EXCERPTS

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

In the arbitration proceeding between

CAMBODIA POWER COMPANY

- Claimant -

and

KINGDOM OF CAMBODIA

- Respondent -

ICSID Case No. ARB/09/18

AWARD

Members of the Tribunal

Neil Kaplan CBE QC SBS, Presiding Arbitrator
John Beechey, Co-Arbitrator
Toby Landau QC, Co-Arbitrator

Secretary of the Tribunal

Martina Polasek

Date of dispatch to the Parties: 22 April 2013

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TABLE OF CONTENTS

FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

ADB	Asian Development Bank
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
BHA	Beacon Hill Associates, Inc.
C(No.)	Claimant Exhibit Number
CB(No.)	Core Bundle Exhibit Number
Cl. Additional Claim No. 1	Claimant's Additional Claim No. 1 dated 10 May 2011
Cl. Additional Claim No. 2	Claimant's Additional Claim No. 2 dated 10 May 2011
Cl. Mem.	Claimant's Memorial on the merits (as amended on 27 September 2010)
Cl. PHB	Claimant's Post-Hearing Submission dated 15 November 2012
Cl. Reply	Claimant's Reply on the merits dated 14 May 2012
Cl. Skeleton	Claimant's Skeleton Argument on the merits dated 27 August 2012
CPC	Claimant, Cambodia Power Company, a Cambodian limited liability company
DOG	Deed of Guarantee between KOC and CPC dated 27 March 1998
EAC	Electricity Authority of Cambodia, an agency of KOC
EDC	Electricité du Cambodge, a Cambodian limited liability company
EVN	Electricité du Vietnam, a state-owned enterprise of SRV
EVN PPA	Power Purchase Agreement between EDC and EVN dated 24 July 2000
IA	Implementation Agreement between KOC and CPC dated 20 March 1996, as amended
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of

	Other States dated 18 March 1965
ICSID or the Centre	International Centre for the Settlement of Investment Disputes
IFC	International Finance Corporation
KEXIM	Export-Import Bank of Korea
KOC	Respondent, Kingdom of Cambodia
Lobit Transcript	Transcript of the hearing concerning the Lobit Issue
MEF	Cambodian Ministry of Economy and Finance, a ministry of KOC
MIME	Cambodian Ministry of Industry, Mines and Energy, a ministry of KOC
MOI	Ministry of Industry, a ministry of SRV
MPG	Mosbacher Power Group L.L.C.
OPIC	United States Overseas Private Investment Corporation
PDC	PDC Group International, Inc., associate to co-project counsel for the C-4 Project, including any principals or staff thereof
PPA	Power Purchase Agreement among KOC, EDC and CPC dated 20 March 1996, as amended
R(No.)	Respondent Exhibit Number
Resp. C-Mem.	Respondent's Counter-Memorial on the merits dated 29 September 2011
Resp. PHB	Respondent's Post-Hearing Submission dated 15 November 2012
Resp. Rejoinder	Respondent's Rejoinder on the merits dated 7 August 2012
Resp. Skeleton	Respondent's Skeleton Argument on the merits dated 27 August 2012
SRV	Socialist Republic of Vietnam, a sovereign state, including but not limited to any ministry or agency thereof
Transcript	Transcript of the hearing on merits

I. PROLOGUE

1. The history of Cambodia, for much of the recent past, has been unhappy and difficult. This case concerns a bold project that followed the end of a bloody civil war. The Kingdom of Cambodia ("***KOC***" or "***Respondent***") was short of power. Without sufficient power generation the economy could not progress and take advantage of more stable times. American interests proposed a power generation project for Phnom Penh ("***C-4 Project***") with support at the highest levels in Washington. [redacted], supported the C-4 Project. But certainly at the beginning, others in the Cambodian government did not. However, the transaction documents giving rise to this dispute were executed. Financial closing never in fact took place.

2. Cambodia Power Company ("***CPC***" or "***Claimant***") contends that the deal did not reach fruition due to deliberate acts of KOC (or due to acts for which KOC is responsible) designed to scupper it. KOC for its part contends that it did all that was required of it, but that the project failed because the Claimant was inexperienced and, crucially, had entered into a power purchase agreement prior to securing financing – something which it never managed to do.

