka is Mr Eyre”.²⁰³ Further, as Mr Eyre is entitled to claim his indirect ownership of the Montrose Share as a qualified investment under the broad definition in Article 1(a) of the BIT, Montrose is entitled to rely on that indirect ownership to be deemed a UK national under Article 8(2).

C. PRELIMINARY JURISDICTIONAL OBJECTION E: MR EYRE’S ALLEGED BENEFICIAL INTEREST IN THE SHARE IS NOT PROTECTED BY THE BIT

(1) The Respondent’s Position

195. Repeating the interpretive analysis set out in support of its Preliminary Jurisdictional Objection based on *indirect* ownership of shares, the Respondent asserts that the BIT does not protect Mr Eyre’s alleged *beneficial* interest in the Montrose Share.

196. Sri Lanka dismisses the cases relied upon by the Claimants for the contrary position on grounds that the specific wording in the treaties involved is broader than that in Article 1(a) of the UK-Sri Lanka BIT. In *Saba Fakes v Turkey*, the Netherlands-Turkey BIT includes in the definition of investment “shares of stock or *other interests* in a company” and provides that investments may be “owned *or controlled*” by investors (emphasis added).²⁰⁴ In *Plama v Bulgaria*, the tribunal held that the Energy Charter Treaty defines investment to mean “every kind of asset owned *or controlled directly or indirectly* by an investor and includes: (b) shares, stocks or *other forms of equity participation in a company*” (emphasis added).²⁰⁵

²⁰² *Vacuum Salt*, para 43.

²⁰³ Claimants’ Post-Hearing Brief, para 9 citing *CMS v Argentina*, ICSID Case No ARB/01/08, Decision on Jurisdiction, 17 July 2003, para 51 (CL-133).

²⁰⁴ *Saba Fakes*; Netherlands-Turkey BIT, Article 1(b)(ii), 1(d) and 2 (RL-106).

²⁰⁵ *Plama*; Energy Charter Treaty, Article 1(6) (RL-19).

197. In any event, argues the Respondent, Mr Eyre did not have the necessary beneficial interest in the shares of Montrose Singapore, the holder of the Montrose Share. To establish such a beneficial interest, Mr Eyre must prove that: (i) at the Montrose level, Mr Fernando held the Montrose Share on trust for Mr Eyre; and (2) at the Montrose Singapore level, Montrose Singapore held its shares in Montrose on trust for Mr Eyre, following the transfer of the Montrose Share from Mr Fernando. Mr Eyre, says Sri Lanka, has failed to prove the beneficial interest on either basis.
198. At the Montrose level, the Respondent contends that Sri Lankan legal principles must apply to the creation of a valid trust between Mr Eyre and Mr Fernando. Articles 3, 6 and 10 of the Sri Lankan Trust Ordinance require proof that Mr Eyre intended to create a trust of the Montrose Share vis-à-vis Mr Fernando and that Mr Fernando agreed to act as trustee. Citing *Pandit v Maheshri*, Sri Lanka argues that proof of such intention and agreement requires clear evidence and cautions the Tribunal against accepting oral evidence of interested parties.²⁰⁶
199. Sri Lanka emphasises that the only evidence of the alleged Montrose trust is just such oral evidence of interested parties – Mr Eyre and his fellow Montrose director, Mr Wijeratne. In the absence of any written trust arrangement, Mr Eyre testified that he left it to local lawyers to advise and create a trust and he did not recall instructing Mr Wijeratne to appoint Mr Fernando as trustee.²⁰⁷ In Sri Lanka’s view, if Mr Eyre really had instructed local lawyers to create a trust, there would have been a document. The only evidence of legal advice was Ms Mudalige’s email suggesting that Mr Eyre have a local director for Montrose, with arrangements to remove the director at will by obtaining the signed resignation letter from Mr Fernando.²⁰⁸ Further, says Sri Lanka, a trust of shares would have been “ill-advised” because it would have been void under Sections 4(1)(b) and 4(2) of the Sri Lankan Trust Ordinance as an illegitimate attempt to evade and

²⁰⁶ Respondent’s Closing Submissions, para 59; *Madhavprasad Nanuram Pandit v Monghilal Ramandand Maheshri* (1927) BOM 161 (RL-113). The Respondent notes that this is an Indian case, and the Sri Lankan Trust Ordinance is based on the Indian Trust Act of 1882.

²⁰⁷ Tr Day One 196:1-15, 19-25; 197:11-25; 198:1-6.

²⁰⁸ Exhibit R-12.5; Exhibit C-85.

“defeat the purpose” of the 100% sales tax imposed by Section 58(3)(A) of the Finance Act No 11 of 1963.²⁰⁹

200. The Respondent describes Mr Wijeratne’s testimony as being equally unreliable. Among other reasons, Mr Wijeratne is in the tourism business and is not a lawyer, and had no familiarity with the Sri Lankan Trust Ordinance or any experience in creating a trust.²¹⁰ At the highest, he recalled that Mr Eyre wanted to “have control” of Montrose and asked him to find “a trusted person” as director, and that he therefore recommended Mr Fernando and obtained the undated signed resignation letter from Mr Fernando.²¹¹ Under cross-examination at the hearing, he recounted that Mr Fernando also provided a blank signed shareholder transfer document, but the Claimants produced no such document.²¹²

201. Turning next to the Montrose Singapore level, the Respondent contends that there is no evidence whatsoever – not even oral testimony from Mr Eyre – that Montrose Singapore agreed to act as trustee in respect of the Montrose Share. Although the Claimants suggest that this was simply a question of transferring an existing Sri Lankan trust to a new trustee, the Sri Lankan Trust Ordinance provides that “[n]o one is bound to accept a trust”.²¹³ What the Claimants must prove, therefore, is that Montrose Singapore had knowledge of the trust and agreed to be bound by it.

202. The Respondent charges the Claimants with patently failing to meet this burden of proof. Mr Eyre testified that he was not aware of any trust at the Montrose level, and there is no way to impute knowledge of any existing trust to Montrose Singapore. Nor, on his evidence, did Mr Eyre give any thought as to whether the Montrose Share should be held on trust for him by Montrose Singapore in addition to his having 99% of the Montrose Singapore shareholding.²¹⁴ To be compliant with the Singapore Companies Act and the Articles of Association of Montrose Singapore, there should have been a Board Resolution

²⁰⁹ Respondent’s Closing Submissions, para 63(b), citing RL-42 and RL-3.

²¹⁰ Tr Day One 223:19-21; 230:11-17.

²¹¹ Tr Day One 227:13-16; 230:1-10.

²¹² Tr Day One 235:3-4

²¹³ Sri Lankan Trust Ordinance, section 10(2) (RL-42).

²¹⁴ Tr Day One 206:11-17.

regarding the trust – and the Claimants produced no such document.²¹⁵ Further, given the conflict of interest posed by the trust, the Articles of Association call for an ordinary shareholders’ resolution – and again the Claimants produced no such document.²¹⁶ The Claimants may object that failure to comply with the Singapore Companies Act and the Article of Association of Montrose Singapore does not invalidate a trust, but, says Sri Lanka, “this is to convert a factual point into a legal point” and the “absence of any board and shareholder resolutions and minutes and the positive absence of any intention to act as trustee strongly rebuts the contention” that such a trust was created.²¹⁷

203. Further, argues the Respondent, Mr Eyre had an obligation under the Singapore Companies Act to disclose his alleged beneficial interest in Montrose at the time the shareholding was transferred, with the failure to disclose constituting a criminal offense.²¹⁸ Given Mr Eyre’s insistence that he always relied on local legal advice, the “reality” is that he was not advised to make such a disclosure in Singapore because “he never had any intention of creating or transferring a trust in the shares and did not give this a moment’s thought”.²¹⁹

204. Finally, the Respondent points out that the 2014 accounts of Montrose Singapore are “fundamentally inconsistent with the existence of a trust which fundamentally negates that contention on a factual level”.²²⁰ There is no disclosure in the accounts of Mr Eyre’s beneficial interest,²²¹ which would imply that the accounts failed to give a true and fair view of the financial position of Montrose Singapore in violation of the Singapore Companies Act and the Singapore Financial Reporting Standards (“SFRS”).²²² The accounts were prepared on a consolidated basis on the ground of the exercise of control by

²¹⁵ Singapore Companies Act, section 157A (RL-128); Memorandum of Articles of Association of Montrose Singapore (“**Montrose Singapore Articles**”), sections 77, 83 and 90 (R-14).

²¹⁶ Montrose Singapore Articles, sections 81(A) and (C).

²¹⁷ Respondent’s Closing Submissions, para 67(d).

²¹⁸ Singapore Companies Act, section 156 (RL-128).

²¹⁹ Respondent’s Closing Submissions, para 67(e).

²²⁰ Respondent’s Closing Submissions, para 67(f).

²²¹ Montrose Singapore’s Financial Year End 31 December 2014 Accounts, Exhibit R-4.

²²² Singapore Companies Act, section 201(5) (RL-128); Singapore Financial Reporting Standards (“SFRS”) 1, 110, 112 (Exhibit 2.1 to Expert Report of Narissa Chen).

