EXTRACTS

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the annulment proceeding between

Mr. Raymond Charles Eyre and
Montrose Developments (Private) Limited

Applicants

v.

The Democratic Socialist Republic of Sri Lanka

Respondent

(ICSID Case No. ARB/16/25)
(Annulment Proceeding)

DECISION ON ANNULMENT

Members of the *ad hoc* Committee

Prof. Eduardo Zuleta, President
Dr. Nudrat E. Piracha, Member
Prof. Giorgio Sacerdoti, Member

Secretary of the *ad hoc* Committee
Ms. Martina Polasek

Date of Dispatch to the Parties: 2 December 2020

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Award	Award dated 5 March 2020, rendered in ICSID Case No. ARB/16/25
Applicants	Mr Raymond Charles Eyre and Montrose Developments (Private) Limited
Application	Application for Annulment, dated 1 May 2020
Applicants' Alternative Case	Case submitted by the Applicants in the letter dated 30 June 2020 and the Reply on Annulment requesting the annulment of the Award under Article 52(1)(b) and Article 52(1)(e) of the ICSID Convention on the basis that the Tribunal: (i) failed to apply the principle of unity of investment to the Applicants' investment operation or alternatively did not properly explain its application, (ii) failed to apply the concept of investment risk to the Applicants' investment operation or alternatively did not properly explain its application, and (iii) ignored evidence material to the Applicants case or alternatively failed to explain how it took account of that evidence.
Applicants' Primary Case	Case submitted by the Applicants in the Application for Annulment and the Reply on Annulment requesting the annulment of the Award under Article 52(1)(b) of the ICSID Convention on the basis that the Tribunal manifestly exceeded its powers by deciding in the Award, as a matter of law, that the Montrose Share did not qualify as an investment because the Montrose Land was not an investment itself and therefore Montrose Sri Lanka did not hold a qualifying investment.
Committee	*Ad hoc C*ommittee deciding the present annulment composed by Prof. Eduardo Zuleta (President), Dr Nudrat E. Piracha, and Prof. Giorgio Sacerdoti, constituted on 2 June 2020.
Counter-Memorial on Annulment	Counter-Memorial on Annulment submitted by the Respondent on 25 June 2020
Hearing	Hearing on Annulment held on 12 and 13 October 2020
Montrose Sri Lanka	Montrose Developments (Private) Limited

Mr Eyre	Mr Raymond Charles Eyre
Parties	Applicants and Respondent
P.O. No. 1	Procedural Order No. 1 issued on 16 July 2020
Rejoinder on Annulment	Rejoinder on the Annulment of the Award submitted by the Respondent on 16 September 2020
Reply on Annulment	Reply on the Annulment of the Award submitted by the Applicants on 21 August 2020
Respondent or Sri Lanka	The Democratic Socialist Republic of Sri Lanka
Tribunal	The Tribunal composed of Prof. Lucy Reed (President), Prof. Julian DM Lew QC, and Prof. Brigitte Stern that issued the Award.
Waiver Issue	Whether the Applicants waived their right and/or are time barred to present additional grounds for annulment not included in the Application.

I. INTRODUCTION

1. This annulment proceeding relates to the Award dated 5 March 2020, rendered in ICSID Case No. ARB/16/25 between Mr Raymond Charles Eyre and Montrose Developments (Private) Limited, on the one side, and the Democratic Socialist Republic of Sri Lanka, on the other side (the "**Award**"). The Award, rendered by a Tribunal composed of Prof. Lucy Reed (President), Prof. Julian DM Lew QC and Prof. Brigitte Stern (the "**Tribunal**"), dismissed jurisdiction for lack of jurisdiction *ratione materiae* and ordered the Claimants to pay to the Respondent GBP 338,162.34 for the Respondent's legal and other costs.

II. THE PARTIES

2. The Applicants are Mr Raymond Charles Eyre ("**Mr Eyre**") and Montrose Developments (Private) Limited ("**Montrose Sri Lanka**") (the "**Applicants**"). In this proceeding, the Applicants are represented by:

Mr Raymond Eyre
[redacted]

Mr Christopher Harris QC
Dr Cameron Miles
3 Verulam Buildings
Gray's Inn
London WC1R 5NT
United Kingdom

Ms Sophie Eyre
Ms Rhiannon Price
Bird & Bird LLP
12 New Fetter Lane
London EC4A 1JP
United Kingdom

3. The Respondent is the Democratic Socialist Republic of Sri Lanka (the "**Respondent**" or "**Sri Lanka**"). In this proceeding, the Respondent is represented by:

Hon Dapula de Livera, President's Counsel
Mr Milinda Gunetilleke
Mr Nirmalan Wigneswaran
Ms Anusha Jayatilake
Attorney General's Office
P.O. Box 502, Hulftsdorp
Colombo 12
Democratic Socialist Republic of Sri Lanka

Mr Ricky Diwan QC
Essex Court Chambers
24 Lincoln's Inn Fields
London WC2A 3EG
United Kingdom

Mr John Whittaker
Ms Caitríona McCarthy
Ms Sophie Morrison
Ms Claire Mayo
Clyde & Co LLP
The St Botolph Building
138 Houndsditch
London EC3A 7AR
United Kingdom

4. The Applicants and the Respondent are collectively referred to as the "**Parties**".

III. PROCEDURAL HISTORY

5. On 1 May 2020, the Applicants presented an Application for Annulment (the "**Application**") of the Award. Under Article 52(5) of the ICSID Convention, the Applicants requested that the ICSID Secretary-General provisionally stay the enforcement of the Award until the *ad hoc* Committee rules on such request, and that the stay be maintained until the *ad hoc* Committee renders a decision on the Application.

6. On 6 May 2020, the ICSID Secretary-General registered the Application and notified the Parties that, under ICSID Arbitration Rule 54(2), the enforcement of the Award was provisionally stayed.

7. On 2 June 2020, the *ad hoc* Committee was constituted under ICSID Arbitration Rules 6 and 53. Its members are Prof. Eduardo Zuleta (President), Dr Nudrat E. Piracha, and Prof. Giorgio Sacerdoti (the "Committee"), appointed by the Chairman of the Administrative Council. Ms. Martina Polasek, ICSID Deputy Secretary-General, was designated to serve as Secretary of the Committee.

8. On 5 June 2020, the Committee invited the Applicants to file a submission stating the reasons for the stay of enforcement of the Award by 15 June 2020. In turn, the Committee invited the Respondent to submit its observations on the Applicants' submission by 25 June 2020. The Parties presented their submissions as scheduled. In the Response submitted by the Respondent on 25 June, among other issues, it claimed that Montrose Sri Lanka had no standing to request the stay of enforcement and to appear as an applicant in the annulment proceedings.

9. On 25 June 2020, the Respondent submitted its Counter-Memorial on Annulment.

10. On 30 June 2020, the Applicants presented their Reply to the Respondent's objection to the stay with two letters, one signed by Mr Raymond C. Eyre and the other by Applicants' counsel, Dr Cameron Miles. The letter signed by Dr Miles included additional grounds and arguments for requesting the annulment of the Award.

11. On 1 July 2020, the Secretary of the Committee informed the Parties that given the additional round of pleadings on the request for a stay of enforcement of the Award, the Committee had extended the provisional stay of enforcement until it received both Parties' submissions and reached a decision.

12. On 3 July 2020, the Respondent presented its Rejoinder on the Stay of Enforcement of the Award.

13. On 15 July 2020, the Parties, the Committee, and the ICSID Secretariat held the First Session.

14. On 16 July 2020, the Committee issued its Decision on the stay of enforcement of the Award, ordering to maintain the stay of enforcement of the Award pending its decision on the Application. The Committee reasoned as follows:

> *78. In view of the Parties' submissions, the Committee considers that three circumstances must be analysed cumulatively in the case at hand: (i) the risk of non-payment of the Award if the Application for Annulment is rejected; (ii) the risk of non-recovery if the stay is lifted and the Award is annulled; and (iii) the balance of hardship between the Parties.*
>
> *79. The Committee considers that it must balance the potential prejudice that each party would suffer if the stay is maintained or terminated and, therefore, will exercise its discretion in view of balancing the interests of the Parties by appreciating the circumstances as specified by them. […]*
>
> *a. Risk of non-payment*
>
> *[…]*
>
> *86. The Committee notes that the risk of non-payment must be objective and supported with evidence. Considering the allegations and documents presented by the Parties, the Committee concludes that there is not enough evidence to determine that a considerable risk of non-payment exists. […]*
>
> *b. Risk of non-recoupment*
>
> *87. The Committee notes that the risk of non-recoupment must be objective and supported with evidence. Considering the allegations and documents presented by the Parties, the Committee finds that there is no considerable risk of non-recoupment if the Application is upheld. […]*
>
> *c. Balance of hardship*
>
> *[…]*
>
> *94. Thus, the Committee concludes that the balance of hardship weighs in favour of the Applicant. If the stay is upheld, it would*

> *continue for a short period that would be compensated by the interest accrued. Conversely, – and given Montrose's non-availability of funds and the effects of the COVID-19 pandemic on Mr Eyre's businesses –, if the stay is lifted, the Applicants would suffer prejudice beyond the inherent or normal effects of an adverse ICSID award subject to /pending annulment proceedings.*
>
> *95. As regards Respondent's request to condition the stay upon posting of security, the Committee observes (i) that Sri Lanka has not demonstrated risk of non-payment by the Applicants; (ii) that the grant of the security would place the Respondent in an advantageous position which will be unjustified given the short timelines of these proceedings, Mr Eyre's undertaking regarding the availability of funds, and the relatively small sum of the cost to be paid by the Applicants and that a larger sum was granted under the LAA Award; and (iii) that the proposed security would cause considerable financial strain on the Applicants (as already set out). Therefore, the Committee considers that no additional security besides Mr Eyre's undertaking is justified. […]*[1]

15. In respect of the issue regarding Montrose Sri Lanka's standing to appear as applicant in the present annulment proceedings, the Committee concluded that:

> *it is uncontested between the Parties that the Annulment Application and the request for stay were presented by both Mr Eyre and Montrose Sri Lanka. Therefore, for the decision on the Stay of Enforcement of the Award, the Committee will consider as applicants those who applied for annulment. The issues of standing as submitted by Respondent, including the effects of an annulment regarding each of the Applicants, refer to the merits of the annulment itself and therefore is a matter to be decided at a later stage. Therefore, the Committee will decide on the stay of the Award without prejudice to any claims that Respondent may have during the annulment proceedings as to the effects of the Award on each of Mr Eyre and Montrose [Sri Lanka].*[2]

16. On 16 July 2020, the Committee issued Procedural Order No. 1 ("**P.O. No. 1**"), where it set out the procedural rules that the Parties agreed, and that the Committee determined shall govern the annulment proceedings. According to Annex A of P.O. No. 1, the procedural

[1] Decision on Stay of Enforcement of the Award, 16 July 2020, ¶¶ 78-79, 86-87, 94-95.
[2] Decision on Stay of Enforcement of the Award, 16 July 2020, ¶¶ 46-47.

calendar was fixed as follows: by 21 August 2020, the Applicants shall submit their Reply on Annulment; by 11 September 2020, the Respondent shall submit its Rejoinder on Annulment; on 1 or 2 October 2020, the Pre-Organizational Meeting would take place if necessary; and the Hearing on Annulment (the "**Hearing**") shall take place on 12 and 13 October 2020 (remotely if necessary).