II. INTRODUCTION AND PARTIES

3. This case concerns a dispute submitted to the International Centre for the Settlement of Investment Disputes ("***ICSID***" or "***Centre***") on the basis of three agreements:

    a. a Power Purchase Agreement, entered into among the Kingdom of Cambodia, Cambodia Power Company and Electricité du Cambodge on 20 March 1996, as subsequently amended ("***PPA***");

    b. an Implementation Agreement, entered into between the Kingdom of Cambodia and Cambodia Power Company on 20 March 1996, as

subsequently amended ("***IA***"); and

c. a Deed of Guarantee, entered into between the Kingdom of Cambodia and Cambodia Power Company on 27 March 1998 ("***DOG***").

4. The dispute resolution clause in each of the three agreements provides for arbitration between the signatory parties under the aegis of ICSID.

5. The Claimant is a Cambodian limited liability company incorporated and existing under the laws of the Kingdom of Cambodia. For the purpose of this matter, the Claimant's registered office is [redacted]

6. CPC is a company wholly owned by [redacted], a Delaware corporation, which entered into the original contracts, the subject matter of this arbitration.

7. The Respondent is the KOC, a sovereign state, represented by the Ministry of Industry, Mines and Energy ("***MIME***"). For the purpose of this arbitration, the Respondent's address is [redacted].

8. The Claimant and the Respondent are hereinafter collectively referred to as the "***Parties***". The Parties' respective representatives and their addresses are listed above on page (i).

III. ARBITRATION CLAUSES

9. This arbitration arises under three different agreements, the PPA, the IA, and the DOG.

III.1 The PPA

10. The PPA contains in Section 16 the following agreement to arbitrate:

[redacted]

[redacted]

[redacted]

...

11. The PPA was novated on 30 September 1996, and subsequently amended. As amended, Section 16 now reads as follows:

[redacted]

16.3 Arbitration

(a)...

(b) (i) If and when the Kingdom of Cambodia has implemented the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "Convention") any dispute shall, subject to Section 16.3(b)(iv) where applicable, be referred to arbitration and finally settled in accordance with the Rules of Procedure for Arbitration Proceedings of the International Centre for the Settlement of Investment Disputes (the "Centre") established by the Convention (the "ICSID Rules") and the parties hereby consent to arbitration thereunder;

(ii) The Parties agree the Company shall be deemed to be a foreign controlled company for the purposes of Article 25(2)(b) of the Convention so long as not less than thirty (30) percent of the shares and other securities convertible into shares issued by the Company are held by Foreign Investors;

(iii) MIME agrees to procure that the Kingdom of Cambodia:

(A) notifies the Centre that it has designated each of MIME and EDC as a sub-division or agency of

the Kingdom of Cambodia which is subject to the jurisdiction of the Centre for the purpose of Article 25(1) of the Convention;

(B) approves the consent by MIME to arbitration under the ICSID Rules for the purpose of Article 25(3) of the Convention; and

(C) arbitration proceedings conducted pursuant to this Section 16.3 shall be held in Washington, D.C., The Hague, Cairo or Kuala Lumpur; and

(iv) Unless and until the Kingdom of Cambodia has implemented the Convention or if for any other reason the Dispute cannot be finally settled pursuant to the terms of the Convention, any Dispute shall be referred to and finally settled by arbitration under the Rules of Arbitration of the International Chamber of Commerce (the "ICC Rules") as modified herein or as otherwise agreed upon in writing by the Parties. The seat of the arbitration, unless otherwise agreed by the Parties, shall be Singapore or such other nearby location as the Parties may agree provided it is in a Contracting State to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. The language of the arbitration shall be English.

[redacted]

[redacted]

[redacted]

[redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]

III.2 The IA

12. The IA contains in Section 12 the following agreement to arbitrate:

12.1 Disputes

If any dispute or difference arises out of or in connection with this Agreement (including in relation to the termination thereof) (each a "Dispute"), the provisions of this Section 12 shall apply.

12.2 International Centre for the Settlement of Investment Disputes

(a) If and when the Kingdom of Cambodia has implemented the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "Convention") it shall, subject to Section 12.3 where applicable, be referred to arbitration and finally settled in accordance with the Rules of Procedure for Arbitration Proceedings of the International Centre for Settlement of Investment Disputes (the "Centre") established by the Convention (the "ICSID Rules") and the parties hereby consent to arbitration thereunder.

(b) The parties agree that the Company shall be deemed to be a foreign controlled company for the purposes of Article 23(2)(b) of the Convention so long as not less than thirty (30) per cent of the shares and other securities convertible into shares issued by the Company are held by Foreign Investors.

(c) MIME agrees to procure that the Kingdom of Cambodia:

(a) notifies the Centre that it has designated MIME as a sub-division or agency of the Kingdom of Cambodia which is subject to the jurisdiction of the Centre for the purpose of Article 25(1) of the Convention; and

(b) approves the consent by MIME to arbitration under the ICSID Rules for the purpose of Article 25(3) of the Convention.

