

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID CASE NO. ARB/09/18

Between

Cambodia Power Company

— Claimant —

And

Kingdom of Cambodia

— Respondent —

**AMENDED DECISION ON THE
CLAIMANT'S APPLICATION TO
EXCLUDE MR. LOBIT'S WITNESS
STATEMENT AND DERIVATIVE
EVIDENCE**

14February 2012

Members of the Tribunal

Neil Kaplan CBE QC SBS – Presiding Arbitrator -

John Beechey – Co-Arbitrator -

Toby Landau QC – Co-Arbitrator -

The Tribunal thanks the Parties for their written submissions and their very helpful oral presentations in Hong Kong on 25th and 26th January 2012 relating to the evidence of Mr. Lobit.

The Tribunal has decided to give the Parties its Decision as a matter of urgency and in so doing has been guided by two factors. First, there is a merits hearing fixed for September 2012 in Paris and the Tribunal and, doubtless the Parties too, do not want to countenance any further delay. This case was due to be heard in April 2012 but was adjourned due to the Claimant's application. Secondly, the Tribunal is anxious not to risk trespassing on matters that might need to be dealt with in the Award following the merits hearing. Accordingly, the Tribunal has concluded that both caution and expedition favour the course of giving just the result of the applications now, but leaving the reasons for further adumbration in the Award, following the September hearing.

Accordingly, having taken into account all the submissions and materials presented, the Tribunal rules as follows:

1. The Tribunal finds that International Law governs the question of the admissibility of Mr. Lobit's evidence in this Arbitration. In applying International Law, the Tribunal finds that questions of impediment, privilege, agency, confidentiality and fiduciary duties, that have been relied upon by CPC, are governed by Californian law. In reaching its determinations on the Claimant's application, the Tribunal considers that it may be guided, as agreed by the Parties, by the IBA Rules on the Taking of Evidence in International Commercial Arbitration.
2. The Tribunal declines to exclude Mr. Lobit's testimony from these proceedings, and to prevent him from participating in these proceedings, on the sole basis of his or PDC's status or relationship with CPC and its legal representatives, including objections based on agency, confidentiality, and fiduciary duties.
3. The Claimant remains at liberty, however, to object to any specific communications about which Mr Lobit has testified, or to which the Respondent has referred, on the basis that the communication itself is subject to attorney-client privilege as a matter of Californian law.
4. For these purposes:
 - (a) Within 7 days of the date of this Amended Decision, the Respondent shall serve on the Claimant a schedule with sufficient particularity of all documents received from Mr. Lobit (including those sent to third parties)(the "**Full Schedule**"). In the Full Schedule, the Respondent should highlight the documents which it maintains relate to the Project and attach all such documents to the said schedule.
 - (b) Within 21 days thereafter, the Claimant shall:

i. particularise any objection it may have to the use of each of the documents identified by the Respondent, as a matter of attorney-client privilege, applying Californian law (excluding any objection based solely upon Mr. Lobit's or PDC's status or relationship with CPC and its legal representatives, or agency, confidentiality and fiduciary duties);

ii. identify by means of a Redfern Schedule, with reasons, any specific passages in Mr. Lobit's 1st witness statement that are said to refer to communications that are covered by attorney-client privilege under Californian law (excluding any objection based solely upon Mr Lobit's or PDC's status or relationship with CPC and its legal representatives, or agency, confidentiality and fiduciary duties); and

iii. file any application for production in respect of documents listed in the Full Schedule, but not already produced by the Respondent.

(c) Within 14 days thereafter, the Respondent shall:

- i. respond to the Claimant's objections filed pursuant to paragraph 4(b)(i) of this Amended Decision;
- ii. respond on the Claimant's submissions filed pursuant to paragraph 4(b)(ii) of this Amended Decision.; and
- iii. if it objects to the production of any document requested by the Claimant (pursuant to paragraph 4(b)(iii) of this Decision), state its reasons in the Redfern Schedule with sufficient particularity.

(d) Within 7 days thereafter, the Claimant may reply to the Respondent's submissions filed pursuant to paragraph 4(d) above.

(e) Within 7 days thereafter, the Respondent may respond.

(f) The Tribunal will rule on all outstanding issues in relation to the matters contained herein as soon as reasonably practical.

5. Having regard to Articles 21 and 22 of the ICSID Convention, the Claimant is hereby restrained from taking any action in any court against Mr. Lobit personally in relation to his involvement and continuing involvement in these proceedings.
6. Save insofar as the Parties' applications have been dealt with herein, the same are dismissed.
7. The costs of this Application are reserved.

8. The Tribunal will now look at the Respondent's Counter-Memorial and Mr. Lobit's 1st Witness Statement *de bene esse*.
9. For the avoidance of doubt, the previous order of the Tribunal suspending procedural steps in these proceedings pending the resolution of the Lobit issue is hereby revoked.

[Signed]

Neil Kaplan QC CBE SBS
For and on behalf of the Tribunal