17. On 21 August 2020, the Applicants submitted their Reply on Annulment.

18. On 7 September 2020, under Section 17.2 of Procedural Order No. 1, the Committee confirmed that the Hearing would be held remotely by videoconference given that a hearing in person was not feasible due to the restrictions resulting from Covid-19. The Committee also decided that it was unnecessary to hold the pre-hearing conference and decided on the Hearing schedule considering the Parties' positions on the schedule.

19. On 16 September 2020, the Respondent submitted its Rejoinder on Annulment.

20. On 5 October 2020, after consulting the Parties, the Committee issued the "Protocol Regarding Remote Hearing Matters."

21. The Hearing took place on 12 and 13 October 2020 by video conference.

22. The following persons attended the Hearing:

Committee:

Mr. Eduardo Zuleta	President
Dr. Nudrat E. Piracha	Arbitrator
Prof. Giorgio Sacerdoti	Arbitrator

ICSID Secretariat:

Ms. Martina Polasek	Secretary of the Committee
Ms. Lamiss Al-Tashi	Hearings & Events Organizer
Ms. Ekaterina Minina	Paralegal
Mr. Jeremy Stephen Myers	Technician
Mr. Emebet Alemu Demissie	Technician
Ms. Olivia Le Menestrel	Intern

For the Applicants:	
Dr. Christopher Harris QC	3 Verulam Buildings
Dr. Cameron Miles	3 Verulam Buildings
Ms. Rhiannon Price	Bird & Bird LLP
Mr. Raymond Eyre	Montrose Global Aircraft Management
For the Respondent:	
Mr. Ricky Diwan QC	Essex Court Chambers
Mr. John Whittaker	Clyde & Co LLP
Ms. Sophie Morrison	Clyde & Co LLP
Ms. Sarah Hill-Smith	Clyde & Co LLP
Mr. Milinda Gunetilleke	Attorney General's Department
Mr. Nirmalan Wigneswaran	Attorney General's Department
Ms. Anusha Jayatilake	Attorney General's Department
C.B Amarasinghe	Sri Lanka Land Reclamation and Development Corporation
H.K.K.W. Ekanayake	Sri Lanka Land Reclamation and Development Corporation
Court Reporter	
Ms. Diana Burden	Court Reporter
Observer:	
Ms. Maria Camila Rincon	Junior Lawyer working with the President of the Committee

23. Further to the Committee's directions of 22 October 2020, on 30 October 2020, the Parties submitted their respective statements on costs. The Committee ruled that no submissions on the allocations of costs were necessary.

IV. POSITION OF THE PARTIES

24. In their Application for Annulment, the Applicants requested the annulment of the Award under Article 52(1)(b) of the ICSID Convention, arguing that the Tribunal manifestly exceeded its powers by deciding in the Award, as a matter of law and treaty interpretation, that the Montrose Share did not qualify as an investment because the Montrose Land was

not an investment itself and therefore Montrose Sri Lanka did not hold a qualifying investment (the "**Applicants' Primary Case**").

25. During the proceedings regarding the stay of enforcement of the Award, the Respondent contended that Montrose Sri Lanka is not a proper Applicant to the annulment proceedings because it did not challenge the determination in the Award that the Montrose Land was not an investment. The Applicants counter this position (the "**Standing Issue**").

26. On 25 June 2020, in its Counter-Memorial on Annulment, the Respondent submitted that the Applicants' Primary Case is based on a flawed reading of the Award because the Tribunal did not conclude, as a finding of law, that the Montrose Share was not an investment. The Tribunal's decision was based on a finding of facts.

27. After the Respondent submitted its Counter-Memorial on Annulment, by letter dated 30 June 2020, the Applicants raised additional grounds for the annulment of the Award and informed the Committee that "they will develop fully these arguments in their Reply Memorial."[3] As advanced by the Applicants, their alternative case was developed in the Reply on Annulment, requesting the annulment of the Award based on Article 52(1)(b) and (e) of the ICSID Convention (the "**Applicants' Alternative Case**").

28. In the Counter-Memorial on Annulment and the Rejoinder on Annulment, the Respondent contended that the Applicants waived their right and/or are time barred to present additional grounds for annulment not included in the Application (the "**Waiver Issue**"). The Applicants counter this position.

29. For the sake of clarity and conciseness, in view of the positions raised by the Parties throughout the annulment proceedings, the Committee will present the Parties' positions under the following headings: (A) the Standing Issue, (B) the Applicants' Primary Case, (C) the Waiver Issue, and (D) the Applicants' Alternative Case.

[3] Letter from Dr Cameron Miles to the Tribunal, 30 June 2020, p. 3.

A. THE STANDING ISSUE

(1) The Applicants' Position

30. The Applicants counter the Respondent's position regarding Montrose Sri Lanka's standing as an applicant in the present proceedings. The Applicants remark that they both presented the Annulment and Stay Applications and that they both seek the total annulment of the Award. The Applicants further claim that jurisdictional determinations cannot be partially annulled. Even if a partial annulment were possible, it would impact Montrose's obligations under the Award.[4]

(2) The Respondent's Position

31. The Respondent contends that Montrose Sri Lanka has no standing to appear as an applicant in the present annulment proceedings because in the Application it raised no ground to challenge the determination in the Award that it had no investment protected under the BIT. Therefore, Montrose Sri Lanka must comply with the Award.[5]

B. THE APPLICANTS' PRIMARY CASE

(1) The Applicants' Position

32. The Applicants' Primary Case refers to the conclusion reached by the Tribunal in the Award to the effect that the Montrose Share could only qualify as a protected investment under Article 1 of the BIT and Article 25(1) of the ICSID Convention if Montrose Sri Lanka itself had a protected investment in the Hotel Project or the Montrose Land. According to the Applicants, such interpretation is wrong in law, and the Award must be annulled under Article 52(1)(b) of the ICSID Convention.[6]

[4] Applicants' Reply on the Stay of Enforcement of the Award, p. 2-3.
[5] Respondent's Response to Applicants' Request to Stay the Enforcement of the Award, 25 June 2020, ¶ 59.
[6] Application for Annulment, 1 May 2020, ¶¶ 29-39; Reply on Annulment, 21 August 2020, ¶ 38.

(a) Article 52(1)(b) of the ICSID Convention

33. As to interpreting the ground of "manifest excess of power" set out in Article 52(1)(b) of the ICSID Convention, the Applicants contend that an award may be annulled under this ground where a tribunal fails to exercise a jurisdiction it possesses.[7] For an award to be annulled, the error of jurisdiction must be manifest,[8] which means that it must be "obvious by itself."[9] Manifest excess does not mean, however, that the excess must "leap out of the page on a first reading of the award," given that "[t]he reasoning in a case may be so complex that a degree of inquiry and analysis is required before it is clear precisely what the tribunal has decided."[10]

34. The Applicants submit that the Respondent errs when it implies that jurisdictional determinations of law and fact cannot be challenged under Article 52(1)(b). To support their position, the Applicants refer to the decision on annulment in *Occidental v. Ecuador* to argue that "[j]urisdictional excess of powers requires a finding that the tribunal has misconstrued the applicable law (e.g. the law regulating ownership of a protected investment) or has wrongly established the relevant facts (e.g., whether an investor actually controls an investment)." Such excess must be manifest.[11]

35. The Applicants contend that just because another case or cases support a tribunal's approach to the law, it does not follow *ipso facto* that an award should not be annulled.[12]

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[7] Application for Annulment, 1 May 2020, ¶¶ 26-27.
[8] Application for Annulment, 1 May 2020, ¶ 28.
[9] Reply on Annulment, 21 August 2020, ¶ 9.
[10] See Reply on Annulment, 21 August 2020, ¶ 9, where the Applicants refer to *EDF International SA, SAUR International SA & León Participaciones Argentinas SA v Argentine Republic*, ICSID Case No ARB/03/23 (Decision on Annulment, 5 February 2016) ¶ 193 (**ALA-11**).
[11] See Reply on Annulment, 21 August 2020, ¶¶ 11-13, where the Applicants refer to *Occidental Petroleum Corporation & Occidental Exploration and Production Company v Republic of Ecuador*, ICSID Case No ARB/06/11 (Decision on Annulment of the Award, 2 November 2015) ¶ 51 (**ALA-13**).
[12] See Reply on Annulment, 21 August 2020, ¶ 13, where the Applicants refer to V Djanic & SW Schill, 'Article 52(1)(b)', in J Fouret et al (eds), The ICSID Convention, Regulations and Rules: A Practical Commentary (Edward Elgar 2019) ¶ 4.1015 (**ALA-16**).

36. While the Applicants acknowledge that a certain deference should be paid to a tribunal's findings, such deference is limited and should not substitute the Committee's independent analysis.[13]

(b) The Tribunal manifestly exceeded its powers by declining its jurisdiction ratione materiae under a wrong finding of law

37. For the Applicants, the Tribunal's decision to decline its jurisdiction *ratione materiae* is based on the incorrect premise that a share in a company can only be considered an investment if that company itself owns an investment. It is the only decision of which the Applicants are aware that adopted such an approach.[14]

38. The Tribunal's approach is contrary to the express wording of the BIT, which in Article 1(a)(ii) provides that an "investment" means "every kind of asset and in particular, though not exclusively […] shares, stock and debentures of companies or interests in the property of such companies". Article 1(a)(ii) includes no condition that the company in question owns a protected investment itself.[15]

39. The Tribunal's conclusion is also inconsistent with the wording of Article 25(1) of the ICSID Convention. While some tribunals have sought to introduce into Article 25(1) an "inherent meaning" of the word "investment," that test does not require that, where an investment consists of shares in a company, the investor must satisfy the requirements of Article 25(1) not only for the shares but also with respect to any assets the company holds.[16]

40. According to the Applicants, the Tribunal's error is clearly and unambiguously communicated in paragraph 292 of the Award, which states that "the Montrose Share can qualify as a protected investment under the ICSID Convention and BIT only if Montrose itself has a protected investment in the planned Hotel Project on the Montrose Land."[17]

[13] Reply on Annulment, 21 August 2020, ¶ 16.
[14] Application for Annulment, 1 May 2020, ¶ 35.
[15] Application for Annulment, 1 May 2020, ¶ 36.
[16] Application for Annulment, 1 May 2020, ¶ 37.
[17] Reply on Annulment, 21 August 2020, ¶ 39, referring to Award, ¶ 292.