(c) Arbitration proceedings conducted pursuant to this Section 12.2 shall be held in Singapore.

[redacted]

[redacted]

13. The IA was novated on 5 June 1996, and amended on 20 July 1998. As amended, Section 12.2 now reads as follows:

[redacted]

12.2 International Centre for the Settlement of Investment Disputes

(a) If and when the Kingdom of Cambodia has implemented the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "Convention") any Dispute shall, subject to Section 12.3 where applicable, be referred to arbitration and finally settled in accordance with the Rules of Procedure for Arbitration Proceedings of the International Centre for the Settlement of Investment Disputes (the "Centre") established by the Convention (the "ICSID Rules") and the parties hereby consent to arbitration thereunder.

(b) The parties agree that the Company shall be deemed to be a foreign controlled company for the purposes of Article 25(2)(b) of the Convention so long as not less than thirty (30) percent of the shares and other securities convertible into shares issued by the Company are held by Foreign Investors.

(c) MIME agrees to procure that the Kingdom of Cambodia:

(i) notifies the centre that it has designated MIME as a sub-division or agency of the Kingdom of Cambodia which is subject to the jurisdiction of the Centre for the purpose of Article 25(1) of the Convention;

(ii) approves the consent by MIME to arbitration under the ICSID Rules for the purpose of Article 25(3) of the Convention; and

(iii) Arbitration proceedings conducted pursuant to this Section 12.2 shall be held in Washington, D.C., The Hague, Cairo or Kuala Lumpur.

[redacted]

[redacted]

III.3 The DOG

14. The DOG contains in Section 7.2 the following agreement to arbitrate:

[redacted]

7.2.2 International Centre for the Settlement of Investment Disputes

(a) If and when the Kingdom of Cambodia has implemented the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "Convention") any Dispute shall, subject to Section 7.4 where applicable, be referred to arbitration and finally settled in accordance with the Rules of Procedure for Arbitration Proceedings of the International Centre for the Settlement of Investment Disputes (the "Centre") established by the Convention (the "ICSID Rules") and the parties hereby consent to arbitration thereunder.

(b) The parties agree the Company shall be deemed to be a foreign controlled company for the purposes of Article 25(2)(b) of the Convention so long as not less than thirty (30) percent of the shares and other securities convertible into shares issued by the Company are held by Foreign Investors.

(c) The Guarantor agrees to procure that the Kingdom of Cambodia:

(i) notifies the Centre that it has designated the Ministry of Economy and Finance as a sub-division or agency of the Kingdom of Cambodia which is subject to the jurisdiction of the Centre for the purpose of Article 25(1) of the Convention;

(ii) approves the consent by the Ministry of Economy and Finance to arbitration under the ICSID Rules for the purpose of Article 25(3) of the Convention; and

(iii) arbitration proceedings conducted pursuant to this Section 7.3 shall be held in The Hague, Cairo or Kuala Lumpur.

[redacted]

IV. PROCEDURAL HISTORY ON THE MERITS

IV.1 Jurisdiction

15. On 22 March 2011, the Tribunal issued a Decision on Jurisdiction upholding its jurisdiction over claims against the Kingdom of Cambodia and declining jurisdiction over claims against Electricité du Cambodge ("***EDC***"). The Decision on Jurisdiction, which is annexed to this Award as Annex 1, contains at paragraphs 15-45 the procedural history in this arbitration leading up to the Decision. This Section provides the procedural history from the date of the Decision on Jurisdiction until the date of this Award, with the exception of the procedural history relating to a witness statement filed by the Respondent, which is set out in **Section V.1** below.

IV.2 The EDC Application

16. The Decision on Jurisdiction concluded that the Respondent had not designated EDC as an agency or subdivision of the Respondent within the meaning of Article 25(1) of the ICSID Convention. This ruling prompted the Claimant to file an application, dated 25 March 2011, with a number of prayers of relief relating to the Tribunal's jurisdiction *ratione personae* over EDC ("***EDC Application***"). The Claimant sought, *inter alia*, that the Tribunal invite the Respondent to fulfil its alleged undertaking to designate EDC pursuant to PPA 16.3(b)(i) and 16.3(b)(iii)(A), as amended. According to the Claimant, the Tribunal had the power to compel the Respondent to designate EDC by ordering specific performance and that, once the designation was made, the Tribunal could acquire jurisdiction *ratione personae* over EDC in this arbitration.