Montrose Singapore over Montrose and a right to a return from its holding in Montrose, but there is no such return right in a trust²²³ and, under Singapore law, a company cannot assert control over another company where shares are held on trust.²²⁴

205. In conclusion, the Respondent argues that it is “implausible and inconsistent with Mr Eyre’s own evidence to suggest – as the Claimants hypothesis – that “Mr Eyre was not aware of any of his statutory responsibilities” with regard to a Montrose Singapore trust. Instead, says Sri Lanka:

*The reason why he gave this no thought was simply that he never considered himself to have an interest beyond his 99% shareholding, which explains why it was never considered, voted upon or otherwise acted upon.*²²⁵

(2) The Claimants’ Position

206. As with their answer to Sri Lanka’s Preliminary Jurisdictional Objection based on indirect ownership of the Montrose Share, the Claimants primarily rely on the broad definition of “investment” in Article 1(a) of the BIT to refute Sri Lanka’s Preliminary Jurisdictional Objection based on Mr Eyre’s alleged beneficial ownership of the Montrose Share. Article 1(a) defines “investment” as “every kind of asset” and, according to the Claimants, “[i]t is beyond argument that beneficial title to shares is an ‘asset’”.²²⁶

207. The Claimants argue further that Article 1(a)(1) includes “property rights” as an illustration of a covered investment and, given that Sri Lankan law recognises beneficial ownership of a share as a property right, Mr Eyre’s beneficial ownership of the Montrose Share *ipso facto* fulfils this requirement. They rely on the Trusts Ordinance, which recognises that shares can be held on trust without entry into the company register and the resulting beneficial interest is enforceable.²²⁷

²²³ SFRS 110, Appendix (definition of control).

²²⁴ Singapore Companies Act, section 5(3) (RL-128).

²²⁵ Respondent’s Closing Submissions, para 67(g).

²²⁶ Claimants’ Post-Hearing Brief, para 7.

²²⁷ Tr Day Three 524:22-544:9.

208. In further support, and following on from its arguments under Article 8(2) of the BIT, the Claimants rely on other tribunal decisions. As noted in connection with the Claimants' indirect ownership claim, the tribunal in *Plama v Bulgaria* interpreted the word "owned" in Article 17(1) of the Energy Charter Treaty to include "beneficial ownership".²²⁸ In *Saba Fakes v Turkey*, the tribunal found:

*the division of property rights amongst several persons or the separation of legal and beneficial ownership is commonly accepted in a number of legal systems, be it through a trust, fiduciary or other similar structure. ... The separation of legal title and beneficial ownership rights does not deprive such ownership of the characteristics of an investment within the meaning of the ICSID Convention or the Netherlands-Turkey BIT.*²²⁹

209. In response to the Respondent's argument that the tribunals in *Plama v Bulgaria* and *Saba Fakes v Turkey* were interpreting broader language contained in the relevant BITs, the Claimants point out that the language at issue went to illustrations of covered investments, while the Claimants here are relying on the definition of "investment" itself in the UK-Sri Lanka BIT – the broad phrase "every kind of asset".²³⁰

210. The Claimants argue further that Mr Eyre is in fact the beneficial owner of the Montrose Share.

211. Starting first with Montrose, the Claimants contend that the evidence clearly shows that Mr Fernando was only a nominee director and shareholder, subject to Mr Eyre's control and to removal by Mr Eyre at any time.²³¹ This evidence includes Mr Eyre's unequivocal statement that "[t]he intention and understanding of all concerned was that at all times that I would retain full beneficial ownership and control over the company".²³² Especially, as Sri Lankan law does not require a written document to create a trust over shares,²³³ the

²²⁸ *Plama*, para 170.

²²⁹ *Saba Fakes*, para 134.

²³⁰ Rejoinder, para 172.

²³¹ Claimants' Post-Hearing Brief, para 42; Exhibits C-85 and C-58.

²³² First Eyre Statement, para 18.

²³³ Rejoinder, para 248.

witness testimony of Mr Eyre is sufficient to prove that Mr Eyre’s intention was to create a trust and that Mr Fernando held the Montrose Share on trust for Mr Eyre – unless the Tribunal finds Mr Eyre’s testimony not credible. Further, while it is true that Article 86(1) of the Sri Lanka Companies Act provides that the person who is registered as the legal owner of shares in the share registry is treated as the holder of those shares under the Companies Act, it does not disallow off-register beneficial ownership.²³⁴

212. Secondly, as for Montrose Singapore, Sri Lanka “grossly overstates” the situation in alleging that Mr Eyre’s beneficial interest is incompatible with Sri Lankan law, in particular that Mr Eyre’s failure to record his beneficial interest in the Montrose Singapore 2014 accounts disproves the transfer of his beneficial interest in the Montrose Share.²³⁵ Particularly given that Montrose Singapore is an exempt non-public company under the Singapore Companies Act, any violation of the SFRS was “utterly trivial in character”.²³⁶ Insofar as Sri Lanka relies on the expert evidence of Ms Chen to demonstrate a breach of the SFRS, her cross-examination – in which, among other things, she had to admit that Montrose Singapore is an exempt private company not required to file audited financial statements containing beneficial interests – discredited her testimony.²³⁷ In any event, argue the Claimants, Mr Eyre explained that his failure to disclose and record his beneficial interest in the Montrose Share in Montrose Singapore’s accounts was innocent – in the press of his other business, he was unaware of the Singaporean legal requirement and assumed he owned the Montrose Share; in response to a question in cross-examination whether he “[gave] any thought at all as to whether [he] wanted, needed or intended to keep a beneficial interest in the shares independently of [his] 99 per cent shareholding in Montrose Sri Lanka”, Mr Eyre answered “No, absolutely not”.²³⁸

213. Even if the Tribunal were to find that the Montrose arrangements were inconsistent with Sri Lankan law and that inconsistency with host State law has preclusive effect with regard

²³⁴ Counter-Memorial, para 138.

²³⁵ Claimants’ Post-Hearing Brief, para 45.

²³⁶ Claimants’ Post-Hearing Brief, para 45.

²³⁷ Claimants’ Post-Hearing Brief, para 46; Tr Day Two 265:11-17.

²³⁸ Tr Day One 206:11-24.

to jurisdiction or admissibility, the Claimants argue that this would not exclude the Tribunal's competence over all aspects of the claims. This is because, under international law, Mr Eyre still has indirect legal title to the Montrose Share as the 99% shareholder of Montrose Singapore and Montrose has a separate direct claim in respect of the Montrose Land.²³⁹

D. PRELIMINARY JURISDICTIONAL OBJECTION F: THE ALLEGED INVESTMENT WAS NOT MADE IN ACCORDANCE WITH LAW AND GOOD FAITH, AND SO IS NOT A PROTECTED INVESTMENT UNDER THE BIT

(1) The Respondent's Position

214. In this Preliminary Jurisdictional Objection, the Respondent directly alleges that, if the Claimants did have a beneficial interest in the Montrose Share *via* trust, that beneficial interest is void under section 4 of the Sri Lankan Trust Ordinance as unlawful, being “of such a nature that, if permitted, it would defeat the provisions of any law”.²⁴⁰ The relevant law is section 58(3)(A) of the Sri Lankan Finance Act, which imposes a 100% sales tax on a sale of a Sri Lankan company where – as with Montrose – more than 25% of the shares are foreign owned. As any trust in Montrose is void, it is ineffective to create a beneficial interest and incapable of constituting an investment under the BIT.

215. In opposition to the Claimants' position that this illegality argument goes to admissibility or the merits rather than jurisdiction, the Respondent emphasises that even Professor Douglas supports this argument in the article on which the Claimants rely. According to Sri Lanka, Professor Douglas acknowledges that if a foreign national acquires title that is ineffective under the host State's law, then there is no investment as a jurisdictional matter.²⁴¹ This is the situation here under section 4 of the Sri Lankan Trusts Ordinance.

216. Given this situation, with the illegality rendering any trust void, the Respondent describes as “sterile” the Parties' debate as to whether it is implicit in the BIT that investments made

²³⁹ Counter-Memorial, para 119; Claimants' Post-Hearing Brief, para 49.

²⁴⁰ Sri Lankan Trust Ordinance, section 4(1)(b) (RL-42).