41. On the other hand, the Applicants object to the Respondent's reading of the Award; namely, that the Tribunal's finding on the Montrose Share and the Montrose Land is a finding of facts, not of law. The Applicants argue that such reading is untenable for two reasons: (i) the jurisdictional objection that Sri Lanka now claims the Tribunal upheld in the Award was never raised in terms; and (ii) even if the objection had been raised, an examination of the relevant part of the Tribunal's reasoning shows that this was not the point being addressed.

42. As to the first point, the Applicants contend that the Respondent wrongfully claims that in the Award, the Tribunal upheld Sri Lanka's jurisdictional objection that the Applicant's claim concerning the Montrose Share was parasitic on their claim for the Montrose Land when applying the *Salini* test. That is because Sri Lanka never raised such objection in terms. The references pointed out by the Respondent in its Reply on Jurisdiction, in the transcript of the oral hearings, and in its Post-Hearing Brief refer to a different objection: that the Montrose Land was owned by Electro Resorts and that neither Mr Eyre nor Montrose Sri Lanka could bring a claim before the Tribunal because Mr Eyre's indirect rights were parasitic on Montrose Sri Lanka's direct rights on the Montrose Land. Said objection was not addressing the *Salini* factors –as claimed by the Respondent–, but the question of who owned the Montrose Land.[18]

43. As to the second point, the Applicants argue that even if Sri Lanka objected in the terms it now claims, the terms of the Award make clear that the Tribunal was not upholding such objection. Sri Lanka's submission is that after the Tribunal had considered Mr Eyre's contributions to the Montrose Land and Hotel Project and found them wanting for lack of investment risk, "no independent factual basis existed for the Montrose Share to constitute an 'investment' and it fell away for precisely the same reasons."[19] If this were the reasoning of the Tribunal, it would have had to consider every individual item that Mr Eyre relied on to establish contribution and investment risk when considering the Montrose Land and Hotel Project and found each of them lacking, so there was "no independent factual basis"

[18] Reply on Annulment, 21 August 2020, ¶¶ 45-53.
[19] Reply on Annulment, 21 August 2020, ¶ 55.

remaining for the Montrose Share to stand as an investment.[20] The Tribunal, however, did not consider every item in paragraph 296 of the Award, where it listed Mr Eyre's contributions. In the said paragraph, the Tribunal did not refer to Mr Eyre's contributions in "(a) establishing and operating a Sri Lankan company from 2010 onwards, and/or (b) directing that company's activities before Sri Lanka's Land Acquisition Board after the Montrose Land was expropriated."[21] For the Applicants, the Tribunal saw no need to examine these contributions because it was operating on the footing that unless that company had an investment of its own in the Montrose Land, the Montrose Share could not constitute an investment.[22]

44. Finally, the Applicants note that Sri Lanka did not even attempt to counter the Applicants' position under their reading of the Award. This omission is tantamount to an admission that, if the Applicants are right in their reading of the Award, the annulment must necessarily follow.[23]

(2) The Respondent's Position

(a) Article 52(1)(b) of the ICSID Convention

45. The Respondent begins by noting that it is "not within the powers of an annulment committee to decide whether it agrees or disagrees with the conclusions of the Tribunal and to substitute its judgment on jurisdictional requirements (including treaty interpretation), the interpretation of the law and/or the assessment of the facts. The committee may only assess whether, in reaching its conclusion, the tribunal manifestly exceeded its powers."[24]

46. The Respondent defines the contours of Article 52(1)(b) by indicating that fact-findings and the weighing of evidence made by tribunals are outside the scope of review of an *ad hoc* committee unless the applicant can prove that the errors of fact-finding committed by

[20] Reply on Annulment, 21 August 2020, ¶ 56.
[21] Reply on Annulment, 21 August 2020, ¶ 60.
[22] Reply on Annulment, 21 August 2020, ¶ 61.
[23] Reply on Annulment, 21 August 2020, ¶ 40.
[24] Counter-Memorial on Annulment, 25 June 2020, ¶ 17.

the tribunal are egregious and irrational.[25] Likewise, an alleged wrong application or interpretation of the law is not a ground for annulment unless the misinterpretation or misapplication is so gross or egregious as substantially to amount to a failure to apply the proper law.[26] These rules apply to any contention regarding manifest excess of jurisdiction.

47. The erroneous application of law must be distinguished from its non-application. The former does not lead to an excess of power.[27] This approach constitutes *jurisprudence constante*. The contrary approach would constitute a *de novo* review of the case, which would be inconsistent with the object and purpose of Article 52 of the ICSID Convention and to its drafting history.[28]

48. The Respondent refutes the Applicants' contention that if the Tribunal whose award is under challenge rules in a similar manner as a previous tribunal has ruled on the matter, the possibility of a manifest excess of power is excluded. If a prior tribunal has interpreted or applied a treaty term or concept in a similar manner to that of the Tribunal, it would be virtually impossible to say that the Tribunal has acted in a way that no reasonable person could have acted. To support its position, the Respondent refers to the annulment decisions in *Caratube v. Kazakhstan* and *SGS v. Paraguay*.[29]

49. The degree of inquiry required to determine whether a tribunal manifestly exceeded its powers must be analysed on two levels: (i) the level of analysis required to understand the decision; and (ii) once understood, the level of ease with which the excess of power can be detected. In respect of the latter, it should not be necessary to resort to complex argumentation and analysis to find the existence of an excess of power.[30] As recognized in

[25] Rejoinder on Annulment, 16 September 2020, ¶ 94.
[26] Rejoinder on Annulment, 16 September 2020, ¶¶ 95-96.
[27] See Rejoinder on Annulment, 16 September 2020, ¶ 101, referring to *Tenaris S.A. and Talta v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, Decision on Annulment of 28 December 2018 at ¶¶ 49, 55 (**RL-4**).
[28] Rejoinder on Annulment, 16 September 2020, ¶¶ 98-99.
[29] See Rejoinder on Annulment, 16 September 2020, ¶¶ 104-105, referring to *Caratube International Oil Company LLP v Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on Annulment of 21 February 2014 at ¶¶ 163-167 (**RL-24**), and *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Annulment, 19 May 2014 at ¶¶ 114-122 (**RL-20**).
[30] See Rejoinder on Annulment, 16 September 2020, ¶¶ 110-112, referring to *Tenaris S.A. and Talta v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, Decision on Annulment of 28 December 2018 at ¶ 76-80 (**RL-4**).

SGS v. Paraguay, an excess of power must be manifest and thus must be easily perceived, self-evident, and not the result from extensive interpretation.[31]

50. Finally, the Respondent remarks that the ground for annulment provided for in Article 52(1)(b) must be distinguished from the one set out in Article 52(1)(e). Thus, the Applicants cannot seek to introduce into Article 52(1)(b) an attack on reasoning referring to the failure to state reasons in the award, falling under Article 52(1)(e).[32] Yet, as analysed *infra*,[33] the Respondent contends that the Applicants waived their right to invoke Article 52(1)(e), as they did not raise this ground in the Application for Annulment.

(b) The Applicants' reading of the Award is incorrect

51. The Respondent considers that the Applicants' Primary Case is flawed because it constitutes a fundamental misreading of the Award.[34]

52. The Applicants' Primary Case is that the Tribunal committed a manifest excess of power under Article 52(1)(b) of the ICSID Convention by allegedly interpreting Article 1 of the BIT and Article 25(1) of the ICSID Convention at paragraph 306 of the Award as requiring that an investor in shares must establish in law – as a condition precedent– that the assets of the company qualify as an investment.[35] For the Respondent, such reading of the Award is wrong. In paragraph 306 of the Award, the Tribunal rejected the claim that the Montrose Share constituted an investment on the facts. It did so because the determination that the Montrose Land was not an investment was outcome determinative of the issue as a matter of fact and not of treaty interpretation.[36]

[31] See Rejoinder on Annulment, 16 September 2020, ¶ 111, referring to *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Annulment, 19 May 2014 at ¶¶ 114-119 (**RL-20**).
[32] Counter-Memorial on Annulment, 25 June 2020, ¶¶ 22-28.
[33] See Section IV(C)(2).
[34] Rejoinder on Annulment, 16 September 2020, ¶ 3.
[35] Rejoinder on Annulment, 16 September 2020, ¶ 2.
[36] Rejoinder on Annulment, 16 September 2020, ¶ 3.

53. The only issue of treaty interpretation in dispute between the Parties was whether the term "investment" as used in Article 25(1) of the ICSID Convention and Article 1 of the BIT had an inherent meaning.[37]

54. The treaty interpretation case advanced by the Applicants as their Primary Case was not raised by either party before the Tribunal. It is implausible that the Tribunal decided a point of treaty interpretation not argued by the Parties and without allowing them to address it. Consequently, the Respondent declines to engage in an alleged case of treaty interpretation that was never argued or decided by the Tribunal.[38]

55. The Applicants contend that the Tribunal failed to address each contribution relied upon by them, referring to two items omitted from the list contained in paragraph 296 of the Award. That is a complaint regarding the Tribunal's reasoning and demonstrates that the Tribunal was addressing a factual question, not a treaty interpretation question.[39]

56. The scheme of the Award follows the scheme of the Parties' arguments. First, it defined the issue of interpretation regarding the inherent meaning of the term "investment" in paragraphs 293 and 294 of the Award. Then, it applied that treaty interpretation to the Montrose Land and the Montrose Share, as set out in paragraphs 296 to 306 of the Award. The conclusion at paragraph 306 that the Montrose Share did not qualify as an investment since the Montrose Land did not qualify as an investment was an application of the term "investment" to the facts.[40] If the Montrose Land did not constitute an investment, there was no basis on which the Montrose Share was capable of being an investment. Indeed, no independent basis was contended for the Montrose Share being an investment.[41]

57. Finally, the Respondent considers that the Applicants miss the point by arguing that during the arbitration proceedings the Respondent did not use the term "parasitic" in the specific context of the application of the *Salini* factors to the issue of whether the Montrose Share

[37] Rejoinder on Annulment, 16 September 2020, ¶¶ 4, 27-32.
[38] Rejoinder on Annulment, 16 September 2020, ¶¶ 4, 45.
[39] Rejoinder on Annulment, 16 September 2020, ¶¶ 4, 56-58.
[40] Rejoinder on Annulment, 16 September 2020, ¶¶ 4, 33-41, 48-51.
[41] Rejoinder on Annulment, 16 September 2020, ¶ 6.