17. By letters of 31 March and 6 April 2011, the Respondent objected to the EDC Application. The Respondent argued that the application was inadmissible under the ICSID Convention and amounted to an abuse of process. The Claimant filed responses to the Respondent's objections by letter of 5 April 2011.

18. On 13 April 2011, the Tribunal and the Parties held a telephone conference during which the Parties set out their respective positions on the EDC Application. Following the session, on 14 April 2011, the Tribunal wrote to the Parties as follows:

> *The Tribunal is satisfied that it has finally decided that it has no jurisdiction over the claim against EDC and thus EDC is not and cannot be a party to this arbitration. Thus no uncertainty arises relating to EDC.*
>
> *With regard to the Claimant's claim based on the alleged breach of the alleged undertaking, this appears to the Tribunal to be a merits issue relating to an allegation of breach of contract.*
>
> *However, it seems to be ancillary to the main claim and would thus appear to qualify under Article 46. No reply has been filed. The Tribunal notes Rule 40(2).*

19. In this connection, the Tribunal proposed that the issue be heard as part of the proceeding on the merits, but stated that it would deal with the Respondent's claim for abuse of process in a separate ruling.

20. On 15 April 2011, each Party commented on the Tribunal's proposal of 14 April 2011. The Respondent sought further clarifications on the nature of the Claimant's designation undertaking claim, namely whether it was one for specific performance or for damages. The Claimant reserved the right to seek whatever remedies may be available for breach of the undertaking, including specific performance as well as damages.

21. On 19 April 2011, the Tribunal issued a decision on the EDC Application ("***EDC Decision***"), which is annexed to this Award as Annex 2. The Tribunal concluded that the Claimant's claims in the EDC Application were admissible under Article 46 of the ICSID Convention as additional claims, which may be introduced by a party before the filing of the Reply, in accordance with Arbitration Rule 40(2). It further concluded that the EDC Application did not amount to an abuse of process. The Tribunal thus directed the Claimant to set out its case on the alleged breach of the alleged undertaking and to

spell out the basis of its claim in a pleading appended to its Memorial on Quantum, due on 10 May 2011. The Respondent was directed to reply in its Counter-Memorial due on 29 July 2011.

IV.3 Respondent's Objections to Claimant's Memorial on Quantum

22. On 11 May 2011, the Claimant filed its Memorial on Quantum, including four witness statements, three expert reports, exhibits and legal authorities and approximately "*4,000 documents in support of Claimant's expenses incurred in connection with the project*". The Claimant concurrently filed two additional claims, which are described at paragraphs 214 to 219 below.

23. On 16 May 2011, the Respondent filed observations on Claimant's Memorial on Quantum taking issue with the Claimant's presentation of additional factual evidence, the introduction of a new additional claim not admitted by the Tribunal and failure to provide key evidence in support of the quantification of its claims. The Respondent requested that the Tribunal:

> *(1) strike out the new submissions and materials filed by the Claimant that relate to the merits of the dispute;*
>
> *(2) order the Claimant to produce all documents upon which its experts rely;*
>
> *(3) organise, translate and re-submit the "4000 documents" in support of the Claimant's expenses claim;*
>
> *(4) order the Claimant to quantify its claim for damages made under its Additional Claim No. 1 forthwith; and*
>
> *(5) amend the procedural timetable.*

24. By letter of 19 May 2011, the Claimant requested the Tribunal to deny the Respondent's requests of 16 May 2011 and to admit its Additional Claim No. 2 under Article 46 of the ICSID Convention.

25. A telephone conference was held with the Tribunal and the Parties on 26 May 2011 to address the procedural issues raised by the Respondent.

26. On 30 May 2011, the Tribunal issued a decision on the Respondent's objections concerning the Claimant's Memorial on Quantum. The Tribunal:

    (1) Declined to strike out parts of the Claimant's Memorial on Quantum and new documentary and witness evidence, with the exception of paragraphs 257-271 of [redacted] Third Witness Statement which addressed a pure liability question;
    (2) Granted the Respondent two additional months to file its Counter-Memorial, to be filed by 29 September 2011;
    (3) Confirmed that its ruling of 19 April 2011 did not limit the Claimant's relief to a request for specific performance with regard to the Claimant's additional claim on KOC's undertaking to designate EDC to ICSID, but that the Claimant could not rely on promissory estoppel, which had already been dealt with at paragraphs 267-269(e) of the Decision on Jurisdiction;
    (4) Fixed a calendar for the Parties to file comments on the admissibility of the Claimant's Additional Claim No. 2; and
    (5) Declined to strike out certain of the Claimant's exhibits which had not been organized or which had not been translated into English and invited the Parties to discuss and resolve the issues between themselves.