²⁴¹ Z Douglas QC, *The Plea of Illegality in Investment Treaty Arbitration* (2014), 29 ICSID Review – FILJ, page 178 (CL-216).

contrary to host state law or good faith are not protected.²⁴² However, the Respondent's position – that such a requirement is implicit in the BIT, without express language of illegality – is supported by *Phoenix v Czech Republic*.²⁴³ The Claimants' reliance on *Bear Creek v Peru* for the contrary position, says Sri Lanka, is misplaced because the tribunal in that case: (a) acknowledged that every case depends on the specific treaty at issue; and, (b) in the case before it, it would not be right to imply a requirement of compliance with host state law and good faith in circumstances where Peru had the option under the relevant treaty to require that an investment be legally constituted to attract protection, but chose not to exercise the option.²⁴⁴

(2) The Claimants' Position

217. The Claimants take umbrage with Sri Lanka's position that Mr Eyre's beneficial interest in the Montrose Share breached Sri Lankan law or was otherwise in bad faith. However, even if this Preliminary Jurisdictional Objection were accepted, the Claimants deny that jurisdiction would be ousted, because Mr Eyre still has indirect ownership of the Montrose Share through Montrose Singapore. The alleged illegality, say the Claimants, is a question for admissibility or the merits.²⁴⁵

218. The Claimants identify their primary position to be that "a violation of Sri Lankan law cannot strip the Tribunal of jurisdiction over the beneficial interest – unless that interest is determined void as a matter of Sri Lankan law".²⁴⁶ This is because the BIT has no express legality clause, and so the issue of whether a claimant procured an investment for a purpose in violation of host State laws can only affect a claimant's case on the merits and not jurisdiction.²⁴⁷ The Claimants rely on *Bear Creek Mining v Peru*, *Stati v Kazakhstan*, and *Liman v Kazakhstan*, while emphasising that Sri Lanka has proved unable to point to a

²⁴² Respondent's Closing Submissions, para 70.

²⁴³ *Phoenix Action Ltd v Czech Republic*, ICSID Case No ARB/06/5, Award, 15 April 2009 ("**Phoenix Action**") (RL-146).

²⁴⁴ *Bear Creek Mining*, paras 319-320.

²⁴⁵ Rejoinder, paras 317 and 335.

²⁴⁶ Claimants' Post-Hearing Brief, para 50.

²⁴⁷ Rejoinder, paras 316-329; Tr Day Three 567:1-568:8.

single case in which a tribunal held that investor illegality was a jurisdictional issue where the BIT lacked an express legality clause.²⁴⁸ Insofar as the Respondent relies on *Phoenix Action v Czech Republic*, the Claimants emphasise that the tribunal there considered the need for compliance with host State law and good faith to be two additional *Salini* factors under Article 25(1) of the ICSID Convention, and the case has not been followed in that respect.²⁴⁹

219. The Claimants cite to a commentary by Professor Douglas that the relevant jurisdictional question is whether the alleged illegality is violative of international public policy rather than only of host State law:

*If the investment is procured for a purpose that is illicit under the law of the host State but not under international public policy then this would provide a defence to the merits of the claims.*²⁵⁰

The Claimants assert that the most serious allegation levied against them by Sri Lanka is violation of only host State law, namely tax evasion under the Sri Lanka Finance Act – and “[a]t no point is the allegation made that tax evasion is violative of international public policy”.²⁵¹

220. In any event, argue the Claimants, Mr Eyre’s beneficial interest in the Montrose Share was not contrary to the Sri Lankan Finance Act.²⁵² This is because the Finance Act addresses the transfer of *property* rather than a beneficial interest. Section 58(3A) of the Finance Act provides:

*Where there is a transfer of ownership of any **property** within Sri Lanka to a company there shall be charged from the transferee of such property, a tax of such amount as is equivalent to the value of*

²⁴⁸ Claimants’ Post-Hearing Brief, para 50; *Bear Creek Mining*, paras 319-320 (CL-176); *Anatolie Stati, Gabriel Stati, Ascom Group SA & Terra Raf Trans Trading Ltd v Republic of Kazakhstan*, SCC Case No V (116/2010), Award, 9 December 2013, para 812 (CL-213); *Liman Caspian Oil BV & NCL Dutch Investment BV v Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award, 22 June 2010, para 187 (CL-200).

²⁴⁹ Rejoinder, para 321; *Phoenix Action*, para 114.

²⁵⁰ Z Douglas QC, *The Plea of Illegality in Investment Treaty Arbitration* (2014), 29 ICSID Review – FILJ, pages 155, 184 (CL-216)

²⁵¹ Rejoinder, para 319.

²⁵² Counter-Memorial, paras 129-144; Rejoinder, paras 330-334.

*that property, if more than twenty five per centum of the issued shares in such company are owned by persons who are not citizens of Sri Lanka.*²⁵³

221. Section 66 of the Finance Act provides that the term “property” in this context refers only to land.²⁵⁴

222. The Claimants juxtapose this plain wording of Section 58(3A) of the Finance Act against Sri Lanka’s reliance on principles of statutory construction used by the courts to avoid interpreting statutes in ways that “would enable persons to undermine [the law’s integrity] by using the scheme of the Act in unintended ways”.²⁵⁵ Despite this reliance, Sri Lanka failed to identify any cases in which the Sri Lankan courts did in fact use these principles in interpreting and applying Section 58(3A). Most important, the Sri Lankan authorities have taken no enforcement action against the Claimants, or even sought to contact them, about this alleged violation of the Finance Act.

223. Finally, the Claimants oppose Sri Lanka’s argument that BIT jurisdiction should be denied because of Mr Eyre’s failure to record his beneficial interest on the Montrose Singapore accounts in alleged violation of Singapore law. No tribunal, say the Claimants, has denied jurisdiction on grounds of violation of a municipal law other than the host State law, which is why most legality clauses specifically require compliance only with host State law.

E. PRELIMINARY JURISDICTIONAL OBJECTION G: MR EYRE DOES NOT HAVE A CLAIM AS INDIRECT LEGAL TITLE HOLDER TO THE MONTROSE LAND

(1) The Respondent’s Position

224. As one of their points supporting the limited scope of the definition of “investment” under Article 1(a) of the BIT, the Respondent contends that by mentioning “interests in the property of such companies” in Article 1(a)(ii) without a mention of “interests in shares”, the BIT excludes indirect shareholdings from coverage.²⁵⁶ To repeat, Article 1(a)(ii)

²⁵³ RL-3 (emphasis added).

²⁵⁴ RL-5.

²⁵⁵ Tr Day Two 390:3-18.

²⁵⁶ Rejoinder para 23, citing Reply, para 39.

reads: “Shares, stock and debentures of companies or *interests in the property* of such companies” (emphasis added). In Sri Lanka’s words:

*any alleged “interests” in shares are not covered by the reference to “shares” because otherwise the language in the second part of the sub-clause of Article 1(a)(ii) would have been used in the context of “shares”. A clear distinction is drawn between owning the shares of the company, and having an interest in the property of the company. What is more and in any event, an indirect shareholder does not have any form of legal or equitable interest in the shares, though it may have a level of control, something entirely distinct from having an interest.*²⁵⁷

225. In this connection, the Respondent opposes the Claimants’ related jurisdictional claim that, based on the “every kind of asset” definition in Article 1(a) of the BIT, the “economic reality” of the situation must allow Mr Eyre to bring a claim as the indirect title holder to the Montrose Land, without regard to the separate corporate personality of Montrose as direct title holder.

226. The Respondent contends that *Pezold v Zimbabwe*, on which the Claimants rely for this position, was decided incorrectly and, in any event, the tribunal in *Pezold v Zimbabwe* did not have the benefit of the more helpful line of authority in *Poštová Banka v Hellenic Republic*.²⁵⁸ As set out in *Poštová*, with reference “to extensive well-established authority”, the default position in international law is that a company is legally distinct from its shareholders (or others claiming to have an interest), the company alone has rights over its own assets, which it alone is capable of protecting, and others have no standing to pursue claims over those assets.²⁵⁹ Absent clear wording, which is lacking here, Mr Eyre lacks standing to pursue a claim to the Montrose Land because he has no legal right to the Montrose Land, as an asset of Montrose.

²⁵⁷ Reply, para 39.

²⁵⁸ *Bernhard von Pezold & Others v Republic of Zimbabwe*, ICSID Case No ARB/10/15, Award, 28 July 2015 (“*Pezold*”) (CL-170).

²⁵⁹ *Poštová Bank*, paras 230-246.

(2) The Claimants' Position

227. The Claimants reject Sri Lanka's interpretive argument based on the absence of the phrase "interests in shares" from Article 1(a)(ii) of the BIT, charging that the argument "conflates the asset that forms the subject matter of the investment (*i.e.*, "shares") with the method of holding it (*i.e.*, directly or indirectly)".²⁶⁰ As addressed in connection with Sri Lanka's Preliminary Jurisdictional Objection based on indirect investment, the Claimants insist that Article 1(a)(ii) is merely illustrative of investments and so the absence of the phrase "interests in shares" does not support Sri Lanka's limited interpretation of Article 1(a)(ii).
228. However, even if the Tribunal were to accept Sri Lanka's interpretation, there is no impact on jurisdiction. According to the Claimants:

*even if Sri Lanka is correct, and the supposed distinction between "interests in the property of such companies" and "shares" means that indirect shareholdings are not protected by Article 1(a) (which is denied), then this is tantamount to an acknowledgement that Article 1(a) gives an indirect investor the right to claim with respect to the property of a company. A fortiori, Mr Eyre still holds an investment: the Montrose Land, held indirectly through Montrose Singapore and Montrose Sri Lanka.*²⁶¹

229. This is consistent, say the Claimants, with the line of authority in *Pezold v Zimbabwe*, where the tribunal upheld the claimants' position that "where a company is controlled, legally or factually, by a certain shareholder or group of shareholders, the latter may be entitled to a direct claim in respect of the assets of the former", and dismissed Zimbabwe's objection that the claimants lacked standing to bring claims related to the protected investments.²⁶²
230. Based on the *Pezold v Zimbabwe* reasoning, the Claimants describe as incorrect Sri Lanka's argument that Mr Eyre lacks standing to bring a claim based on his indirect legal

²⁶⁰ Rejoinder, para 24.