was an investment. The point is that the Respondent specifically refuted the Applicant's contentions that the inherent meaning of the term "investment" had been satisfied on the facts. According to the Respondent, if Montrose Sri Lanka did not own the Montrose Land, the Montrose Share claim would fail as being "parasitic" because if the company had no assets and hence no investment, the elements of the Salini Test would not be complied with. The same would apply if the only asset of the company bore no investment risk.[42] The Respondent claims that, in any event, it also separately stated in the arbitration proceedings that if there was no investment in the Montrose Land, there would be no investment in the Montrose Share because it was parasitic.[43]

C. THE WAIVER ISSUE

(1) The Applicants' Position

58. The Applicants counter the Respondent's contention that they "waived their right to advance any such new ground," referring to the Alternative Case raised by the Applicants after the Respondent submitted its Counter-Memorial. For the Applicants, it is wrong to conclude that "once an application for annulment is lodged, the applicant's position is set in stone and any and all other grounds are deemed waived." [44]

59. The Applicants note that the only express limitation on raising grounds of annulment is the 120 days set forth in Article 52(2) of the ICSID Convention. The Applicants raised both of their grounds for annulment (Articles 52(1)(b) and Article 52(1)(e)) within that 120-day time limit. The Award is dated 5 March 2020, meaning the 120 days expired on 3 July 2020. The first ground was raised in the Application dated 1 May 2020, and the second ground was raised in the letter dated 30 June 2020.[45] In any event, it is permissible that an

[42] Rejoinder on Annulment, 16 September 2020, ¶¶ 52-55.
[43] Rejoinder on Annulment, 16 September 2020, ¶¶ 52-55.
[44] Reply on Annulment, 21 August 2020, ¶ 135.
[45] Reply on Annulment, 21 August 2020, ¶¶ 136, 138.

applicant advances new arguments regarding existing grounds even after the 120-day time limit has elapsed.[46]

60. The Applicants argue that Sri Lanka's opposition to the Additional Points is ironical. In the underlying arbitration, Sri Lanka sought to introduce three new jurisdictional objections in its Reply on Jurisdiction, months after the deadline set in various provisions of the ICSID Arbitration Rules. Although the Applicants argued that these new objections should be excluded, they were admitted by the Tribunal.

61. Albeit Sri Lanka contends that Mr Eyre waived his right to raise additional points for the annulment of the Award by raising solely one ground in the Application, Sri Lanka fails to mention the crucial fact that the Application proceeded on the assumption that the meaning of the Award dealing with the Montrose Share would be common ground. Mr Eyre's additional points have been raised as a direct response to Sri Lanka's proposed reading of the Award. Moreover, Mr Eyre did not state unequivocally that he waived his right to raise further grounds or arguments about annulment if the need arose.[47]

62. Likewise, Montrose Sri Lanka did not waive its right to present its own basis for annulment in the Application. As made clear by the words "the Applicants have limited their application to a single particularly egregious example of procedural error", the Applicants gave themselves the freedom to change their position in later pleadings if they saw fit, provided that such change was not unduly prejudicial to Sri Lanka.[48] Such prejudice has not been alleged.

(2) The Respondent's Position

63. The Respondent submits that the Applicants waived their right and/or are time barred to present their Alternative Case by not stating such claim in the Application for Annulment.[49]

[46] Reply on Annulment, 21 August 2020, ¶ 138, referring to RL-15, Schreuer et al, ICSID Commentary, 929 (**RL-15**) and *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No ARB/98/4 (Decision on the Application by the Arab Republic of Egypt, 5 February 2002) ¶ 19 (**ALA-18**).
[47] Reply on Annulment, 21 August 2020, ¶¶ 152-157.
[48] Reply on Annulment, 21 August 2020, ¶¶ 158-160.
[49] Rejoinder on Annulment, 16 September 2020, ¶ 6-7.

64. For the Respondent, neither the language nor the object and purpose of Article 52 of the ICSID Convention support the Applicants' position.

65. Regarding the language, Article 52 provides for a single application for annulment to be made within a time limit of 120 days. It does not permit multiple applications or the amendment of an application made within the 120-day time limit.[50] Article 52(4) of the ICSID Convention reinforces the above because it specifically excludes the application of Article 46 – which permitted the Tribunal to determine an incidental or additional claim arising directly out of the subject-matter of the dispute provided the claim is within the scope of the consent of the parties and the jurisdiction of ICSID –to proceedings before the Annulment Committee. It therefore excludes the right to determine any incidental or additional claims in annulment proceedings.[51]

66. Regarding object and purpose, Article 52 is intended to be limited to the control of the fundamental integrity of the ICSID arbitral process, imposing a high threshold. If there is a glaring error that goes to fundamental integrity, it will be obvious, and an applicant does not need and should not have more than one shot at raising it.[52]

67. To support its case, the Respondent relies on Professor Schreuer's comments on the ICSID Convention to reject the contention that a party can amend an annulment application to assert new grounds for annulment not contained in the original annulment application.[53] It also rejects the application of the reasoning in *Wena Hotels v. Egypt,* given that is not a case concerned with waiver.[54]

68. The Respondent counters the Applicants' position that they can simply suggest an intention to add new grounds to their Annulment Application within the 120-day time limit to comply with the 120-day limit.[55]

[50] Transcript of Oral Hearing, 12 October 2020, p. 158: 6-18.
[51] Rejoinder on Annulment, 16 September 2020, ¶¶ 8, 64.
[52] Rejoinder on Annulment, 16 September 2020, ¶ 65.
[53] Rejoinder on Annulment, 16 September 2020, ¶ 65.
[54] Rejoinder on Annulment, 16 September 2020, ¶ 70.
[55] Rejoinder on Annulment, 16 September 2020, ¶ 75.

69. Furthermore, the Respondent argues that paragraph 3 of the Annulment Application contains an express waiver by Montrose Sri Lanka that it is not pursuing any other ground for annulment and an express choice by Mr Eyre to pursue only one ground for annulment being the alleged question of treaty interpretation concerning the Montrose Share, thus expressly waiving all other grounds for objection. Indeed, it was made clear that all other potential grounds for annulment were not being pursued.[56]

70. In the Application, Montrose Sri Lanka made expressly clear that it was not challenging the determination that the Montrose Land was not an investment. It therefore expressly waived any right to pursue any ground of annulment relating to the Montrose Land. Likewise, Mr Eyre expressly waived pursuing any unity of investment/investment risk argument [redacted].[57]

71. Based on the foregoing, the Respondent rejects the Applicants' reliance upon the letter of 30 June 2020 to include a new ground for the annulment of the Award.[58]

72. Finally, the Respondent contends that there is no justification for the Applicants' position that they could not have predicted the Respondent's interpretation of the Award.[59]

D. THE APPLICANTS' ALTERNATIVE CASE

(1) The Applicants' Position

73. The Applicants argue that even if the Committee agreed with Sri Lanka's reading of the Award, such reading reveals yet further annullable errors under Articles 52(1)(b) and (e) of the ICSID Convention.[60]

[56] Rejoinder on Annulment, 16 September 2020, ¶ 78.
[57] Rejoinder on Annulment, 16 September 2020, ¶¶ 81-84.
[58] Rejoinder on Annulment, 16 September 2020, ¶ 84.
[59] Rejoinder on Annulment, 16 September 2020, ¶ 84.
[60] Reply on Annulment, 21 August 2020, ¶ 65.

74. The Applicants request the annulment of the Award based on the following grounds: (i) that the Tribunal failed to apply the principle of unity of investment to the Applicants' investment operation or alternatively did not properly explain its application; (ii) that the Tribunal failed to apply the concept of investment risk to the Applicants' investment operation or alternatively did not properly explain its application; and (iii) that the Tribunal ignored evidence material to the Applicants' case and on which the Applicants placed considerable reliance or alternatively failed to explain how it took account of that evidence.

75. As to the first ground, the Applicants note that the Tribunal manifestly failed to apply the unity of investment principle to the Applicants' investment operation, which requires that an investment operation consisting of multiple transactions directed towards the same economic objective be assessed as a whole.[61] Had the Tribunal applied unity of investment or addressed the Applicants' investment operation as actually pleaded, [redacted][62]

76. The Tribunal's failure to apply unity of investment led it wrongfully to decline jurisdiction. This failure constitutes an excess of powers within the meaning of Article 52(1)(b) of the ICSID Convention, given that the Tribunal misconstrued the applicable law and wrongly established the relevant facts.[63] The Tribunal's failure also constitutes a failure to give reasons within the meaning of Article 52(1)(e), considering that its reasoning on the matter

[61] Reply on Annulment, 21 August 2020, ¶ 115.
[62] Reply on Annulment, 21 August 2020, ¶ 118.
[63] Reply on Annulment, 21 August 2020, ¶ 120, referring to *Occidental v Ecuador*, Decision on Annulment of the Award, ¶ 51 (**ALA-13**).

of unity of investment is patently insufficient, and does not enable a reader to understand how this conclusion was reached.[64]

77. As to the second ground,[65] the Tribunal also failed to apply the concept of investment risk that it identified as relevant, viz. a situation wherein "profits are not ascertained but depend on the success or failure of the economic venture concerned".[66] The Tribunal failed to apply this standard in two respects: (i) it failed to apply it to the acquisition of the Montrose Land, which it characterised as 'bare' and therefore acquired without investment risk. In so doing, it failed to apprehend the nature of land as an asset that is invariably acquired as an investment in its own right; (ii) it failed to apply its own standard to the Hotel Project itself. Rather, it applied the doctrine of pre-investment expenditure.