IV.4 The Parties' Requests for Production of Documents and Further Written Submissions on the Merits

27. On 18 June 2011, the Parties submitted to the Tribunal an agreed amended procedural timetable.

28. On 29 September 2011, pursuant to the agreed timetable, the Respondent filed its Counter-Memorial on the merits, including three witness statements, three expert reports, exhibits and legal authorities. The Counter-Memorial contained a witness statement of Mr Jay Lobit which was the subject of a procedural issue which eventually led to the suspension of the proceeding on the merits (this issue is described more fully in **Section V** below).

29. On 21 October 2011, the Claimant served a request for production of documents on the Respondent.

30. On 17 February 2012, after the lifting of the suspension on the proceeding on the merits, the Respondent served its objections to the Claimant's request for production of documents.

31. On 2 March 2012, the Claimant submitted its request for production of documents to the Tribunal, including the Respondent's observations. Further observations were filed by the Respondent and the Claimant by communications of 6 March 2012 and 7 March 2012, respectively.

32. The procedural calendar was further amended by agreement of the Parties on 8 March 2012.

33. On 15 March 2012, the Tribunal issued its decision with respect to the Claimant's request for production of documents.

34. On 9 May 2012, the Claimant informed the Tribunal and the Respondent that it would not be able to submit the entire Reply (i.e. the submission, the witness statements, the expert reports, the exhibits and the legal authorities) on the next day, as had been agreed between the Parties, and therefore requested an extension of the time limit. In support of its request, the Claimant referred to various logistical and personal issues encountered by its legal team. The Claimant suggested that it file the completed documents on a rolling basis.

35. On the same day, the Tribunal extended the time limit for the filing of the Claimant's Reply to 11 May 2012. The Tribunal emphasized that last minute applications should be avoided.

36. On 11 May 2012, the Claimant informed the Tribunal that it would not be able to comply with the deadline, as extended. Therefore, the Claimant asked the Tribunal to reconsider its decision and allow the Claimant to file its Reply and supporting

documents on 14 May 2012. The Respondent strongly objected to such request for reconsideration and urged the Tribunal to order the Respondent to submit its Reply forthwith.

37. On the same day, the Tribunal ordered the Claimant to file its Reply over the weekend, expressing its dissatisfaction with the situation and reserving its decision on the costs associated with the extension to a later stage.

38. On 14 May 2012, the Claimant filed its Reply, including five witness statements, five expert reports, exhibits and legal authorities. The Claimant reserved the right to file a sur-reply following the Respondent's Rejoinder.

39. On 15 May 2012, the Respondent reiterated that the Claimant's delay in submitting its Reply was premeditated, greatly prejudicial and that the Respondent was opposed to any further submission by the Claimant. The Respondent also noted that the Claimant had failed to provide a final prayer for relief with its Reply and sought an order from the Tribunal directing the Claimant to file the prayer for relief within 24 hours.

40. On the same day, the Tribunal granted the Respondent's request.

41. On 16 May 2012, the Claimant submitted its Consolidated Prayer for Relief, including 60 different categories of relief sought.

42. On 7 August 2012, the Respondent filed its Rejoinder on the merits, including four witness statements, three expert reports, exhibits and legal authorities.

IV.5 The Main Hearing

43. On 30 August 2012, a telephone conference was held between the President and the Parties to organize the hearing on the merits (the "***Main Hearing***"). The Parties agreed on most organizational matters, with the exception of whether or not there should be written closing submissions by the Parties following the Main Hearing. Subsequently, on 4 September 2012, the Parties filed a tentative schedule for the Main Hearing,

including the sequence of witnesses and experts to testify at the Hearing.

44. The Main Hearing was held at the ICC Hearing Centre in Paris in the period 10-13 and 17-21 September 2012. The Claimant was represented by Mr Richard Keck, Mr Rory Macmillan, Mr Jason Blechman of Macmillan Keck and Mr Toby Starr of Starr & Partners LLP, and Mr William Frain-Bell, Counsel of Hardwicke Chambers. Non-legal representatives of the Claimant present at this Hearing included [redacted] and [redacted]. The Respondent was represented by Mr Peter Turner, Mr Sami Tannous and Dr Kate Parlett, all of Freshfields Bruckhaus Deringer LLP. The Respondent's counsel was also assisted by Mr Fred Bennett of Quinn Emmanuel Urquhart & Sullivan LLP and Ms Billie Slott of Sciaroni & Associates.