²⁶¹ Rejoinder, para 32.

²⁶² *Pezold*, paras 317-327.

title to the Montrose Land. The Tribunal, say the Claimants, does have jurisdiction *ratione materiae* over this claim.

F. PRELIMINARY JURISDICTIONAL OBJECTION H: THE CLAIMANTS' REFLECTIVE LOSS CLAIM IS NOT PERMITTED UNDER THE BIT

(1) The Respondent's Position

231. Sri Lanka relies on Article 5 of the BIT for its final Preliminary Jurisdictional Objection, which goes to Mr Eyre's reflective loss claim based on the loss in value of the Montrose Share as a result of the alleged expropriation of the Montrose Share. Article 5 provides (emphasis added):

(1) Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated, or subjected to measures having effect equivalent to nationalization or expropriation ... in the territory of the other Contracting Party except for a public purpose related to the needs of that Party and against prompt, adequate and effective compensation. ... The national or company affected shall have a right, under the law of the Contracting Party making the expropriation to prompt determination of the amount of compensation either by law or by agreement between the parties and to prompt review

*(2) Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which nationals or companies of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) are applied **to the extent necessary** to guarantee prompt, adequate and effective compensation in respect of the investment to such nationals or companies of the other Contracting Party who are owners of those shares.*

232. Sri Lanka argues that Article 5(2) of the BIT limits a shareholder's right to make a claim for expropriation of the relevant company's assets only where "necessary". Looking to the ordinary meaning of the phrase "to the extent necessary", a shareholder may make a claim for expropriation of a company's assets only in the *Barcelona Traction* type case where the company itself is incapable of acting and, in all other situations, may claim only for direct or indirect expropriation of the actual shares themselves under Article 5(1) of the BIT. Here, says Sri Lanka, Montrose as a company is fully capable of making a claim

for expropriation of the Montrose Land in Sri Lanka – and, indeed, has done so in Sri Lanka, and has been paid compensation.

233. The Respondent contends that the Claimants’ reliance on *RosInvest v Russia* for the contrary position is misplaced, because the relevant treaty article in that case did not contain the limitation of necessity. The Claimants’ reliance on *AAPL v Sri Lanka* is also misplaced, because the relevant point was not taken in that case.

(2) The Claimants’ Position

234. The Claimants give short shrift to Sri Lanka’s reflective loss argument. They first state that “[n]aturally, a claim can only be brought under [Article 5(1)] in respect of shares if those shares are expropriated – whether directly or indirectly”, but that does not prevent a shareholder like Mr Eyre from pursuing another cause of action under the BIT, for example for unfair and inequitable treatment, for losses caused by state action.²⁶³

235. With regard to Article 5(2) of the BIT, the Claimants reiterate their responses to Sri Lanka’s Preliminary Jurisdictional Objection against indirect shareholder claims. They again rely on *RosInvest v Russia* and *AAPL v Sri Lanka* in support of Mr Eyre’s reflective loss claim for the reduction in value of the Montrose Share as a result of the Respondent’s expropriation of the Montrose Land without full compensation. According to the Claimants, the tribunal in *RosInvest v Russia* found that the sole purpose of Article 5(2) is to clarify the right of an indirect shareholder to make an indirect claim in relation to its shares when company assets are expropriated, which was also decided in *AAPL v Sri Lanka*.²⁶⁴

VIII. THE TRIBUNAL’S ANALYSIS AND DECISIONS

236. The Tribunal commences its analysis of the Parties’ positions by setting out the basic jurisdictional principles applicable in the instant case. The Tribunal will then address the central disputed issues of jurisdiction *ratione materiae* and *ratione personae*.

²⁶³ Rejoinder, para 145.

²⁶⁴ Rejoinder, paras 146-147.

A. JURISDICTIONAL PRINCIPLES

237. The governing principles of jurisdiction are found in the ICSID Convention and the UK-Sri Lanka BIT.

238. The relevant jurisdictional requirements of the ICSID Convention are contained in Article 25, which reads in pertinent part (emphasis added):

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw the consent unilaterally.

(2) “National of another Contracting State” means:

(a) any natural person who had the nationality of a Contracting State other than the State Party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered ...

*(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and **any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties agreed should be treated as a national of another Contracting State for the purposes of this Convention.***

239. As reflected in Article 25, three well-known conditions must be met for ICSID to have jurisdiction:

- a. a condition *ratione personae*: the dispute must oppose a Contracting State and a national of another Contracting State;

- b. a condition *ratione materiae*: the dispute must be a legal dispute arising directly out of an investment; and
- c. a condition *ratione voluntatis*: the Contracting State and the investor must consent in writing that the relevant dispute be settled through ICSID arbitration.

240. A fourth condition *ratione temporis* must be added, namely that the ICSID Convention must have been applicable at the time of the relevant dispute.

241. The jurisdictional requirements of the UK-Sri Lanka BIT are contained in Article 8, which reads in pertinent part:

- (1) *Each Contracting Party hereby consents to submit to [ICSID] for settlement by conciliation or arbitration under the [ICSID Convention] any legal disputes arising between the Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former.*
- (2) *A company which is incorporated or constituted under the law in force in the territory of one Contracting Party and in which before such dispute arises the majority of shares are owned by nationals or companies of the other Contracting Party shall in accordance with Article 25(2)(b) of the ICSID Convention be treated for such purposes of the Convention as a company of the other Contracting Party.*

242. Article 1 of the BIT provides the definition of the terms “investment”, “nationals” and “companies”, as relevant here (emphasis added):

- (a) *“investment” means every kind of asset and in particular, though not exclusively, includes:*
 - (i) *moveable and immovable property and other property rights such as mortgages, liens or pledges;*
 - (ii) *shares, stock and debentures of companies or interests in the property of such companies;*

(iii) *claims to money or to performance under contract having a financial value;*

...

(c) “nationals” means:

(i) *In respect of the United Kingdom: physical persons deriving their status as United Kingdom nationals from the law in force in any part of the United Kingdom or in any territory for the international relations of which the Government of the United Kingdom is responsible;*

...

(d) “Companies” means:

(i) *In respect of the United Kingdom: corporations, firms or associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of Article 11; ...*

243. The Respondent has raised no objections concerning the Tribunal’s jurisdiction *ratione voluntatis* or *ratione temporis* based on consent or time limitations. For good order, the Tribunal confirms that it has jurisdiction *ratione voluntatis* and *ratione temporis*.

244. As to jurisdiction *ratione temporis*, the relevant dates are not disputed. First, the ICSID Convention entered into force in respect of the United Kingdom on 18 January 1967 and in respect of Sri Lanka on 11 November 1967. Therefore, as of 11 November 1967, the Convention was in effect between Sri Lanka and the United Kingdom within the meaning of Article 25(1). Second, the UK-Sri Lanka BIT entered into force on 18 December 1980. Accordingly, both the ICSID Convention and the BIT were in force when the instant dispute arose, according to the Claimants, on 10 July 2013.²⁶⁵

245. As to jurisdiction *ratione voluntatis*, the necessary consent of the Respondent to ICSID arbitration is found in Article 8(1) of the UK-Sri Lanka BIT of 18 December 1980, and

²⁶⁵ Memorial, para 82.

the consent of the Claimants has been given in their Request for Arbitration dated 7 July 2016.

246. The Respondent's numerous Preliminary Jurisdictional Objections concern the Tribunal's jurisdiction *ratione personae* and *ratione materiae*.

247. At the outset, the Tribunal observes that the Respondent has sometimes blurred the different concepts of jurisdiction *ratione materiae* and *ratione personae*, particularly in the evolving organisation of its Preliminary Jurisdictional Objections, which has made it necessary for the Tribunal to distinguish what is relevant to each. To give one example among many, the Respondent presented Objection 2 in its Reply in the following manner:

*The Tribunal lacks jurisdiction ratione personae over: (1) Montrose Sri Lanka, because it does not constitute a company of the United Kingdom; and (2) Mr Eyre, because he is not the owner of the shares of Montrose Sri Lanka.*²⁶⁶

248. It can readily be seen that the first sentence indeed relates to jurisdiction *ratione personae*, but the second does not, as it relates instead to jurisdiction *ratione materiae*.

249. In light of the Parties' blurring of jurisdiction *ratione materiae* and *ratione personae* issues, as well as the challenges posed by the evolving facts presented by the Claimants and the evolving categorisation of the Preliminary Jurisdictional Objections presented by the Respondent, the Tribunal has found it necessary to analyse those Objections in a structure that does not strictly follow the Parties' positions.