78. These failures led the Tribunal to decline its jurisdiction, which is a manifest excess of power under Article 52(1)(b) of the ICSID Convention and produced further annullable errors for the purpose of Article 52(1)(e). For the Applicants, it is not possible to determine on the face of the Award why a purchase of land cannot be considered an investment risk, given that (a) land is often held for an extended period of time in the hopes that its value will increase, and (b) the Montrose Land, in this case, was acquired by the Applicants expressly to pursue the Hotel Project. It is equally impossible to determine why the Tribunal (a) applied the concept of pre-investment expenditure to the Hotel Project when it said it was applying investment risk, and (b) applied pre-investment expenditure at all when the Applicants had acquired assets within Sri Lanka that took them out of the pre-investment phase of their project.[67]

79. As to the distinction between pre-investment and investment, the Applicants note that "there is no good reason as to why the signing of a contract should be the tipping point between pre-investment activity and an investment proper."[68] While it might be argued that the proposed development would never have occurred or is overvalued, these points are

[64] Reply on Annulment, 21 August 2020, ¶¶ 121-122.
[65] Reply on Annulment, 21 August 2020, ¶¶ 123-128.
[66] Reply on Annulment, 21 August 2020, ¶ 123.
[67] Reply on Annulment, 21 August 2020, ¶¶ 126-128.
[68] Reply on Annulment, 21 August 2020, ¶ 112.

relevant for the merits or the quantum phase of the proceedings. They have no bearing on the Tribunal's jurisdiction.[69]

80. As to the third ground, the Applicants claim that the Tribunal failed to take account of evidence on which they placed conspicuous reliance, such as [redacted][70]

81. The Applicants rely on *TECO v. Guatemala* to contend that the Tribunal's decision may be annullable under Article 52(1)(e) of the ICSID Convention, given it ignored material evidence that the parties deemed highly relevant to their case and, even if it found it of no assistance, it did not set out the reasons for this conclusion.[71] For these grave failures to take account of evidence too, the Award must be annulled under Article 52(1)(e) of the ICSID Convention.[72]

(2) The Respondent's Position

82. The Respondent argues that the Applicants are engaged in an attempt at appellate review and not annulment[73] and counters their contentions regarding (i) the alleged unity of investment principle, and (ii) the investment risk.

83. As to the unity of investment, the Respondent counters the Applicants' position that the Tribunal failed to correctly apply the unity of investment principle, which constitutes a manifest excess of power under Article 52(1)(b) for the reasons described below.[74]

[69] Reply on Annulment, 21 August 2020, ¶ 113.
[70] Reply on Annulment, 21 August 2020, ¶ 129.
[71] Reply on Annulment, 21 August 2020, ¶ 130.
[72] Reply on Annulment, 21 August 2020, ¶¶ 131-133.
[73] Rejoinder on Annulment, 16 September 2020, ¶ 18.
[74] Rejoinder on Annulment, 16 September 2020, ¶¶ 45-54.

84. First, this is not a case of non-application. The Tribunal considered and applied the unity of investment principle, but it rejected it on the facts in paragraph 301 of the Award.[75]

85. Second, case-law demonstrates that unity of investment gives substantive investment protection to an overall investment project provided that the investor can identify an investment within the overall investment project, and unity of investment does not elevate individual components of an alleged investment into an investment looked at as a whole if none of the components themselves can constitute an investment.[76]

86. Third, there is nothing egregious in the Tribunal's findings regarding the application of the unity of investment principle to the Montrose Land and the Montrose Share so that no reasonable person could have shared the Tribunal's view.[77]

87. The Respondent further objects to the application of Article 52(1)(e) to annul the Award because there is no difficulty in understanding the Tribunal's reasoning.[78]

88. As to the investment risk, the Respondent objects to the Applicants' position that the Tribunal failed to apply the principle of investment risk correctly and that this is tantamount to a manifest excess of power under Article 52(1)(b), for the reasons set out below.[79]

89. First, this is not a case of non-application of the law. At paragraphs 300 and 301 of the Award, the Tribunal determined that the Montrose Land as bare land bore no investment risk as opposed to commercial risk, absent specific commitments and arrangements towards the aspirational Hotel Project involving financial cost with risk and possible benefit. Therefore, this is not a case of non-application of the investment risk principle and is instead an attempt at an appellate review.[80]

[75] Rejoinder on Annulment, 16 September 2020, ¶ 19(1).
[76] Rejoinder on Annulment, 16 September 2020, ¶ 19(2)
[77] Rejoinder on Annulment, 16 September 2020, ¶ 19(3).
[78] Rejoinder on Annulment, 16 September 2020, ¶ 20.
[79] Rejoinder on Annulment, 16 September 2020, ¶¶ 54-64.
[80] Rejoinder on Annulment, 16 September 2020, ¶ 21(1).

90. Second, case law has distinguished between investment risk and commercial risk, and there is no basis for impugning the Tribunal's decision as constituting a manifest excess of power.[81]

91. Third, there is nothing egregious in the Tribunal's application of the principle such that no reasonable person could have shared the Tribunal's view.[82]

92. As to the Applicants' contention regarding the failure to state reasons under Article 52(1)(e), the Respondent alleges that it is misconceived because: (i) there is no difficulty in understanding the Tribunal's reasoning; and (ii) the Applicants' complaint that the Tribunal failed to expressly refer to the payment of stamp duty and the additional payment to get clean title for the land is irrelevant. For the Respondent, "[t]his was not outcome determinative evidence since it stood and fell with: a) the absence of investment risk; b) the determination that even if there had been payment for the Land, it would not have converted the acquisition into an investment. The Tribunal was under no obligation to refer to these two alleged contributions, which added nothing to the Applicants' case based on the Tribunal's analysis of investment risk and contribution."[83]

V. ANALYSIS OF THE COMMITTEE

A. THE STANDING ISSUE

93. As a preliminary matter, the Committee must decide on the Respondent's contention that Montrose Sri Lanka has no standing to appear as applicant in the present annulment proceedings because in the Application, it raised no ground to challenge the determination in the Award that it had no investment protected under the BIT.[84]

94. The Committee considers that there is no reason to uphold the Respondent's position.

[81] Rejoinder on Annulment, 16 September 2020, ¶ 21(2).
[82] Rejoinder on Annulment, 16 September 2020, ¶ 21(3).
[83] Rejoinder on Annulment, 16 September 2020, ¶ 22(2).
[84] Respondent's Response to Applicants' Request to Stay the Enforcement of the Award, 25 June 2020, ¶ 59.

95. First, it is undisputed that both Mr Eyre and Montrose Sri Lanka participated as claimants in the underlying arbitration. Therefore, both Applicants were entitled to request the annulment of the Award under Article 52 of the ICSID Convention.

96. Second, it is clear from the Application and subsequent memorials that both Mr Eyre and Montrose Sri Lanka are requesting the annulment of the Award. The fact that the Applicants pleaded a single ground for annulment as their Primary Case –not related to the Tribunal's determination that Montrose Sri Lanka did not have a protected investment under the BIT–does not mean that Montrose Sri Lanka has no standing to request the annulment of the Award.

97. Consequently, the Committee concludes that Montrose Sri Lanka does have standing in the present proceedings to request the annulment of the Award.

B. THE WAIVER ISSUE

98. The Parties in their submissions have raised the following issues: (a) whether the Applicants expressly waived their right to raise further grounds and/or arguments; (b) if not, were the Applicants time barred from raising new grounds given that the 120-day period for submission of the Annulment Application had not yet expired; (c) whether the Applicants raised new grounds or arguments; and (d) whether there exists any legal basis for amending the original Annulment Application.

99. Given that the decision regarding the so called "waiver" or the time bar limitation referred to in Article 52 of the ICSID Convention directly affects the admissibility of the Applicants' Alternative Case, the Committee will decide first whether the Applicants waived their right and/or are time barred to request the annulment of the Award under the grounds and reasoning presented in their Alternative Case.

100. The Respondent contends that the Applicants waived their right to present the Alternative Case by not stating such claim in the Application for Annulment.[85] For the Respondent,

[85] Rejoinder on Annulment, 16 September 2020, ¶ 6-7.

neither the language nor the object and purpose of the ICSID Convention allow an applicant to present new grounds after the application for annulment has been submitted.

101. On the other hand, the Applicants claim that nothing in the ICSID Convention or the Arbitration Rules support the Respondent's position. Article 52 of the ICSID Convention sets out a 120-day limit for presenting the grounds for annulment, and the Applicants did so within this time limit given that this term expired on 3 July 2020, and the Applicants raised their Alternative Case on 30 June 2020. The Applicants further argue that the ICSID Convention does not rule out the possibility of amending an annulment application. It is precisely what the Applicants did: they supplemented their existing Application.[86] Furthermore, Sri Lanka has raised no serious complaint that they are prejudiced by the Applicants being able to run the Alternative Case.[87] Finally, the Applicants note that it was not possible for them to anticipate the Respondent's reading of the Award.[88]

102. Given the positions advanced by the Parties, the central question faced by the Committee is whether the Applicants may, within the 120-day time limit set out in Article 52 of the ICSID Convention but after the Respondent submitted its Counter-Memorial on Annulment, amend their Application for Annulment to introduce new grounds that were not raised in the original Application,[89] or whether by not stating the Alternative Case in the original Application, the Applicants waived their right and/or are time barred to do so.

103. To resolve this question, the Committee will first interpret the rules applicable to this annulment proceeding and, thereafter, apply said rules to the case at hand in the light of the facts presented by the Parties.

104. The main rules touched upon by the Parties are Article 52 of the ICSID Convention and Rule 50 of the ICSID Arbitration Rules.

[86] Transcript of Oral Hearing, 12 October 2020, p. 83: 23-25, p. 84: 1-18.
[87] Transcript of Oral Hearing, 12 October 2020, p. 82: 22-25.
[88] Transcript of Oral Hearing, 12 October 2020, p. 86: 4-17.
[89] The Committee notes that, as agreed by the Parties, and embodied in Procedural Order No. 1 and the Procedural Calendar, the Applicants decided that their Application for Annulment stands as their Memorial on Annulment.

105. Article 52 of the ICSID Convention provides in its relevant part as follows:

> *(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:*
>
> *(a) that the Tribunal was not properly constituted;*
>
> *(b) that the Tribunal has manifestly exceeded its powers;*
>
> *(c) that there was corruption on the part of a member of the Tribunal;*
>
> *(d) that there has been a serious departure from a fundamental rule of procedure; or*
>
> *(e) that the award has failed to state the reasons on which it is based.*
>
> *(2) The application shall be made within 120 days after the date on which the award was rendered except that when annulment is requested on the ground of corruption such application shall be made within 120 days after discovery of the corruption and in any event within three years after the date on which the award was rendered.*
>
> *[…]*
>
> *(4) The provisions of Articles 41-45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply mutatis mutandis to proceedings before the Committee.*

106. In turn, Rule 50 of the ICSID Arbitration Rules provides, in its relevant part, that:

> *(1) An application for the interpretation, revision or annulment of an award shall be addressed in writing to the Secretary-General and shall: […]*
>
> *(c) state in detail: […]*
>
> *(iii) in an application for annulment, pursuant to Article 52(1) of the Convention, the grounds on which it is based. These grounds are limited to the following:*
>
> *- that the Tribunal was not properly constituted;*
>
> *- that the Tribunal has manifestly exceeded its powers;*
>
> *- that there was corruption on the part of a member of the Tribunal;*

- that there has been a serious departure from a fundamental rule of procedure;

- that the award has failed to state the reasons on which it is based; […]

(3) The Secretary-General shall refuse to register an application for: […]

(b) annulment, if, in accordance with Article 52(2) of the Convention, it is not made:

(i) within 120 days after the date on which the award was rendered (or any subsequent decision or correction) if the application is based on any of the following grounds:

– the Tribunal was not properly constituted;

– the Tribunal has manifestly exceeded its powers;

– there has been a serious departure from a fundamental rule of procedure;

– the award has failed to state the reasons on which it is based;

(ii) in the case of corruption on the part of a member of the Tribunal, within 120 days after discovery thereof, and in any event within three years after the date on which the award was rendered (or any subsequent decision or correction).