IV.6 The Post-Hearing Phase

45. The Parties filed Post-Hearing Submissions on 15 November (Respondent) and 16 November 2012 (Claimant) and Schedules of Costs on 29 November 2012.

46. On 19 March 2013, the proceeding was declared closed pursuant to Arbitration Rule 38(1).

V. THE LOBIT ISSUE

V.1 Procedural History Relating to the Lobit Issue

47. On 29 September 2011, the Respondent served its Counter-Memorial, together with supporting documents which included a Witness Statement of Mr Edgar Jay Lobit ("***Witness Statement***").

48. By a letter dated 6 October 2011, the Claimant raised concerns about the Witness Statement (the "***Lobit Issue***"). The Claimant alleged that Mr Lobit had in the past been

part of the Claimant's legal team. As a result, according to the Claimant, the Witness Statement contained a significant amount of privileged and confidential material that could not be used in this arbitration. Similarly, the exhibits submitted together with the Respondent's Counter-Memorial "*include[d] numerous privileged and confidential internal communications of Claimant that appear to have been supplied by Mr Lobit*".[1]

49. By an email dated 11 October 2011, the Respondent's counsel brought to the attention of the Tribunal a letter by the Claimant's counsel sent to Mr Lobit. In this letter, the Claimant demanded from Mr Lobit that he take all necessary steps to (i) cease to make further disclosures of confidential information; and (ii) withdraw the Witness Statement.[2]

50. By an email dated 12 October 2011, the Tribunal requested the Respondent's reply at the earliest possible date. In addition, the Tribunal asked the Claimant to refrain from taking any further actions against Mr Lobit before the Tribunal could consider both Parties' positions.

51. By a letter dated 13 October 2011, the Claimant responded to the Tribunal expressing concerns about the Tribunal's directions that the Claimant refrain from taking actions against Mr Lobit. Indeed, the Claimant explained that if it did not take prompt action, it might jeopardize its right to claim equitable relief under US Law. The Claimant recognized that an amicable solution could still be found between the Parties with regard to this matter. It subsequently agreed to forbear from further actions until 18 October 2011.

52. By a letter dated 18 October 2011, the Respondent declined to take any of the steps the Claimant had asked it to take. The Respondent denied that (i) the Witness Statement contained information protected by attorney-client privilege; and (ii) Mr Lobit owed

[1] Claimant's letter to the Tribunal dated 6 October 2011.

[2] Claimant's letter to Mr Lobit, dated 10 October 2011.

fiduciary duties to the Claimant, including a duty not to disclose confidential information.

53. By a letter dated 19 October 2011, in view of the Respondent's position, the Claimant informed the Tribunal that it would file a formal application for exclusion of Mr Lobit's evidence from the proceedings (the "***Lobit Application***"). The Claimant subsequently filed the Lobit Application, together with the 4th witness statement of [redacted], exhibits and legal authorities on 26 October 2011.

54. Having given both Parties the opportunity to state their views on the procedural calendar in regard to the Lobit Issue, on 29 October 2011 the Tribunal directed the Respondent to file a response to the Lobit Application within three weeks and the Claimant to file a reply within seven days of the Respondent's response. The Parties subsequently agreed that the Respondent would be entitled to file a rejoinder.

55. A conference call between the President of the Tribunal and the Parties was scheduled to discuss the approach to be adopted by the Tribunal in considering the Lobit Application, including whether or not an independent expert should be appointed to assist in deciding on the applicable legal rules and if the specific offending material would be a breach of such rules, and if a separate hearing should be convened. Hearing dates for this purpose were preliminarily reserved, with the understanding that the Main Hearing would be postponed.

56. By a letter dated 9 November 2011, Mr Lobit, through his counsel Fred G. Bennett of the law firm of Quinn Emanuel, dismissed claims that the Witness Statement contained privileged or confidential information. Mr Lobit invoked the immunity provisions contained in Articles 21 and 22 of the ICSID Convention and numerous California law provisions in support of his position. Mr Lobit urged the Claimant (i) to drop its demand that he withdraw his Witness Statement; and (ii) to confirm that the Claimant accepted that Mr Lobit was protected by the ICSID Convention's provisions on immunity, and would therefore not file actions against him.

57. On 11 November 2011, the Parties participated in a teleconference with the President of the Tribunal, during which the Parties agreed on a number of procedural issues concerning the Lobit Application. Following the teleconference, the President of the Tribunal invited the Parties to state their views on the possibility of retaining an independent expert in regard to the Lobit Application.