250. As a further preliminary point, the Tribunal confirms that the Claimants carry the burden of proof on their affirmative jurisdictional case. Where the burden shifts to the Respondent in connection with a particular Preliminary Jurisdictional Objection, the Tribunal will so indicate.

²⁶⁶ Reply, Heading C.

B. JURISDICTION *RATIONE PERSONAE*

251. The Claimants Montrose and Mr Eyre contend that each is a qualifying United Kingdom national under Article 25(2) of the ICSID Convention.
252. The case of Mr Eyre is straightforward. It is undisputed that Mr Eyre is a UK national, and the Tribunal has jurisdiction *ratione personae* as to him under Article 25(2)(a) of the ICSID Convention and Article 1(c) of the BIT.
253. The case of Montrose, as a Sri Lankan company, is more complicated. The Respondent challenges jurisdiction over Montrose in its Preliminary Jurisdictional Objection D (corresponding to Objection 2 in the Respondent's Reply).
254. Having considered the Parties' positions, the Tribunal concludes that it has jurisdiction *ratione personae* as to Montrose as well as Mr Eyre, for the reasons that follow.
255. Article 25(2)(b) of the ICSID Convention, in its second sentence, provides that ICSID jurisdiction extends – by exception to the general rule that ICSID arbitration is not designed for companies against their own State of incorporation – to “any juridical person which had the nationality of a Contracting State other than the State party to the dispute ... and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention”. Although the text is one interrupted sentence, the text also reflects that Article 25(2)(b) separately establishes both a subjective test and an objective test of jurisdiction *ratione personae*.
256. First, the Article 25(2)(b) *subjective test* is raised by the phrase “the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention”. In the Tribunal's view, this subjective test is met here by Article 8(2) of the BIT, as a declaration of the agreement between Sri Lanka and United Kingdom for purposes of the second clause of Article 25(2). To recall, Article 8(2) provides:

A company which is incorporated or constituted under the law in force in the territory of one Contracting Party and in which before such dispute arises the majority of shares are owned by nationals or companies of the other Contracting Party shall in accordance with Article 25(2)(b) of the ICSID Convention be treated for such

purposes of the Convention as a company of the other Contracting Party.

257. Article 8(2) expressly makes a connection to Article 25(2)(b) of the ICSID Convention, and Montrose is a juridical person incorporated under the law in force in Sri Lanka.

258. Secondly, the Article 25(2)(b) *objective test* is raised by the phrase “because of foreign control”. A claimant does not meet this test simply by meeting the subjective test: these two tests are not the same. This is well-reflected in two decisions where issues similar to those in this arbitration were present. In *Vacuum Salt v Ghana*, the tribunal decided (emphasis added):

*the parties’ agreement to treat Claimant as a foreign national “because of foreign control” does not ipso jure confer jurisdiction. The reference in Article 25(2)(b) to “foreign control” necessarily sets an objective Convention limit beyond which ICSID jurisdiction cannot exist and parties therefore lack power to invoke same no matter how devoutly they may have desired to do so*²⁶⁷

259. Similarly, the tribunal in *Autopista v Venezuela* decided: “locally incorporated companies may agree to ICSID arbitration subject to two requirements: [t]he parties have agreed to treat the said company as a national of another Contracting State for the purposes of this Convention; and [t]he said company is subject to foreign control”.²⁶⁸

260. Accordingly, the next question for the Tribunal is whether the necessary objective foreign control of Montrose exists. According to Article 8(2) of the BIT, the relevant national company – here, Montrose – may be deemed foreign if “the majority of shares are owned by nationals or companies of the other Contracting Party” – here, Mr Eyre as a United Kingdom national. The issue here is whether Mr Eyre must *directly* exercise “foreign control” of the sole Montrose Share, i.e. by owning the share directly himself, or whether indirect control will suffice, i.e. the share being held by Montrose Singapore over which he has ultimate control.

²⁶⁷ *Vacuum Salt*, para 36.

²⁶⁸ *Autopista Concesionada de Venezuela C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction, 27 September 2001, para 104 (RL-8).

261. The Respondent's basic position, as detailed in Section VII.B above, is that Mr Eyre's indirect ownership of Montrose deprives Montrose of deemed United Kingdom nationality for purposes of the BIT. This position rests on Sri Lanka's interpretation of Articles 1(a) and 8.2 of the BIT. Given that: (a) Article 1(a) includes in the definition of "investment" "[s]hares, stock and debentures of companies or interests in the property of such companies"; (b) "companies" is defined in Article 1(d)(ii) as the relevant locally incorporated company; and (c) Article 1(a)(ii) does not expressly include an interest in *shares* as "an interest in the property of such companies", the protected "shares" may only be shares of Montrose as a Sri Lankan company. As only Montrose Singapore directly owns the Montrose Share, Article 1(a) necessarily excludes Mr Eyre's indirect holding in Montrose because this shareholding through Montrose Singapore reflects only his *interest* in the Montrose Share and not *ownership* of the Montrose Share itself. Further, given that Article 8(2) of the BIT requires that the majority of the shares of the relevant locally incorporated company be "*owned* by nationals or companies of the other Contracting Party", Mr Eyre cannot *own* the sole Montrose Share for purposes of Article 8(2) without having *direct legal title* to the sole Montrose Share, which he does not have.
262. The Claimants' response, in brief, is that Mr Eyre has "*direct beneficial title* to the sole share in Montrose, which is a Sri Lankan-domiciled company", and holds *indirect legal title* to the sole Montrose Share through his (Mr Eyre's) 99% stake in Montrose Singapore, which owns Montrose.²⁶⁹ This is sufficient, argue the Claimants, to allow Mr Eyre to exercise the foreign control of Montrose necessary to establish jurisdiction *ratione personae* under the ICSID Convention and Article 8(2) of the BIT.
263. Having considered the Parties' positions, the Tribunal does not accept Sri Lanka's interpretation of Article 1(a) of the BIT together with Article 8(2).
264. As for the definition of investment in Article 1(a), there are many tribunal decisions recognising indirect shareholder claims where the relevant treaty, like the UK-Sri Lanka BIT, defines investment broadly as "every kind of asset".

²⁶⁹ Memorial, paras 99-101 (emphasis in original).

265. Turning to Article 8(2), which the Tribunal confirms is a declaration of consent for purposes of Article 25(2)(b) of the ICSID Convention and hence most relevant to the instant issue, there is no indication in the text of Article 8(2) of the BIT that the majority of shares in the relevant host State company cannot be owned *indirectly* by a national of the other Contracting State. The purpose of Article 8(2) is to allow a locally incorporated company, which is often required for local investment, to bring a claim in its own right for purposes of Article 25(2)(b) of the ICSID Convention, without regard to the rights of direct or indirect shareholders in that company.

266. To recognize indirect *foreign control* of such a locally incorporated company, through indirect as well as direct share ownership, is in line with both ICSID jurisprudence and commercial reality. In modern international economic relations, chains of closely-held companies are frequently used, without preventing the majority shareholder at the top of a chain from asserting control of or making claims on behalf of a foreign company lower in the chain. To quote Professor Schreuer:

*Whereas the first part of Art. 25(2)(b) merely refers to an investor's nationality, the second part specifically refers to control. This would indicate an approach that is governed less by formal aspects of corporate nationality than by economic realities. Therefore, on balance, the better approach would appear to be a realistic look at the true controllers thereby blocking access to the Centre for juridical persons that are controlled directly or indirectly by nationals of non-Contracting States or nationals of host states.*²⁷⁰

267. Turning to the instant case, the Tribunal accepts that the Claimants have met the indirect foreign control test. Mr Eyre, a United Kingdom national, owns 99% of the shares of Montrose Singapore, which in turn is the legal owner of the sole Montrose Share, and hence Mr Eyre indirectly exercises control over the Sri Lankan national company Montrose. This nearly 100% foreign ownership meets the level that the *Vacuum Salt* tribunal found, in the context of Article 25(2)(b) of the ICSID Convention, “almost certainly would result in foreign control, by whatever standard”.²⁷¹

²⁷⁰ Schreuer, page 323.

²⁷¹ *Vacuum Salt*, para 43.

268. Accordingly, the Tribunal has decided, based on Mr Eyre’s indirect ownership of the Montrose Share, that Montrose can “be treated as a national of another Contracting State” for purposes of the objective foreign control test in Article 25(2)(b) of the ICSID Convention.
269. In light of this holding, the Tribunal does not consider it necessary to address Sri Lanka’s arguments based on the United Kingdom FCO Memorandum, especially as there is no indication that it was part of the *travaux préparatoires* of the BIT. Similarly, the Tribunal does not find it necessary to address the Parties’ lengthy exchanges on the possible import of *Barcelona Traction*, customary international law and Article 5(2) of the BIT on the interpretation of the definition of investment in Article 1(a) of the BIT.
270. In conclusion, the Tribunal determines that it has jurisdiction *ratione personae* as to both Claimants: as to Mr Eyre, under Article 25(2)(a) of the ICSID Convention and Article 1(c) of the BIT; and as to Montrose, under Article 25(2)(b) of the ICSID Convention and Article 8(2) of the BIT. The Tribunal rejects the Respondent’s Preliminary Jurisdictional Objection *ratione personae* D (corresponding to Objection 2 in the Respondent’s Reply).