107. The Committee must interpret the ICSID Convention in the light of Article 31 of the Vienna Convention on the Law of Treaties of 1961 (the "**VCLT**"), reflecting customary international law.[90] When interpreting Article 52 of the ICSID Convention and Rule 50 of

[90] VCLT, Article 31:
1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
(b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

the Arbitration Rules in accordance with the ordinary meaning to be given to the terms of the ICSID Convention, the Committee observes that:

- The "application" for annulment referred to in both provisions is set out in singular. Neither the ICSID Convention nor the Arbitration Rules provide for multiple applications. The applicant to an annulment therefore may present only one application.

- The application must be presented in writing, must be addressed to the Secretary-General, and must invoke one or more grounds set out in Article 52(1) of the ICSID Convention. Such grounds shall be stated in detail.

- The 120-day limit set out in Article 52(2) of the ICSID Convention imposes a time limit to request the annulment after the award has been issued. Conversely, when the corruption of a member of the tribunal is invoked as a ground for annulment, the 120-day time limit does not begin counting after the award is rendered but after the discovery of corruption. This distinction evidences that the shortcomings of an award engaging one or more of the grounds set forth in paragraphs (a), (b), (d), or (e) of Article 52(1) must be identified by the applicants as soon as the award is rendered and, in any event, within the aforementioned 120 days.

- Compliance with the 120-day limit is a *sine qua non* requisite to register an application for annulment. Under Rule 50(3)(b) of the Arbitration Rules, the Secretary-General shall refuse to register an application for annulment if it is not made within 120 days after the date on which the award was rendered when the application is based on paragraphs (a), (b), (d) and (e) of Article 52(1) of the ICSID Convention. The verb "shall" indicates that it is mandatory–not discretional–for the Secretary-General to verify compliance with the 120-day time limit.

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) Any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

108. The Parties repeatedly invoked as an authoritative source of doctrine the comment on Article 52 in "*The ICSID Convention: A Commentary"*, written by Christoph H. Schreuer, Loretta Malintoppi, August Reinisch, and Anthony Sinclair. The Committee will refer hereunder to Professor Schreuer et al.' comments regarding the substantiation of the application for annulment and the limitations to the grounds advanced by the Parties.

109. First, there is no *ex officio* annulment of awards. A request for annulment is discretionary and the applicant may decide whether or not to apply for annulment and on what grounds it wishes to base its application.[91] The annulment application cannot be made in the form of a simple general assertion that one or more of the five grounds for annulment set out in Article 52(1) is engaged but should also state what features of the award exhibit flaws constituting grounds for annulment.[92]

110. Second, "a request for annulment directed at certain shortcomings and based on certain grounds for annulment may be seen as a waiver of any right to request annulment based on other defects or other grounds."[93]

111. Third, the grounds for annulment invoked in the application may be further developed in the course of the proceedings.[94] Yet, a party may not amend its application in the course of the proceedings "on points that were known to it but which it failed to raise in the original application" unless new unknown facts come to light. This prohibition follows either from the understanding that there has been an implicit waiver or from the 120-day time limit.[95]

112. Fourth, an incorrect classification of a defective feature of the award in terms of the grounds provided in Article 52(1) should not lead to the denial of the annulment. The applicant should be allowed to develop its application and reclassify the alleged defect. The *ad hoc* Committee has the authority to annul the award under a different ground, "as long as the incriminated defect has been pleaded as a basis for annulment by a party."[96] Yet, "[a]

[91] Schreuer et al., The ICSID Convention, A Commentary, Second Edition (**RL-15**(**A**)), p. 1052, ¶ 531.
[92] Schreuer et al., The ICSID Convention, A Commentary, Second Edition (**RL-15**(**A**)), p. 927, ¶ 87.
[93] Schreuer et al., The ICSID Convention, A Commentary, Second Edition (**RL-15**(**A**)), p. 1053, ¶ 534.
[94] Schreuer et al., The ICSID Convention, A Commentary, Second Edition (**RL-15**(**A**)), p. 1053, ¶ 531.
[95] Schreuer et al., The ICSID Convention, A Commentary, Second Edition (**RL-15**(**A**)), p. 1053, ¶ 535.
[96] Schreuer et al., The ICSID Convention, A Commentary, Second Edition (**RL-15**(**A**)), p. 1054, ¶ 538.

Committee may not annul unless it is asked to do so by a party even if it comes to the conclusion that, objectively, there is a ground for annulment."[97]

113. The Parties also invoked the annulment decision in *Soufraki v. United Arab Emirates* as relevant to the decision to be taken by the Committee in this annulment case.

114. The relevant legal issue discussed in *Soufraki* is whether "all the grounds for annulment were properly introduced in the Application," considering that, "because of the existence of strict time limit in the ICSID Convention, a new ground for annulment cannot in principle be admitted in the course of the proceedings, while of course new arguments fleshing out grounds already admitted can be developed."[98]

115. In his request for annulment, Mr Soufraki invoked Article 52(1)(b) of the ICSID Convention, claiming that the tribunal exceeded its powers by (i) exercising a jurisdiction it did not possess by reviewing the decisions of the Italian authorities in the application of Italian nationality laws, and by (ii) declining to exercise jurisdiction it did possess by determining the merits of the claim. Also, the applicant invoked Article 52(1)(e), claiming that the tribunal provided no legal basis for its decision to apply Italian nationality law. In its subsequent submissions, the applicant developed the arguments classified under the first ground of annulment but also presented a third complaint under the heading of "manifest excess of power"; namely, that the tribunal failed to apply the proper law to the determination of Mr Soufraki's nationality.

116. The *ad hoc* committee analysed whether the contention that the Tribunal also exceeded its powers by failing to apply the proper law, as presented in the Claimant's Memorial, was a new ground for annulment, or whether it could be considered as encompassed in the annulment application.[99] The *ad hoc* committee found that the application included a reference to both the tribunal's lack of power to determine the claimant's nationality and

[97] Schreuer et al., The ICSID Convention, A Commentary, Second Edition (**RL-15(A)**), pp. 1054, ¶ 536.
[98] *Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment of 5 June 2007 (**RL-1**), ¶ 33.
[99] *Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment of 5 June 2007 (**RL-1**), ¶ 34.

the failure to apply the proper law when making such determination, under the following wording: "[the tribunal] assumed a jurisdiction which it did not possess to apply Italian law in a manner radically at odds with the way it had been applied by the competent Italian authorities."[100]

117. Therefore, the *ad hoc* committee concluded that, although intermingled with the assumption that the tribunal had no jurisdiction to assess the claimant's nationality, the claim regarding the failure to apply the proper law was present in the annulment application.[101] Accordingly, despite the changes in the presentation of Mr. Soufraki's allegations, "four distinguishable, albeit sometimes overlapping, arguments have been made under the two grounds for annulment provided for in Article 52(1)(b) and Article 52(1)(e)."[102] Namely, (1) whether the tribunal manifestly exceeded its powers in exercising power it did not have by going behind the official nationality certificates to determine Mr Soufraki's nationality, (2) whether the tribunal manifestly exceeded its powers in failing to apply the proper law in the determination of Mr. Soufraki's nationality, (3) whether the tribunal manifestly exceeded its powers in not exercising the power to ascertain the claim on the merits, and (4) whether the tribunal failed to state reasons in support of the conclusions reached in its award.[103] Consequently, the *ad hoc* committee decided that the claimant's different grounds for annulment were admissible.

118. Based on the foregoing, the Committee finds that the case at hand must be analysed in the light of the rules set out below, which follow from interpreting Article 52 of the ICSID Convention and Rule 50 of the Arbitration Rules:

- An applicant may present a single annulment application, not multiple applications. The application must include all the grounds upon which the applicant relies to request

[100] *Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment of 5 June 2007 (**RL-1**), ¶ 34.
[101] *Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment of 5 June 2007 (**RL-1**), ¶ 34.
[102] *Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment of 5 June 2007 (**RL-1**), ¶ 35.
[103] *Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment of 5 June 2007 (**RL-1**), ¶ 35.

the annulment, including the defective features of the Award engaging one of the grounds for annulment set out in Article 52(1). Such grounds should be stated in detail, as provided in Rule 50 of the Arbitration Rules.

- An application for annulment based on the grounds provided in Article 52(1)(a), (b), (d), or (e) may only be requested within a time limit of 120 days after the Award is rendered.

- An applicant cannot invoke new grounds based on new incriminating defects known to it but that it consciously decided not to raise in the application. An amendment of the application to include new grounds and new incriminating defects would only be acceptable if it is based on new facts that were not known to an applicant when the application was lodged.

- An *ad hoc* committee may not annul an award under grounds, or incriminating defects that the parties have not pleaded, even if it concludes that objectively there is a ground for annulment.

119. The Committee will now turn to analyse the facts and specific circumstances in light of the criteria that follows from Article 52 of the ICSID Convention and the applicable Arbitration Rules.

120. The Committee notes that the Applicants made, expressly and unequivocally, specific statements in their Application regarding the scope and extent of such application.

121. First, that they were requesting the annulment of the Award "under Article 52(1)(b) of the ICSID Convention because the Tribunal failed to exercise its jurisdiction – and in so doing manifestly exceeded its powers."[104]

[104] Application for Annulment, 1 May 2020, ¶¶ 2, 24-39.