58. By a letter dated 14 November 2011, the Respondent objected to the appointment of an independent expert by the Tribunal. The Claimant was in favour of the appointment of an expert and objected to the Tribunal looking at the offending material *de bene esse*. By a letter dated 16 November 2011, the Claimant further developed its position with regard to the duties of Mr Lobit.

59. On 18 November 2011, the Tribunal decided the issues that would be addressed during the hearing, which would exclude looking at the allegedly offending material itself. It was subsequently agreed that the Tribunal would issue a summary decision on the Lobit issue and that the reasons upon which that decision was based would be included in this Award.

60. On 2 December 2011, the Respondent filed its response to the Lobit Application, together with a second witness statement of Mr Lobit (the "***Second Witness Statement***").

61. On 13 December 2011, following an extension, the Claimant filed a reply, together with legal authorities.

62. On 20 December 2011, the Respondent filed its rejoinder, together with one annex.

63. On 25 and 26 January 2012, a hearing dealing with the Lobit Issue took place in Hong Kong at the Hong Kong International Arbitration Centre. The Claimant was represented by Mr Richard Keck and Mr Jason Blechman, both of Macmillan Keck. The Claimant's counsel was also assisted by Mr Jeffrey Vale of Valle Makoff LLP. Non-legal representatives of the Claimant present at this hearing included [redacted]. The Respondent was represented by Mr Peter Turner, Ms Marie Stoyanov and Mr Sami

Tannous, all of Freshfields Bruckhaus Deringer LLP. The Respondent's counsel was also assisted by Mr Fred Bennett of Quinn Emmanuel Urquhart & Sullivan LLP.

64. At the hearing, Mr Lobit gave evidence and was cross-examined. The Respondent did not wish to cross-examine [redacted].

65. On 29 January 2012, the Tribunal issued a Decision on the Claimant's application to exclude Mr Lobit's witness statement and derivative evidence (the "***Lobit Decision***"). The Lobit Decision, which is attached hereto as Annex 3, declined to exclude Mr Lobit's Witness Statement and to prevent him from participating in the arbitration "*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*". However, the Tribunal allowed the Claimant to object to any specific communication disclosed by Mr Lobit in his Witness Statement or referred to by the Respondent, on the grounds of attorney-client privilege under Californian Law. For these purposes, the Tribunal set up a specific procedure to be followed by the Parties.

66. In addition, the Lobit Decision specified that the Claimant should not take any action in any court against Mr Lobit personally in relation to his involvement in this arbitration.

67. The factual background to the Lobit Decision, and the Tribunal's reasoning on this issue, are set out below in **Sections V.2** and **V.3**.

68. On 1 February 2012, the Claimant sought modifications of the Lobit Decision with regard to the schedule and the manner in which the objections were to be submitted, together with clarifications about the status of the proceedings.

69. On 14 February 2012, the Tribunal issued an Amended Decision on the Claimant's Application to exclude Mr Lobit's Witness Statement and derivative evidence ("***Amended Lobit Decision***"). The Amended Lobit Decision is attached hereto as Annex 4. Among other things, the Amended Lobit Decision restructured the timetable of the procedure to deal with the Claimant's objections to Mr Lobit's direct and derivative evidence, and revoked the Tribunal's previous order suspending the

proceedings on the merits.

70. On 24 March 2012, the Claimant filed a 176 page Redfern Schedule setting out its objections to Mr Lobit's testimony and derivative evidence ("***Lobit Objections Schedule***"). The objections included a new ground based on mediation privilege (the "***Mediation Objections***"). Specifically, it was argued that Mr Lobit had been involved in mediations between the C-4 Project's lenders and between Mosbacher Power Group ("***MPG***") and BHA. As such, he was said to have been provided with confidential information by the parties to these mediations but had disclosed such information to the Respondent.

71. On 3 April 2012, the Respondent objected to the new ground, arguing, among other things, that the Mediation Objections were inadmissible as they should have been raised when the Claimant first raised the objections to Mr Lobit's Witness Statement and derivative evidence.

72. On 9 April 2012, the Tribunal ruled on the Mediation Objections. It dismissed them *in limine*. According to the Tribunal, the Mediation Objections should have been raised together with the other objections to Mr Lobit's evidence in January 2012.

73. On 23 April 2012, the Respondent replied to the Claimant's objections as set out in the Lobit Objections Schedule.

74. On 21 May 2012, the Claimant added its replies to the Lobit Objections Schedule. On 28 May 2012, the Respondent submitted its last round of responses in the Lobit Objections Schedule, which by this stage had reached 238 pages.