C. JURISDICTION *RATIONE MATERIAE*

271. Again, as there are two Claimants – Montrose and Mr Eyre – the Tribunal must ascertain its jurisdiction *ratione materiae* for each of them, by determining whether each has a protected investment for purposes of Article 25(1) of the ICSID Convention and Article 1(a) of the BIT.
272. The first step is to identify the investment at issue. The Claimants together seek compensation of some US\$ 20 million for the loss of their investment in the planned Hotel Project on the Montrose Land. Sri Lanka has, more or less clearly, divided its Preliminary Jurisdictional Objections between the Claimants’ alleged investment in the Montrose Land itself and Mr Eyre’s alleged investment in the Montrose Share.
273. In this regard, it bears restating that Montrose has legal title to and owns the Montrose Land, and Montrose Singapore has equity title to and owns the Montrose Share, and hence directly owns Montrose. Although Mr Eyre originally based a claim on alleged beneficial

ownership of the Montrose Land itself, he has limited his claim to a beneficial ownership interest only in the Montrose Share through his 99% ownership of Montrose Singapore. Accordingly, only Montrose has a claim based on investment directly in the Montrose Land.

(1) The Alleged Investment in the Montrose Land

a. Investment in the Montrose Land by Montrose versus Electro Resorts – Import of the MOU

274. The question whether Montrose itself has a protected investment under the UK-Sri Lanka BIT is the focus of Sri Lanka's Preliminary Jurisdictional Objection A (corresponding to Objection 6 in the Respondent's Reply). Sri Lanka contends that the Claimants cannot claim in respect of Electro Resorts' beneficial interest in the Montrose Land and/or the Montrose Land does not constitute an investment under Articles 1(a)(ii) and 8(1) of the BIT. This Objection turns on the impact of the undated (apparently July 2010) Memorandum of Understanding between Montrose Global and Electro Resorts (again, the "MOU"), which assumed such prominence in the Respondent's case.
275. As a preliminary matter, the Tribunal considers that Sri Lanka carries the burden to prove that Electro Resorts has a beneficial interest in the Montrose Land by operation of the MOU and a constructive trust under Sri Lankan law, rather than requiring the Claimants to prove a negative. The Tribunal finds that Sri Lanka has failed to prove, on a balance of the probabilities, that the operative instrument for transfer of the Montrose Land was the MOU and not the 4 August 2010 Deed of Transfer.
276. Following careful examination of the Parties' submissions and the relevant evidence, the Tribunal finds the MOU to be a non-binding agreement both on the facts and under the applicable English governing law. There are several reasons for this conclusion.
277. First, the Tribunal cannot accept that reasonable businesspersons would agree, on a binding basis, to regulate a multi-million-dollar real estate development project with an undated document, from which other agreements would potentially follow. It is simply not a credible situation, especially given that, in comparison, the MOU contained a specific date for the completion of other Development Project documentation and all of

the other prospective agreements referred to in the MOU are identified with their respective future dates.

278. Secondly, on the facts in the record, Sri Lanka has failed to show whether, how and when the parties to the MOU acted upon the terms therein for the purported sale of the Montrose Land. Sri Lanka has also failed to show how an understanding between two parties – Montrose Global and Electro Resorts – could bind Montrose as a non-party to that understanding, particularly when Montrose subsequently concluded a Deed of Transfer with Electro Resorts to purchase the same Montrose Land.

279. Thirdly, and most importantly, the Tribunal considers that the MOU was superseded by the Deed of Transfer signed on 4 August 2010. The Deed of Transfer is a dated and notarised document. The date and content of the Deed of Transfer is patently inconsistent with the MOU-related email exchanged between Ravi Wethasinghe and Mr Eyre less than two weeks earlier on 23 July 2010, which envisioned transfer of the Montrose Land, a meeting with a notary, and the signing of the MOU on the following Monday, 26 July 2010.

280. The transfer language of the Deed of Transfer is unequivocal. It recites that Electro Resorts, as the Vendor, has agreed with Montrose, as the Purchaser:

for the absolute sale and conveyance ... all that allotment of land depicted in Plan No.1700 dated 14th February, 1978 ... together with the buildings, trees, plantations and everything else standing thereon ... free of all encumbrances and charges whatsoever at or for the price or sum of RUPEES ONE HUNDRED MILLION ONLY (Rs.100,000,000-) of lawful money of the said Republic of Sri Lanka”.

....

In the presence of the said agreement and in consideration of the said sum of [Rs 100 million] of lawful money of the said Republic of Sri Lanka well and truly paid to the VENDOR by the PURCHASER (the receipt whereof the VENDOR doth hereby expressly admit and acknowledge) the VENDOR both hereby sell grant convey transfer assign set over and assure to the PURCHASER all that allotment of land depicted in Plan No.1700 dated 14th February, 1978

281. In the view of the Tribunal, the Deed of Transfer could serve as a valid and binding transfer of the Montrose Land from Electro Resorts to Montrose. However, its validity was not challenged, and could have been challenged only for a good legal reason, for example, for fraud, failure of consideration, or non-existence of the land, and this is not Sri Lanka's case.

282. The Tribunal acknowledges the Respondent's point that the notary, Ms Mudalige, added at the end of the Deed of Transfer the certification that "the within mentioned consideration was not passed in my presence".²⁷² This does not prove, however, that Montrose did not pay the consideration, but only that it was not paid in the notary's presence. There is contrary evidence that the consideration was paid, including: (a) the 27 July 2010 Electro Resorts Board resolution recording the sale and transfer of the Montrose Land for Rs 100 million (with no mention of the MOU); and (b) the entry in the Montrose audited company accounts of Mr Eyre's having paid Rs 100 million for the Montrose Land, which Mr Eyre admitted he did not remember.

283. Although this evidence does leave the record uncertain as to whether and when Montrose paid the 100 million rupees, the Tribunal cannot agree that this invalidates the effect of the Deed of Transfer. If in fact the payment was not made, Electro Resorts may have had a claim for non-payment against Montrose or some other remedy for breach of contract, but this matter is not before this Tribunal, and no suggestion to that effect has been made.

284. Although the Tribunal considers that its findings on the effect of the MOU are determinative, it will nonetheless address the Respondent's assertion of a constructive trust in favour of Electro Resorts. To remind, the Respondent describes the present dispute as "a classic case of Electro retaining the beneficial interest in the Land, by reason of a constructive trust being automatically imposed pursuant to section 83 of the Trust Ordinance".²⁷³ To this end, Sri Lanka contends that, because the constructive trust arose automatically under Sri Lankan law: (a) it is entitled to take the same points as, and be in

²⁷² Exhibit C-7.

²⁷³ Respondent's Closing Submissions, para 22.

no less a position than, Electro Resorts in these proceedings; and (b) that equity would disregard the separate corporate personality of Montrose Global and Montrose, because Mr Eyre controls both.²⁷⁴

285. The Tribunal finds both of these contentions unpersuasive and insufficiently supported by either facts or law. Sri Lanka has not shown why it is entitled to be in the same position as Electro Resorts, which is a private entity owned and controlled by Ravi Wethasinghe, or provided any legal basis for such assertion. Nor has Sri Lanka proven on what grounds the Tribunal should disregard the corporate personality of both Montrose Global and Montrose, other than noting that Mr Eyre owns both companies.

286. Given the Tribunal's determination that the MOU was superseded by the Deed of Transfer, there is no need for a ruling on the Respondent's request that the Tribunal draw adverse inferences from the Claimants' failure to produce MOU-related documents post-dating the MOU itself.

287. In this regard, the Tribunal recalls Sri Lanka's allegations that the Claimants were "deliberately economical with the true facts",²⁷⁵ and the objection of the Claimants' counsel to what they saw as an "attempt to undermine or attack Mr Eyre's credibility at every stage".²⁷⁶ As the Tribunal President stated in the hearing: "that is not how the Tribunal heard that evidence yesterday. Sloppy perhaps, too busy, perhaps, but ... we did not hear that as being a charge of lying or an attack on Mr Eyre's overall business reputation".²⁷⁷ The Tribunal reiterates that Mr Eyre appeared to be a witness of integrity, who clearly explained what he did remember and frankly admitted what he could not remember about transactions that he described as personal matters to which he acknowledged he did not bring his full professional attention and skills.

²⁷⁴ Respondent's Closing Submissions, para 22.

²⁷⁵ Reply, para 3.

²⁷⁶ Tr Day Two 432:22-433:24.

²⁷⁷ Tr Day Two 433:25-434:10.

288. To conclude, the Tribunal rejects the Respondent's Preliminary Jurisdictional Objection A (corresponding to Objection 6 in the Respondent's Reply).

b. Proof of Investment in the Montrose Land by Montrose and/or Mr Eyre

289. In its Preliminary Jurisdictional Objection B (corresponding most closely to Objections 7 and 8 in the Respondent's Reply), Sri Lanka contends that the Claimants have no investment in the Montrose Land under Article 25(1) of the ICSID Convention and Article 1 of the BIT because neither made a contribution to acquire the Montrose Land for the Hotel Project nor took any related investment risk.

290. As a preliminary matter, it is undisputed that Montrose holds legal title to the Montrose Land, which could be an investment if the Montrose Land qualifies as a protected investment under the ICSID Convention and the BIT.

291. As the Tribunal has determined that the Deed of Transfer and not the MOU was the operative instrument for transfer of the Montrose Land, Electro Resorts does not have a competing beneficial interest in the Montrose Land. Nor is Mr Eyre asserting an investment claim based on beneficial ownership of the Montrose Land.

292. Therefore, although technically Sri Lanka's Preliminary Jurisdictional Objection B should concern only Montrose's claim for investment in the Montrose Land, the record reflects that any investment came through Mr Eyre and so the Tribunal must also examine his role. This examination necessarily overlaps with other Preliminary Jurisdictional Objections made by Sri Lanka based on Mr Eyre's claims for loss of his alleged investment in the Montrose Share. Indeed, the Tribunal decides that the Montrose Share can qualify as a protected investment under the ICSID Convention and the BIT only if Montrose itself has a protected investment in the planned Hotel Project on the Montrose Land, which is addressed below.

293. The Tribunal does not find it necessary to resolve the dispute between the Parties as to whether the *Salini* criteria do or do not apply *per se* in evaluating whether an investor has made a protected investment. There are now many decisions that have considered that "investment" has an inherent meaning and implies at least a contribution by the investor,

a certain duration, and economic risk. This risk may be anticipated or unanticipated changes to market conditions, economic factors and/or political influences affecting the commercial transaction in the area of the investment. This was pertinently stated by the tribunal in *Poštová Banka v Hellenic Republic*:

361. *If an “objective” test is applied, in the absence of a contribution to an economic venture, there could be no investment. An investment, in the economic sense, is linked with a process of creation of value, which distinguishes it clearly from a sale, which is a process of exchange of values ...*

...

367. *Under an “objective” test, the element of risk is essential and cannot be analysed in isolation. Indeed any economic transaction – it could even be said any human activity entails some element of risk. Risk is inherent in life and cannot per se qualify what is an investment.*

368. *The investment risk, for purposes of the application of an “objective” test, was defined by the Romak tribunal as follows:*

“All economic activity entails a certain degree of risk. As such, all contracts – including contracts that do not constitute an investment – carry the risk of non-performance. However, this kind of risk is pure commercial, counterparty risk, or, otherwise stated, the risk of doing business generally. It is therefore not an element that is useful for the purpose of distinguishing between an investment and a commercial transaction.

An ‘investment risk’ entails a different kind of alea, a situation in which the investor cannot be sure of a return on his investment, and may not know the amount he will end up spending, even if all relevant counterparties discharge their contractual obligations. Where there is ‘risk’ of this sort, the investor simply cannot predict the outcome of the transaction.”

369. *In other words, under an “objective” approach, an investment risk would be an operational risk and not a commercial risk or a sovereign risk. A commercial risk covers, inter alia, the risk that one of the parties might default on its obligation, which risk exists*

in any economic relationship. A sovereign risk includes the risk of interference of the Government in a contract or any other relationship, which risk is not specific to public bonds.

370. Under the objective approach, commercial and sovereign risks are distinct from operational risk. The distinction here would be between a risk inherent in the investment operation in its surrounding – meaning that the profits are not ascertained but depend on the success or failure of the economic venture concerned – and all the other commercial and sovereign risks.²⁷⁸

294. The Tribunal accepts these criteria for the concept of a protected investment – “a contribution to an economic venture of a certain duration implying an operational risk” – and will analyse the Claimants’ alleged investment in the Montrose Land against these criteria.

295. The Respondent bases this Preliminary Jurisdictional Objection on the lack of credible evidence in the record that either Montrose or Mr Eyre paid consideration for the alleged transfer of the Montrose Land from Electro Resorts. Sri Lanka also rejects the Claimants’ contention that they do not need to prove payment for the Montrose Land itself, but can rely on proof of Mr Eyre’s contribution to the Hotel Project under principles of unity of investment. Sri Lanka argues that the Claimants cannot rely upon principles of unity of investment to prove that the Hotel Project qualifies as an investment under Article 1 of the BIT and Article 25(1) of the ICSID Convention, because they never obtained planning permission nor entered into contractual commitments to develop the bare Montrose Land. As the Hotel Project was only aspirational, the Claimants undertook at most pre-investment activity without incurring investment risk.

296. In support of their claim that the Montrose Land constitutes an investment, the Claimants argue that Mr Eyre “owned – both directly and indirectly – Montrose, which served as the investment vehicle for the entire Hotel Project”.²⁷⁹ They rely upon the unity of investment concept in *Inmaris v Ukraine*.²⁸⁰ Mr Eyre claims further that he made substantial

²⁷⁸ *Poštová Bank*, paras 361 and 367-370 (footnotes omitted), citing *Romak*, paras 229-230.

²⁷⁹ Memorial, para 112.

²⁸⁰ *Inmaris*, para 92.

contributions to the investment in the Hotel Project, by arranging for feasibility studies and development strategy reports, retaining Woods Bagot to prepare the initial architectural proposal, and approaching hotel management companies and potential sources of development finance in the private and public sectors. Once the Montrose Land was flooded, he made significant efforts to have the damage remedied and to find a solution by liaising with Sri Lankan officials. Mr Eyre also: (a) in 2003, lent approximately US\$ 1 million to Ravi Wethasinghe to obtain his initial security interest over the Montrose Land by way of lease; (b) in 2007, contributed US\$ 350,000 to the initial development costs of the Montrose Land; (c) in 2010, arranged the incorporation of Montrose and, through Mr Fernando, directed operations of the company; and (d) in 2010, through Montrose Singapore, paid the additional sum of US\$ 1 million to Electro Resorts to purchase the Montrose Land. Mr Eyre intended to be involved in the Hotel Project long-term, and certainly took on commercial risk. Finally, through Mr Eyre's efforts, the Hotel Project would have provided substantial work and jobs for the local community, as well as tax revenue to Sri Lanka.

297. For purposes of determining whether the Montrose Land constitutes a protected investment, the Tribunal considers that in this case and for the reasons explained above, the criteria of contribution and operational risk are sufficient to defeat jurisdiction *ratione materiae*.

298. As for Montrose, there is no evidence whatsoever on the record that Montrose itself paid any funds or made any other contribution towards the purchase of the Montrose Land from Electro Resorts or later towards the Hotel Development.

299. The situation is more complicated for Mr Eyre. Turning first to the Montrose Land itself, the Claimants admit that there was no written sale contract for the Montrose Land, and rely on the Deed of Transfer.²⁸¹ The Deed of Transfer recites that Montrose Singapore paid Electro Resorts consideration of Rs 100 million (approximately US\$ 887,000) for the Montrose Land, but the notary attested that she did not witness actual payment. The Claimants rely on evidence that payment came on 4 April 2011 from Montrose Singapore,

²⁸¹ Exhibit C-7.

although Montrose Singapore was not incorporated until September 2011, and the receipt from Electro Resorts is for US\$ 1 million.²⁸² Mr Eyre attempted to explain the difference with testimony that part of the consideration for the Montrose Land was his forgiveness of his earlier loans of US\$ 1 million and US\$ 350,000 to Ravi Wethasinghe, but there is no evidence on the record documenting that those loans were in fact made or, more importantly, connecting those loans to the sale and transfer of the Montrose Land.

300. Even accepting Mr Eyre's explanation that his dealings with the Ravi Wethasinghe and the Montrose Land were personal and hence suffered from a lack of his customary professional attention, the Tribunal cannot ignore the patent lack of credible evidence documenting the sale and transfer terms for the Montrose Land. The Tribunal cannot find, on a balance of the probabilities, that Mr Eyre – through Montrose or Montrose Global or any other Montrose Group entity – contributed funds towards the purchase of the Montrose Land or, in any event, that he (or Montrose Group companies) contributed more than US\$ 1 million. Even if he did contribute the US\$ 1 million referenced in the Electro Resorts receipt, it can only be seen, for purposes of this Preliminary Jurisdictional Objection, to have been for the bare land and hence contributed without investment risk. The Tribunal notes that Sri Lanka awarded Montrose close to US\$ 1 million – approximately US\$ 838,947 – for the undeveloped Montrose Land in December 2016.

301. Turning from the bare Montrose Land to the planned Hotel Project, the Tribunal agrees with the Respondent that principles of unity of investment²⁸³ do not elevate Mr Eyre's payments and efforts in relation to the potential hotel development and to the contribution and operational risk necessary to prove a qualifying investment under Article 1 of the BIT and Article 25(1) of the ICSID Convention. The Claimants have not proven, on a balance of the probabilities, that the Hotel Project was anywhere near a certainty before the dredging and compulsory State acquisition of the Montrose Land. The record reflects that Mr Eyre has not obtained formal planning permission and, in fact, there was no evidence that the suspension of the amended preliminary planning clearance application submitted on 12 March 2012 had been raised or of any application for it to be raised or for new

²⁸² Exhibit C-44.

²⁸³ For example, such as those addressed by the tribunal in *Inmaris v Ukraine*.

permission. Further, Mr Eyre has not, despite obviously substantial efforts, actually executed contractual commitments with architects, hotel management firms or financiers. The Claimants may be right in stating in the Memorial that the Hotel Project was recognised as “potentially lucrative”,²⁸⁴ but more than potential is necessary. There must have been substantive commitments and arrangements entered into, involving specific commitments and financial costs, all of which would entail both certain risks as well as possible benefits.

302. The Tribunal can find only that the Hotel Project remained at best aspirational at the time of the compulsory State acquisition in 2010.²⁸⁵ Consequently, Mr Eyre’s contributions rose only to the pre-investment level and he did not face the operational risk necessary for the Hotel Project to qualify as a protected investment for purposes of Article 1 of the BIT and Article 25(1) of the ICSID Convention.

303. To conclude, for the reasons stated above, the Tribunal accepts Sri Lanka’s Preliminary Jurisdictional Objection B (corresponding to Objection 7 in the Respondent’s Reply), and finds that it lacks jurisdiction *ratione materiae* over the Claimants’ claim based on the Montrose Land – whether bare land or as the base for the planned Hotel Project – which is not a protected investment under the BIT and the ICSID Convention.

(2) The Alleged Investment in the Montrose Share

304. The Respondent’s remaining Preliminary Jurisdictional Objections – Objections C and E through H – go to Mr Eyre’s alleged investment in the Montrose Share, which encompasses his alleged investment in the Hotel Project planned for the Montrose Land.

305. All of the remaining Preliminary Jurisdictional Objections are variations on the theme that Mr Eyre’s shareholder claims are parasitical to claims made by Montrose as the company through which Mr Eyre must claim, whether as indirect shareholder or beneficial owner of the Montrose Share. Preliminary Objection C (corresponding most closely to Objection 8 in the Respondent’s Reply) is expressly titled as such: “Any Alleged Shareholder Claim

²⁸⁴ Memorial, para 212.

²⁸⁵ This is similar to the situation in *Romak*, see paras 228-231.

Is Dependent Upon the Land Constituting an Asset of Montrose, Which It Is Not”. Preliminary Jurisdictional Objection E (corresponding most closely to Objection 1 in the Reply), which focuses on Mr Eyre’s alleged beneficial interest in the Montrose Share, echoes the Respondent’s arguments relating to indirect ownership of the Montrose Land in Preliminary Jurisdictional Objection B, complicated by questions as to whether Mr Fernando and later Montrose Singapore held the Montrose Share on trust for Mr Eyre. Preliminary Jurisdictional Objection F (corresponding to Objection 9 in the Reply) adds the allegation that, even if Mr Eyre did have a beneficial interest in the Montrose Share *via* a trust, that beneficial interest is void as unlawful tax evasion under Sri Lankan law. Preliminary Jurisdictional Objection G (corresponding most closely to Objections 4 and 5 in the Reply) essentially repeats the argument made in Preliminary Jurisdictional Objection B that the definition of investment in Article 1(a)(ii) of the BIT does not expressly include an “interest in shares” in the reference to “[s]hares ... and interests in property”. Finally, in Preliminary Jurisdictional Objection H (corresponding to Objection 3 in the Reply), the Respondent rejects any reflective loss claim for Mr Eyre based on any loss in value of the Montrose Share as a result of the alleged expropriation of the Montrose Land.

306. Based on the history of the Montrose Land transfer and the planned Hotel Project, and as the Tribunal has already observed, the Montrose Share could qualify as a protected investment under Article 1 of the BIT and Article 25(1) of the ICSID Convention only if Montrose itself had a protected investment in the Hotel Project on the Montrose Land. The Tribunal has already determined that the Montrose Land, whether alone or with the planned Hotel Project, does not qualify as a protected investment. Consequently, there is no need for the Tribunal to address and decide the remaining Preliminary Jurisdictional Objections. The Respondent’s Preliminary Jurisdictional Objections C, E, F, G and H (corresponding to Claims 8, 1, 9, 4-5 and 3 in the Respondent’s Reply) are dismissed.

IX. COSTS

A. THE CLAIMANTS' COST SUBMISSIONS

307. In their Statement of Costs, the Claimants seek total legal and expert costs for the jurisdictional phase of £418,697.78. This breaks down as follows:

Component	Amount
Solicitor Fees and Expenses (Bird & Bird LLP)	£205,297.78
Counsel Fees	£136,920.00
Sri Lankan Counsel Fees and Expenses	£72,540.00
Factual Witness Expenses	£3,940.00
TOTAL	£418,697.78

308. The Claimants also seek the Tribunal fees and other arbitration costs for the jurisdictional phase, including ICSID fees and venue, transcriber and interpreter fees, to be determined by the Tribunal.

B. THE RESPONDENT'S COST SUBMISSIONS

309. In its Schedule of Costs Relating to Jurisdiction, the Respondent seeks total legal and expert costs of £1,014,487.01, plus reimbursement of arbitration costs. The legal fees and expert costs break down as follows:

Component	Amount
Solicitor Fees (Clyde & Co LLP)	£271,065.65
Solicitor Fees (Allen & Gledhill)	£42,264.85

Expert Fees (Mazars LLP)	£26,056.62
Counsel Fees	£651,226.50
Disbursements (travel, hotel, bank charges, courier, photocopying, stationary, searches, sundries, USB devices)	£23,873.39
TOTAL	£1,014,487.01

The Respondent also seeks costs relating to the substantive proceedings incurred before the Tribunal's bifurcation decision, excluding costs of the jurisdiction application, in the total amount of £176,847.66. This includes solicitor fees, counsel fees, expert fees of Mr Eric Levy, and other disbursements.

C. THE TRIBUNAL'S DECISION ON COSTS

310. Article 61(2) of the ICSID Convention provides:

In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

311. This provision gives the Tribunal discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties as it deems appropriate.

312. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in US\$):

Arbitrators' fees and expenses	
Prof. Lucy Reed	122,956.76
Prof. Brigitte Stern	102,925.14
Prof. Julian Lew	87,370.19
ICSID's administrative fees	158,000.00
Direct expenses	42,412.92
Total	<u>513,665.01</u>

313. The above costs have been paid out of the advances made by the Parties.²⁸⁶ As a result, each Party's share of the costs of arbitration has amounted to US\$ 256,832.51.

314. In exercising its discretion, the Tribunal has considered that, although the Respondent has prevailed in having the arbitration dismissed for lack of jurisdiction *ratione materiae*, the Claimants did prevail on the Respondent's Preliminary Jurisdictional Objections based on jurisdiction *ratione personae* and on the Objection to jurisdiction *ratione materiae* based on the MOU. Further, even recognising the necessity for the Respondent to address the Claimants' evolving facts, the Tribunal considers Sri Lanka's legal fees to be excessively high, in part due to the unnecessarily complicated iterations of the Preliminary Jurisdictional Objections.

315. For these reasons, the Tribunal has determined that the Claimants and the Respondent should each bear their one-half of the total arbitration costs, and that the Claimants should pay the Respondent one-third of the total amount of its solicitors, counsel and expert fees and disbursements for the jurisdiction phase. The Tribunal denies the Respondent's claim for costs pre-dating the jurisdiction bifurcation decision.

²⁸⁶ The remaining balance will be reimbursed to the Parties in proportion to the payments advanced to ICSID.

X. AWARD

316. For the reasons set forth above, the Tribunal decides as follows:

- (1) The Tribunal has jurisdiction *ratione personae* as to the claims of both Claimants, and the Respondent's Preliminary Jurisdictional Objection D (corresponding to Objection 2 in the Respondent's Reply) is dismissed;
- (2) The Respondent's Preliminary Jurisdictional Objection B (corresponding to Objection 7 in the Respondent's Reply) is granted, and all of the Claimants' claims are dismissed for lack of jurisdiction *ratione materiae*;
- (3) The Respondent's Preliminary Jurisdictional Objections A (corresponding to Objection 6 in the Respondent's Reply, respectively) is dismissed;
- (4) All other Preliminary Jurisdictional Objections and claims are dismissed;
- (5) The Claimants are ordered to pay to the Respondent £338,162.34, which equals one-third of the total amount of its solicitor, counsel and expert fees, and disbursements for the jurisdiction phase; and
- (6) The Claimants and the Respondent are each to bear their one-half of the total arbitration costs of US\$ 256,832.51.

[signed]

Julian DM Lew QC
Arbitrator
1 MAR 2020

Date:

[signed]

Brigitte Stern
Arbitrator

Date:

28 FEB 2020

[signed]

Lucy Reed
President of the Tribunal

Date: 4 MAR 2020