122. Second, that:

> *the Award is regrettably replete with serious failures to grapple with the evidence presented to the Tribunal, to the extent that some have even been picked up by the legal press: for example, the Tribunal's abject failure to deal with the evidence of a USD 400,000 contribution made by Mr Eyre. In recognition of the narrow compass of the annulment jurisdiction under Article 52 of the ICSID Convention, however, the Applicants have limited their application (sic.) a single particularly egregious example of procedural error by the Tribunal – namely its refusal to exercise its jurisdiction on the basis that notwithstanding the clear word of the BIT, the share that Mr Eyre held in Montrose Sri Lanka did not qualify as an investment because Montrose Sri Lanka did not itself separately hold an investment.*[105]

123. These statements are reaffirmed in the Application. Paragraph 22 of the Application states that:

> *[the] Application proceeds on one ground only: the Tribunal's erroneous rejection of jurisdiction ratione materiae over the Montrose Share, on the basis that Montrose Sri Lanka did not own a valid investment under Article 1(a) of the BIT and Article 25(1) of the ICSID Convention. The Tribunal appears to have invented its own, novel and unique additional requirement for an investment. Given that 'shares, stock and debentures of companies or interests in the properties of such companies' are expressly protected as investments in their own right under Article 1(a)(ii) of the BIT without any reference to whether the companies to which the shares relate hold investments in their own right, this conclusion is wrong in principle and untenable.*[106]

124. The Applicants contend that they did not waive their right to present new grounds not included in the Application because therein, they noted that the incriminating defect raised was merely an example of errors in the Award. Therefore they "gave themselves the freedom to change their position in later pleadings if they saw fit."[107] However, the Committee is not persuaded by this reasoning. The wording of the Application is unequivocal. The Applicants stated that, while the Award could be "replete with serious

[105] Application for Annulment, 1 May 2020, ¶ 3.
[106] Application for Annulment, 1 May 2020, ¶ 26.
[107] Reply on Annulment, 21 August 2020, ¶ 159.

failures to grapple with the evidence presented to the Tribunal," given the "narrow compass of the annulment jurisdiction," the Applicants "limited their application to a single particularly egregious example of procedural error." They confirmed that statement by indicating that they were applying for annulment "on one ground only". According to the Applicants, the only ground for which they were applying was a procedural error consisting of the Tribunal's decision to decline its jurisdiction based on the finding of law that the Montrose Share could not be considered an investment because Montrose Sri Lanka did not hold an investment itself.[108] Therefore, the Applicants wilfully decided not to pursue the annulment of the Award under other grounds or incriminating defects of the Award despite expressly acknowledging that other "serious failures" could be found therein.

125. The Committee further considers that upholding the Applicants' theory would allow any applicant to simply invoke one ground for annulment, characterize such ground as an example of the alleged flaws in the award, and in subsequent submissions during the annulment proceedings include any ground or any defective feature not originally included in the application. This would run contrary to the principles applicable to annulment proceedings explained in paragraphs 103 to 118 above.

126. Accordingly, the Committee finds that the Applicants expressly waived their right to request the annulment based on (1) other grounds different from Article 52(1)(b) of the ICSID Convention, and (2) other defective features of the Award different from the Tribunal's decision to decline its jurisdiction based on the alleged finding of law that the Montrose Share did not qualify as an investment if Montrose Sri Lanka did not itself hold an investment separately.

127. In view of the foregoing, the Committee must turn to analyse whether the grounds and incriminating defects raised in the Alternative Case may be considered as encompassed within the Primary Case presented in the Application. In other words, whether the Alternative Case is simply a development of the arguments presented in the Primary Case.

[108] Application for Annulment, 1 May 2020, ¶ 3.

128. The Committee agrees with Professor Schreuer et al., and the *ad hoc* committee in *Soufraki,* in that an applicant should be allowed to develop during the annulment proceedings the arguments supporting the grounds that it raised in the annulment application. An applicant should also be permitted to reclassify, under a different ground, an incriminating defect already classified under a particular ground in the annulment application.

129. The Committee observes that the case at hand is neither a case where the Applicants "reclassified" an incriminating defect under a ground raised but wrongly classified in the Application nor a case where the Applicants supplemented their claims under the Primary Case by presenting the Alternative Case. For the Committee, it is clear that the Alternative Case is based on grounds and alleged defects of the Award that the Applicants knew and that are different from the ones claimed by the Applicants in the Primary Case.

130. On the one hand, the Applicants' Primary Case, as pleaded in the Application and the Reply on Annulment, is based on only one incriminating defect: that the Tribunal declined to exercise its jurisdiction because it concluded –as a matter of law– that the Montrose Share did not constitute an investment because Montrose Sri Lanka did not hold an investment itself. The ground invoked as a result of this alleged flaw is "manifest excess of power", set out in Article 52(1)(b) of the ICSID Convention.

131. On the other hand, the Applicants' Alternative Case, as pleaded in the letter dated 30 June 2020 and the Reply on Annulment, is based on the following alleged defects of the Award: (i) that the Tribunal failed to apply the principle of unity of investment to the Applicants' investment operation or alternatively did not properly explain its application, (ii) that the Tribunal failed to apply the concept of investment risk to the Applicants' investment operation or alternatively did not properly explain its application, and (iii) that the Tribunal ignored evidence material to the Applicants' case or alternatively failed to explain how it took account of that evidence. According to the Applicants, these failures led the Tribunal to decline its jurisdiction wrongfully, and, therefore, the Award should be annulled under the grounds provided in Article 52(1)(b) and (e).

132. It is evident from the mere reading of the allegations, and the grounds invoked in the Alternative Case that there is no identity between the incriminating defects supporting the Primary Case and the Alternative Case. Furthermore, the Applicants did not invoke, explicitly or implicitly, the ground provided in Article 52(1)(e) to support its request for annulment as to the Primary Case.

133. Even though paragraphs 29 to 31 of the Application mention in a passing manner that the Tribunal's reasoning is "minimal, and confined to four paragraphs,"[109] the Committee observes that the Applicants wilfully decided not to invoke Article 52(1)(e) in their Primary Case. Moreover, the Applicants did not contend in their Primary Case that "minimal" reasoning was equivalent to lack of reasoning. Neither in the Application nor in the Reply on Annulment do the Applicants refer to said ground regarding the Primary Case. In both documents, the Applicants decided to invoke a single ground with respect to the Primary Case: Article 52(1)(b). Consequently, the Committee cannot reclassify the alleged defect of the Award under a ground that was not invoked by the Applicants in the Application, either by invoking the corresponding provision of the ICSID Convention or by describing the corresponding defect in the Award, because it would be exceeding its mandate under Article 52 of the ICSID Convention.

134. Under Article 52 of the ICSID Convention and Rule 50 of the Arbitration Rules, it is an applicant's duty to invoke one or more of the grounds provided for in Article 52(1) of the ICSID Convention, and to state those grounds in detail in the annulment application. The Committee cannot arrogate a burden that lies on the Applicants.

135. Finally, the Committee is not convinced by the Applicants' contention that the Alternative Case should be admitted because it was presented as a response to Sri Lanka's reading of the Award after the Counter-Memorial on Annulment. First, the Applicants do not explain why they could not have pleaded the Alternative Case absent Sri Lanka's Counter-Memorial on Annulment. Second, the Application itself indicates that the Applicants knew of other grounds for annulment potentially applicable to the Award that were characterized

[109] Application for Annulment, 1 May 2020, ¶ 29.

as contingent on Sri Lanka's position and consciously decided to invoke only one ground. Third, if the Committee accepted the Applicants' position, an applicant could modify the grounds for annulment *ad infinitum* depending on the other party's response.

136. In sum, the Committee considers that no legal basis exists, given the facts of this case, for allowing amendment of the original Annulment Application; the Alternative Case is not encompassed in the Primary Case, and it does not develop the arguments presented in the Application but presents new defects and grounds for annulment. Therefore, the Committee finds that the Applicants waived their right to request annulment based on other defects or on other grounds not claimed in the Application.

137. For efficiency, the Committee further concludes that whether the Applicants are time barred from presenting the Alternative Case is irrelevant because it already found that the Applicants waived their right to raise new defects and grounds for annulment not pleaded in the Application. Thus, the Committee need not address the time bar matter.

138. Based on the abovesaid considerations, the Committee decides that the Alternative Case is not admissible. Therefore, it will only analyse the Primary Case presented by the Applicants to decide on the annulment of the Award.

C. THE PRIMARY CASE

139. The Parties' submissions concerning the Applicants' Primary Case raise two issues: whether the Tribunal's finding that the Montrose Share does not qualify as a protected investment constituted a finding of fact or of law, and whether the alleged finding qualifies as a "manifest excess of power" within the meaning of Article 52(1)(b). In light of the Parties' contentions, the Committee will analyse (1) the scope of Article 52(1)(b) of the ICSID Convention, and (2) whether the alleged defects of the Award raised in the Primary Case constitute a manifest excess of power.

(1) Article 52(1)(b): Manifest excess of power

140. The Parties agree that for Article 52(1)(b) to be applied, a tribunal's error must be "manifest".[110] They also agree that Article 52(1)(b) applies to a tribunal's decision to decline a jurisdiction that it possessed. Yet, they differ on what "manifest" means.

141. On the one hand, the Applicants advance that the "error must be obvious by on the face of the award";[111] however, a degree of inquiry and analysis may be required if the reasoning of the award is complex. For the Applicants, the excess need not "leap out of the page on a first reading of the award."[112]

142. On the other hand, the Respondent claims that an *ad hoc* annulment committee is not a court of appeal; it is not within its powers to decide whether it agrees or disagrees with the conclusions of the Tribunal.[113] The Committee may only assess whether the Tribunal manifestly exceeded its powers. For the Respondent, manifest means "obvious, evident, clear, and plain and therefore does not require elaborate analysis." The Respondent relies on the decision of the *ad hoc* committee in *Azurix Corp. v. Argentina* to contend that the relevant test is "whether the excess of power can be discerned with little effort and without deeper analysis."[114]

143. First, the Committee notes that annulment under the ICSID Convention is not a remedy against an incorrect decision. It is a remedy of an exceptional and limited nature that constitutes a safeguard against "violation of the fundamental principles of law governing the Tribunal's proceedings."[115] As stated in the annulment decision in *TECO v. Guatemala,* "an *ad hoc* Committee's mandate is strictly circumscribed by the five grounds for annulment, listed within the ICSID Convention and an *ad hoc* Committee may not, under

[110] Application for Annulment, 1 May 2020, ¶ 28; Reply on Annulment, 21 August 2020, ¶ 9.
[111] Application for Annulment, 1 May 2020, ¶ 28; Reply on Annulment, 21 August 2020, ¶ 9.
[112] See Reply on Annulment, 21 August 2020, ¶ 20, where the Applicants refer to *EDF International SA, SAUR International SA & León Participaciones Argentinas SA v Argentine Republic*, ICSID Case No ARB/03/23 (Decision on Annulment, 5 February 2016) ¶ 193 (**ALA-11**).
[113] Counter-Memorial on Annulment, 25 June 2020, ¶ 17.
[114] See Rejoinder on Annulment, 16 September 2020, ¶ 101, referring to *Azurix v Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Annulment of 1 September 2009 (**RL-6**), ¶¶ 67-69.
[115] Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, ¶ 71.

the guise of applying them, reverse an Award on the merits."[116] In this sense, the Committee shall not assess whether the Tribunal committed errors interpreting the applicable law or assessing the relevant facts or evidence presented by the Parties.[117] The Committee must determine whether the Tribunal committed a manifest excess of power.