75. On 5 June 2012, the Tribunal rendered its decision on the Lobit Objections Schedule. The Tribunal rejected the Claimant's objections to passages of Mr Lobit's Witness Statement, and to documents that were given by Mr Lobit to the Respondent's Counsel. The Tribunal ruled that for each of the objections it had formulated, the Claimant had failed to identify a specific communication that was actually protected by attorney-client privilege under California law. Additionally, the Tribunal emphasized the considerable

amount of time and effort it had spent on this phase of the arbitration, which appeared to have been, in the end, a substantial and needless distraction from the real issues between the Parties.

76. At this stage, the Tribunal observes that in relation to the Lobit Application alone, it was served with over 500 pages of submissions from the Parties (excluding supporting documentation).

77. The following sections set out the factual background to the Lobit Issue and the Tribunal's reasons for the Lobit Decision and Amended Lobit Decision.

V.2 Factual Background to the Lobit Issue

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

V.3 The Tribunal's Reasons for the Amended Lobit Decision

89. The Tribunal found that international law governed the question of admissibility of evidence in these international arbitration proceedings. However, in determining issues of impediment, privilege and other duties allegedly owed by Mr Lobit to CPC, the Tribunal held that California law was relevant.

[redacted]

90. Specifically, the Tribunal did not accept the Respondent's submission that international law is the only system of law to which an international arbitral tribunal should refer when determining the admissibility of evidence in international arbitration proceedings. The Tribunal notes the Respondent's acceptance that California law governed the issues of Mr Lobit's duties towards CPC, in the event that the Tribunal decided not to apply international law alone.[12]

91. The issue before the Tribunal was whether Mr Lobit was precluded from disclosing his entire file to the Respondent's Counsel by any duty under California law. The Claimant relied on: (i) the alleged agency relationship between PDC/Mr Lobit and the Claimant;[13] and (ii) Mr Lobit's alleged personal status as a trusted adviser to the Claimant.[14] The Tribunal will deal with these two grounds in turn.

A. The Alleged Agency Relationship Between Mr Lobit/PDC and CPC

92. The Claimant argued that fiduciary duties were owed by Mr Lobit to CPC, by reason of an alleged agency relationship that once existed between Mr Lobit, his firm, and their client, CPC.

93. As a preliminary remark, the Tribunal notes that PDC's Engagement Letter does not explicitly set out that PDC and its employees would be agents of CPC. Therefore, the Tribunal must apply the Californian law test on the Parties' actual conduct during their relationship in order to determine if their relationship amounted to one of agency.

94. Although the Parties refer to different Californian cases, it is clear that, under California law, the main criteria to be met in order for an agency relationship to arise are the following:

[12] Respondent's response to the Lobit Application, pages 4-5, para. 17.
[13] Lobit Application, pages 19-20.
[14] Lobit Application, pages 19-20.

a. The Agent must have the power to alter the Principal's legal relations with third parties, and
b. The Principal must have the right to control the Agent's work, and the level of such control must be relatively tight.

95. The Tribunal also takes into account other factors mandated by Californian law, including, for example, whether the Agent is engaged in a distinct occupation or business; whether the Principal supplies the tools, instrumentalities and work premises to the Agent; and whether the parties believe that they are creating an employer-employee relationship.

96. As far as the first main feature is concerned, the Tribunal accepts Mr Lobit's evidence that PDC negotiated and drafted the financing agreements relating to the C-4 Project.[15] Likewise, the Tribunal accepts that Mr Lobit assumed a lead role in PDC's team during negotiations with the sponsors and third parties.[16]

97. However, the Tribunal is not convinced that Mr Lobit or PDC had the power to alter CPC's relationships with third parties. Indeed, the Tribunal accepts Mr Lobit's evidence that the final decision on the contracts' drafting and commercial terms was for the Claimant to take. Similarly, it is clear to the Tribunal that it was the Claimant which was to sign the agreements and contracts that PDC negotiated and drafted.[17]

98. The Tribunal finds that neither PDC nor Mr Lobit had the power to bind the Claimant or to alter its legal relations with third parties. PDC was hired to negotiate and coordinate sponsors' efforts with respect to the C-4 Project, but does not seem to have been authorized to sign or execute contracts/agreements with third parties on behalf of CPC.

[15] Second Witness Statement, page 9, para. 23; Transcript of Lobit Hearing ("***Lobit Transcript***"), