**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

***Raymond Charles Eyre and Montrose Development (Private) Limited***

***v.***

***Democratic Socialist Republic of Sri Lanka***

**(ICSID Case No. ARB/16/25)**

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# PROCEDURAL ORDER NO. 2

# DECISION ON BIFURCATION

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***Members of the Tribunal***
Prof. Lucy Reed, President of the Tribunal
Prof. Julian D.M. Lew, Q.C., Arbitrator
Prof. Brigitte Stern, Arbitrator

***Secretary of the Tribunal***
Geraldine R. Fischer

**Date: February 21, 2018**

1. The Tribunal sets out the procedural background in Section I of this Procedural Order No. 2 on bifurcation of jurisdiction issues. After summarizing the Parties' positions in Section II, the Tribunal provides the reasons for its bifurcation decision in Section III. The Tribunal's decision is set out in Section IV and the new procedural timetable is set out in Annex A.

## I. PROCEDURAL BACKGROUND

2. On June 1, 2017, the Tribunal issued Procedural Order No. 1 in this claim under the United Kingdom-Sri Lanka bilateral investment treaty ("BIT"), including a partial procedural schedule ("Annex A").

3. Per Annex A of Procedural Order No. 1, the Respondent on December 8, 2017 filed its Preliminary Jurisdictional Objections Pursuant to Article 41(1) of the ICSID Convention, accompanied by Exhibits R-0001 through R-0011 and Legal Authorities RL-0001 through RL-0049. This contained a request for bifurcation of preliminary objections on jurisdiction (the "Respondent's Bifurcation Request").

4. On December 29, 2017, the Claimants filed their Objections to the Respondent's Request to Bifurcate (the "Claimants' Bifurcation Opposition") together with a proposed schedule and two legal authorities.[1]

[1] *Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2 (Decision on Respondent's Application for Bifurcation, June 13, 2013); and *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24 (Procedural Order No. 2, June 17, 2015).

5. On January 10, 2018, in response to the Tribunal's invitation, the Respondent filed its Response to the Claimants' Objection to the Respondent's Request to Bifurcate (the "Respondent's Bifurcation Response") together with one legal authority.[2]

6. On January 12, 2018, the Claimants applied to the Tribunal for leave to reply to Respondent's Bifurcation Response, which was granted. The Claimants filed their submission on January 17, 2018 (the "Claimants' Bifurcation Reply").

7. On January 26, 2018, the Secretariat relayed the following communication from the Tribunal to the Parties:

> Upon review of the Parties' submissions of December 8 and 29, 2017 and January 10 and 17, 2018, the Tribunal has determined that bifurcation of jurisdiction is appropriate, for reasons to be outlined in an order to follow.
>
> Based on the Parties' agreement that the merits issues are not unduly complex, with relatively complex submissions and expert testimony to come only at the quantum phase, we consider that it would be most efficient to bifurcate the proceedings to hear both jurisdiction and merits together first before moving to a quantum stage, if necessary. The Tribunal will attempt to find earlier hearing dates for the joint jurisdiction and merits phase, or, if necessary, hold the hearing on days during the reserved week in October 2018.
>
> Before proceeding in this fashion, we would appreciate the Parties' views on the suggested scope of bifurcation and the number of days likely necessary to hear jurisdiction and merits together. Please provide your views (email is fine) by February 1, 2018.

8. By letter of February 1, 2018, the Claimants agreed with the Tribunal's proposed bifurcation of a joint jurisdictional and merits phase, followed by a quantum phase (if required). The Claimants expressed the view that "the proposed jurisdiction and merits hearing could be accommodated within two days of sitting time, to be scheduled as

[2] C*airn Energy PLC and Cairn UK Holdings Ltd v. Republic of India*, PCA, Case No.2016-2017 (Procedural Order No. 4, April 19, 2017) ("*Cairn v. India*").

early as possible subject to availability", and they attached an indicative procedural calendar with a possible hearing after 15 July 2018. They also requested that the Tribunal reserve a provisional hearing date for quantum.

9. Also on February 1, 2018, the Respondent supported the Tribunal's proposed bifurcation, and suggested a two-and-one-half day hearing with one-half day in reserve. The Respondent expressed the "view and understanding" that bifurcation would mean that all legal issues relating to causation and quantum, the quantum and planning expert issues, related disclosure issues, and related factual evidence would not be included in the bifurcated first phase. They added:

> There is one further issue which would need to be hived off to any future quantum phase, being the question of whether adequate compensation was provided in the context of the Claimant's [sic] claim for alleged expropriation under Article 5(1): see §165 of the Claimant's [sic] Memorial. This necessarily raises issues that go to quantum. However, and to clarify further and for the avoidance of doubt, the Claimants argue that adequate compensation is a precondition to any expropriation being lawful. The Respondent disagrees given the terms of the BIT and this legal issue can be dealt with in this jurisdiction/liability phase.

10. On February 2, 2018, the Claimants wrote that they "strongly oppose" the Respondent's suggestion that the bifurcated jurisdiction/merits phase not include the question of the adequacy of the compensation paid by the Respondent on the taking of the Claimants' investments. In their view:

> [t]he question of whether compensation offered or paid to the Claimants was "*adequate*" within the meaning of Article 5(1) is not the same as the question of the Claimants' rightful compensation under the customary standard of full reparation established in the *Chorzow Factory* case [footnote omitted]. The former … would entail hearing from a Sri Lankan land valuation expert as to the bare value of the Montrose Land at the time at which it was taken. The latter – comprising evidence as to the future value of the Claimants' planned Hotel Project [footnote omitted] – would then be heard in the quantum phase (if required) when determining the Claimants' ultimate losses.

If the Respondent's suggestion is adopted, say the Claimants, "it will leave the Tribunal unable to determine liability in its decision on jurisdiction and merits since it will not be able to rule definitively on any of the treaty breaches advanced in the Memorial."

11. By letter dated February 5, 2018, the Respondent objected that the Claimants were attempting "to amend their case in correspondence in order to seek to have the opportunity to put in new land surveyor expert evidence that they have never advanced in respect of a case they have never advanced." The Respondents emphasize that the Claimants have not put forward any expert evidence supporting a case for the value of the bare land before the alleged expropriation; in claiming in their Memorial that the land was worth approximately US$21 million, the basis is the DCF computation of their alleged loss of opportunity to develop a hotel on the land. The Respondent also argues that "it is well-established that compensation does not go to lawfulness" of expropriation.

12. On February 6, 2018, the Secretariat relayed the following communication from the Tribunal to the Parties:

> The Tribunal notes the differing, and apparently irreconcilable, views of the parties as to whether the issue of the lawfulness of the alleged expropriation of the Montrose Land is properly and fully a liability/merits issue or a quantum issue. Under the circumstances, the Tribunal confirms its decision to bifurcate only jurisdiction issues for a preliminary phase, for reasons to follow in a formal decision.
>
> The Tribunal proposes to conduct the hearing on **22-24 August 2018** (two days, with a half day in reserve). If the parties can agree on this August date, the Tribunal requests counsel to attempt to agree a balanced procedural timetable leading up to the hearing. If the parties cannot agree on the 22-24 August hearing date, the Tribunal will calendar the jurisdiction hearing for the reserved days of **17-19 October 2018** (two days, with a half day in reserve), and requests counsel to attempt to agree the procedural timetable.

> The parties are to revert by **13 February 2018**. The Tribunal will schedule the merits and quantum hearing after the jurisdiction schedule is settled.

13. On February 13, 2018, the Parties reported to the Tribunal that the Respondent's counsel are unavailable for the Tribunal's proposed August 2018 hearing dates, and the Claimants consequently have "reluctantly and under protest" agreed to the October 17-19, 2018 hearing dates. The February 13, 2018 letter attaches the new draft procedural timetable agreed by the Parties.

## II. THE PARTIES' POSITIONS ON BIFURCATION OF JURISDICTION

### A. THE RESPONDENT'S BIFURCATION REQUEST

14. In its December 8, 2017 submission, the Respondent raises the following jurisdictional objections:

> (i) The Claimants are not "investors" under the BIT and so they lack standing to bring a claim under BIT Article 8(2) or, in the alternative, BIT Article 8(1);
>
> (ii) There is no "investment" within the meaning of Article 1(a) of the BIT and Article 25 of the ICSID Convention; and/or
>
> (iii) The Claimants' claim does not "directly arise" out of any alleged "investment" pursuant to ICSID Convention Article 25.[3]

15. The Respondent provides detailed argument on each of these objections and concludes by submitting that the Claimants' "claims should be dismissed on jurisdictional grounds and that this should be dealt with as a preliminary issue and/or by way of formal stay of the proceeding on the merits."[4]

### B. THE CLAIMANTS' BIFURCATION OPPOSITION

[3] Bifurcation Request, ¶¶ 3; 39 *et seq.*

[4] Bifurcation Request, ¶ 123.

16. The Claimants oppose the Respondent's bifurcation request, arguing that, although appearing to request bifurcation, the Respondent "has not advanced any positive case for bifurcation in the Preliminary Objections, nor has it referred to any of the factors identified in the relevant ICSID case-law which would militate in favor of bifurcation."[5] The Claimants underscore that "[w]hilst the decision to bifurcate proceedings under Rule 41(4) is a matter of discretion…a number of considerations applicable to the exercise of discretion have been identified by prior ICSID tribunals", the "touchstone of analysis is procedural efficiency."[6]

17. Analyzing the Respondent's preliminary objections using the bifurcation factors identified in ICSID case law, the Claimants submit:

(i) The Respondent's request for bifurcation is not substantial as the preliminary objections are likely to fail;[7]

(ii) The Bifurcation Request "is highly unlikely to lead to a reduction in the proceedings [as] none of the jurisdictional objections made appears particularly meritorious"; even if they succeeded, given the parties already considered that a five-day hearing would suffice for both jurisdiction and merits, there would only be a "very limited amount of time and expenditure" saved, "which would likely be matched or exceeded by the additional time and cost taken in arranging and arguing a separate jurisdictional phase of the proceeding."[8]

[5] Bifurcation Opposition, ¶¶ 1- 2.
[6] Bifurcation Opposition, ¶¶ 4-5.
[7] Bifurcation Opposition, ¶¶ 25-26.
[8] Bifurcation Opposition, ¶¶ 27-28.

(iii) "Whilst the issues identified by the Respondent in the Preliminary Objections are not overly intertwined with the merits…none of the points…, if upheld by the Tribunal, would resolve the entire dispute…. This fundamental nature of Respondent's objections also increases the substantial risk that a separate jurisdictional phase, even if partially successful for the Respondent, would still lead to a merits phase with no narrowing of the issues."[9]

(iv) "The strongest factor militating against bifurcation, however, is the complete lack of proportionality of the delay to the proceedings. According to the Claimants, "[t]he merits phase of the proceedings will be uncomplicated", which is the reason that the "Tribunal set down the timetable in Annex A of PO1 of just over 15 months from the filing of the Memorial to the final hearing. Granting the Request would disrupt this considerably…. There would also be the substantial additional cost of both party legal costs and Tribunal expenses for a second oral hearing and the production of two partial awards rather than a single final award." The Claimants posit that "the true motivation for seeking a preliminary determination of the insubstantial jurisdictional objections is simply to drag the proceedings out…."[10]

18. Concluding, the Claimants argue that the Tribunal should dismiss the Bifurcation Request and adopt the Claimants' proposed modified procedural timetable that would permit the Tribunal still to hold 'a single final hearing" during the October 2018 scheduled dates.[11]

## C. THE RESPONDENT'S BIFURCATION RESPONSE

19. In its Bifurcation Response, the Respondent counters the Claimants' argument that it did not advance a specific bifurcation request or justify its proposal by explaining that it "did not understand that it was required to do so at the time of filing its Preliminary

[9] Bifurcation Opposition, ¶¶ 29-31.
[10] Bifurcation Opposition, ¶¶ 32-35.
[11] Bifurcation Opposition, ¶¶ 36-38.

Objections" as the "procedural steps leading to a hearing on bifurcation have already been set out in the Tribunal's Flow Chart…."[12] Moreover, "[i]f the Claimants thought otherwise, they could have promptly canvassed the point…rather than waiting 21 days to file their Objection[.]"[13] The Respondent further submits that the Flow Chart needed only be updated to specify that a 1.5 day jurisdictional hearing would be required as well as a jurisdictional document disclosure phase. [14]

20. The Respondent disagrees with Claimants' bifurcation "test" – that the "merits of the jurisdictional objections advanced … are not prima facie of substance and are likely to fail" – and "the Claimants' asserted assessment of the merits."[15] Instead, the Respondent submits that to oppose bifurcation:

> [t]he Claimants would have to argue that the jurisdictional objections are on their face obviously frivolous such that the Respondent has not put forward serious arguments. Beyond such circumstances, which is obviously not the case, it is singularly inappropriate for the Claimants to seek to argue the merits in this way and to invite the Tribunal to prejudge the merits of the Respondent's jurisdictional objections.[16]

The Respondent then emphasizes several alleged deficiencies in the Claimants' substantive arguments regarding the Respondent's jurisdictional objections.[17]

21. Contrary to the Claimants' assertions, the Respondent contends that "[i]f the Respondent is successful on its jurisdictional objections then there will have been considerable time and costs saving" as the hearing will be shorter, expert evidence will not be addressed, witness evidence will be curtailed and the need for document disclosure will be less.[18] The Respondent also disputes the Claimants' assertion that

[12] Bifurcation Response, ¶¶ 1-3.
[13] Bifurcation Response, ¶ 4.
[14] Bifurcation Response, ¶ 5.
[15] Bifurcation Response, ¶¶ 9-10.
[16] Bifurcation Response, ¶¶ 9-10 (citing *Cairn v. India*).
[17] Bifurcation Response, ¶¶ 11-12.
[18] Bifurcation Response, ¶ 15.

"the Respondent has to succeed on several of its jurisdiction arguments in order to knock out both Claimants."[19]

22. In the event the Tribunal denies bifurcation, the Respondent objects to the Claimants' proposed timetable. First, the Respondent submits that it would not be able to produce its Counter-Memorial on the Merits with supporting evidence by January 26, 2018. Second, the Respondent argues that the deadline for the Respondent's Rejoinder is unfair as lead counsel will be away in August 2018 and there would have been only ten weeks from the proposed document production deadline (as compared to the Claimants' having four months to prepare a Reply). Consequently, the Respondent proposes two alternative timetables in the event its Preliminary Objections are not bifurcated.[20]

## D. THE CLAIMANTS' BIFURCATION REPLY

23. In their Bifurcation Reply, the Claimants underscore that "as the Respondent ultimately accepts, the case for bifurcation is not made out." The Claimants then stress that the "expeditious resolution of all issues in dispute as a combined jurisdiction and merits hearing… in October 2018" is in both Parties' interest.[21] The Claimants highlight that the Respondent's submissions on bifurcation are premised on the success of its jurisdictional objections and note that a decision to bifurcate cannot be "premised on the mere fact that preliminary objections have been made." Instead, the Claimants assert that "the analysis must take into account the context of the application."

24. The Claimants explain that this case should not be bifurcated as it "remains a straightforward case by investment arbitration standards…with comparatively modest quantum"; little evidence on the merits is needed; the Parties agreed a five-day hearing would suffice on both jurisdiction and merits (versus 1.5 days estimated by the

[19] Bifurcation Response, ¶ 19.
[20] Bifurcation Response, ¶¶ 22-33.
[21] Bifurcation Reply, p. 1.

Respondent for jurisdiction only); and the additional cost and the delay of an additional phase is not merited. [22] After considering the Respondent's proposed procedural timetable for a non-bifurcated proceeding, the Claimants adjust the proposed deadlines for the document production phase and the time limit for the Claimants' Reply. [23]

## III. TRIBUNAL'S ANALYSIS

25. Article 41(2) of the ICSID Convention provides that:

> Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

26. In addition, ICSID Arbitration Rule 41(4) provides in relevant part that the Tribunal "may deal with the objection as a preliminary question or join it to the merits of the dispute...."

27. Having considered the Parties' positions on bifurcation, and as indicated to the Parties in prior communications, the Tribunal finds that bifurcation of the Respondent's preliminary objections on jurisdiction is warranted on several grounds.

28. First, the Respondent has raised serious jurisdictional objections that, if accepted, could lead to dismissal of the entire case or a substantial part of the case. This will promote procedural efficiency.

29. Second, the Respondent's preliminary objections involve limited factual and legal issues, which could be fully developed with a limited further document production stage and limited witnesses. Even the Claimants recognize that "the Preliminary Objections are not overly intertwined with the merits."[24] The merits are – subject to

[22] Bifurcation Reply, p. 2.
[23] Bifurcation Reply, pp. 2-3.
[24] Claimants' December 29, 2017 letter, para. 29.

the Parties' differing and apparently irreconcilable views as to whether the issue of the lawfulness of the alleged expropriation of the Montrose Land is properly and fully a liability/merits issue or a quantum issue – relatively straightforward, because it is undisputed that the Respondent took the Montrose Land and paid the original purchase price.

30. Third, it is quantum that will be the most complicated and expensive stage, as the Claimants are seeking lost future profits exceeding US$20 million from the hotel project contemplated for the Montrose Land. If the quantum phase is necessary, there will be complex submissions and a host of fact and expert witness testimony. It would be a waste of significant time and funds for the Parties to address quantum in the first phase should the Tribunal decide in the Respondent's favor in whole or substantial part on jurisdiction.

## IV. DECISION

31. In light of the above, the Tribunal orders as follows:

    a. the Respondent's request to bifurcate preliminary objections on jurisdiction is granted; and

    b. the procedural timetable for the bifurcated first phase is as set out in Annex A.

On behalf of the Tribunal,

[signed]

Professor Lucy Reed
President of the Tribunal
Date: February 21, 2018

## Annex A. Procedural Timetable

| **Event** | **Period** | **Deadline** |
|---|---|---|
| Claimants' Counter-Memorial on Jurisdiction | +8 weeks | April 18, 2018 |
| Document Requests, in the form of Redfern Schedules | +2 weeks | May 2, 2018 |
| Objections to Document Requests | +1 week | May 9, 2018 |
| Replies to Objections to Document Requests and production of uncontested documents | +1 week | May 16, 2018 |
| Decision by the Tribunal on Contested Document Requests | +1 week | May 23, 2018 |
| Production of Ordered Documents | +1 weeks | May 30, 2018 |
| Respondent's Reply | +6 weeks | July 11, 2018 |
| Claimants' Rejoinder | +6 weeks | August 23, 2018 |
| Hearing on Jurisdiction | | October 17-19, 2018 |