144. The excess of power must be manifest and not arguable, as *ad hoc* committees have recognized in *Soufraki v. UAE*, *Total v. Argentina*, and *Azurix v. Argentina*.[118] To be manifest, the excess of powers must be self-evident rather than the product of elaborate interpretations. This, however, does not mean that the Committee cannot delve into the reasoning of the Tribunal when the case is complex in order to determine whether there has been a manifest excess of powers. Accordingly, the Award must be analysed as a whole and not in parts.

145. Finally, the Committee notes that "a Tribunal's failure to apply the proper law could constitute a manifest excess of powers, but that erroneous application of the law could not amount to an annullable error, even if it is manifest."[119] Accordingly, if the application of the law is susceptible to more than one interpretation, then there is no manifest excess of powers.

(2) Whether the alleged defects in the Award constitute a manifest excess of power

146. The Applicants claim that the "conclusion reached by the Tribunal over its supposed lack of jurisdiction *ratione materiae* over the Montrose Share was manifestly wrong in law."[120] The Applicants characterize this conclusion as a principle of law created by the Tribunal that does not exist in international investment law, is not provided in the ICSID Convention, and is contrary to the text of the BIT.[121]

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[116] *TECO Guatemala Holdings LLC v Republic of Guatemala*, ICSID Case No ARB/10/23, Decision on Annulment, 5 April 2016, ¶ 73.
[117] Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, ¶ 90.
[118] *Soufraki v United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment of 5 June 2007(**RL-1**), ¶ 24; *Total S.A. v Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Annulment of 1 February 2016 (**RL-5**), ¶ 243; *Azurix v Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Annulment of 1 September 2009 (**RL-6**), ¶¶ 68-69.
[119] Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, ¶ 90.
[120] Application for Annulment, 1 May 2020, ¶ 35.
[121] Application for Annulment, 1 May 2020, ¶¶ 35, 36, 39.

147. The Committee, however, is not convinced by the Applicants' reading of the Award. The conclusion reached by the Tribunal as regards its jurisdiction *ratione materiae* is not a general or abstract finding of law that "a share in a company can only be considered an investment if that company itself owns an investment." An integral reading of the Award shows that the Tribunal is not establishing a general principle of law; it is deciding on the facts according to the evidence in the record, as it is explained below.

148. First, the wording in paragraph 292 of the Award is clear in stating that the Tribunal's decision is that "the Montrose Share can qualify as a protected investment under the ICSID Convention and the BIT only if Montrose [Sri Lanka] itself has a protected investment in the planned Hotel Project on the Montrose Land."[122] The Tribunal did not generally refer to "a share" or to "a company" in the abstract or as a general principle of law, it specifically referred to the Montrose Share and to Montrose Sri Lanka in a factual, not legal, analysis. Furthermore, the Committee observes that in paragraph 292, the Tribunal set the factual context of its decision and, in the following paragraphs, fleshed out the reasons supporting its conclusion, as it is made clear in the last line of the paragraph with the words "which is addressed below."

149. Second, after paragraph 292, the Tribunal develops the following analysis:

- In paragraphs 293 and 294 of the Award, the Tribunal upheld the application of the Salini Test, concluding that "there are now many decisions that have considered that "investment" has an inherent meaning [under the ICSID Convention]."[123] The Tribunal noted that the "inherent meaning" requires at least three elements: a contribution by the investor, a certain duration, and economic risk. The Tribunal further referred to the decision in *Poštová Banka v. Hellenic Republic* to conclude that the economic risk must be an investment risk (an "operational risk"), not a commercial risk. Then, the Tribunal analysed the Claimants' alleged investment in the Montrose Land against the abovesaid criteria.

[122] Award, ¶292.
[123] Award, ¶293.

- In paragraphs 295 and 296, the Tribunal referred to the Parties' arguments on whether or not the Montrose Land constituted or not a protected investment.

- In paragraph 297, the Tribunal stated that the criteria of contribution and operational risk of the Salini Test were not met, and therefore the Montrose Land was not a protected investment. Between paragraphs 298 to 302, the Tribunal elaborated on the reasons for reaching this conclusion.

- In paragraph 298, the Tribunal concluded that there is no evidence in the record that Montrose Sri Lanka contributed for purchasing the Montrose Land or the Hotel Development.

- In paragraphs 299 and 300, the Tribunal recounted the evidence presented by Mr Eyre to demonstrate his alleged contribution to the Montrose Land and concluded that "[it] cannot ignore the patent lack of credible evidence documenting the sale and transfer terms for the Montrose Land."[124] Therefore, the Tribunal concluded that "[it] cannot find on a balance of the probabilities, that Mr Eyre –through Montrose [Sri Lanka] 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."[125]

- In paragraphs 301 and 302, the Tribunal addressed the Claimants' argument regarding the theory of the "unity of investment" and rejected it. The Tribunal assessed the evidence in the record and considered "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," and that Mr Eyre did not actually execute

[124] Award, ¶ 300.
[125] Award, ¶ 300.

contractual commitments with architects, hotel management firms or financiers. Therefore, the Hotel Project "remained at best aspirational at the time of the compulsory State acquisition in 2010." The Tribunal went further on to conclude that "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."[126]

- Finally, in paragraph 303, the Tribunal decided that it had no jurisdiction *ratione materiae* because the Montrose Land –whether as bare land or as the base for the planned Hotel Project– was not a protected investment.

150. For the Committee the abovementioned paragraphs show that the Tribunal analysed the structure of the transaction for the purchase of the Montrose Land, assessed the facts and the evidence in the record, and concluded, as a finding of fact, that the Montrose Land did not comply with the Salini Test accepted by the Tribunal in paragraphs 293 and 294 of the Award.

151. In sum, the Committee concludes that the Tribunal's finding does not purport to create a new principle of law. It is an application of the facts to the inherent meaning of investment defined by the Tribunal in paragraphs 293 and 294 of the Award.

152. Consequently, given that the Applicants' Primary Case is based on a reading of the Award that is incorrect, as rightly submitted by Respondent, in the Committee's opinion, the Tribunal did not manifestly exceed its powers by deciding, as a matter of law, that the Montrose Share did not qualify as an investment because the Montrose Land was not an investment itself and therefore Montrose Sri Lanka did not hold a qualifying investment. As extensively addressed above, the Tribunal's decision is based on a factual analysis on whether the Applicants' alleged investments met the Salini Test accepted by the Tribunal.

[126] Award, ¶ 302.

153. As a final note, the Committee notes that it may or may not agree with the drafting of the Award and the form in which the conclusions are developed and expressed, or with the elements constituting the Salini Test, or on how the Tribunal applied the facts to the law as to the alleged inherent meaning of the term "investment". Yet, it is not the task of the Committee to redraft the Award or to determine whether the Salini Test was applicable or not. The Salini Test has been widely debated in investment law and was debated in the case at hand, and the Tribunal concluded that it applied and analysed the facts in the light of this conclusion. The Committee cannot second-guess the Tribunal's analysis of the facts or the evidence. The fact that another position contrasting the Tribunal's conclusions is arguable does not reach the threshold of "manifest excess of power", as provided in Article 52(1)(b) of the ICSID Convention.

154. Based on the foregoing, the Committee concludes that there is no ground, as pleaded by the Applicants, to annul the Award.

VI. COSTS

155. Under Article 61(2) of the ICSID Convention –read in conjunction with Article 52 of the ICSID Convention and ICSID Arbitration Rules 47(1)(j) and 53– the Committee shall 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.

156. The Committee observes that Article 61(2) of the ICSID Convention gives wide discretion to the Committee to determine how to allocate the costs of the proceedings. The Committee will first fix the costs of the annulment proceedings and then allocate the costs and other reimbursable expenses between the Parties.

157. The Applicants advance that the total costs of legal representation and assistance in connection with the annulment proceedings amount to £164,141.80. The Respondent claims that the total costs incurred by it in the annulment proceedings amount to

£298,282.44. The Parties included in their statements of costs both the Annulment Application and the stay of enforcement of the Award.

158. The costs of the arbitration, including the fees and expenses of the Committee, ICSID's administrative fees and direct expenses, amount to (in USD):[127]

Committee's fees and expenses	
Prof. Eduardo Zuleta	58,500.00
Dr. Nudrat E. Piracha	34,687.50
Prof. Giorgio Sacerdoti	33,000.00
ICSID's administrative fees	42,000.00
Direct expenses	10,558.24
Total	**178,745.74**

159. The Committee will proceed to allocate the costs and other reimbursable expenses of the arbitration taking into account the success of the claims and defences of the Parties, as well as their procedural conduct, the reasonability and proportionality of the costs of legal representation and other circumstances of the case.

160. The Respondent prevailed in all its defences submitted before this Committee, including the defense related to the late submission of the Alternative Case. However, the Committee devoted a significant amount of time in deciding the stay of enforcement, in which Applicants prevailed. The Committee further notes that the Applicants raised complex issues that demanded the Committee's careful analysis, in particular because the Award presented some challenging issues to follow the Tribunal's rationale.

161. The Committee notes, in addition, that there is a significant disproportion between the fees for legal representation of the Applicants and the Respondent.

[127] The ICSID Secretariat will provide the parties with a detailed Financial Statement of the case account once all invoices are received and the account is final.

162. In sum, in reaching its decision, the Committee has considered the circumstances of the case, including the disparity between the costs claimed by the Parties, the outcome of the Stay Application in favour of the Applicants, the inadmissibility of the Applicants' Alternative Case, raised after the submission of Respondent's response, and the outcome of the Application in favour of the Respondent. The Committee has also considered that the Applicants' Primary Case was not manifestly frivolous and/or unmeritorious or dilatory, and that the Applicants presented genuine issues which could legitimately be brought before an annulment committee.

163. In light of the above, the Committee concludes that the Applicants shall bear all the expenses incurred by ICSID and the members of Committee in connection with this annulment proceeding. In addition, the Applicants shall bear £40,000 of the fees for legal representation of the Respondent and shall bear their own legal costs.

VII. DECISION OF THE COMMITTEE

164. Based on foregoing, the Committee decides:

(a) The Application for Annulment submitted by the Applicants is dismissed in its entirety.

(b) The Applicants shall bear all fees and expenses incurred by ICSID in connection with this proceeding, including the fees and expenses of the members of the Committee.

(c) The Applicants shall bear £40,000 of Respondent's legal costs and shall bear their own legal costs in connection with this annulment proceeding.

(d) Pursuant to Article 52(5) of the ICSID Convention and ICSID Arbitration Rule 54(3), the stay of enforcement of the Award ordered by the Committee on 16 July 2020 is terminated.

[redacted]

Nudrat E. Piracha
Member

Date: 02 December 2020

[redacted]

Giorgio Sacerdoti
Member

Date: 2 December 2020

[redacted]

Eduardo Zuleta
President of the *ad hoc* Committee

Date: 30 November 2020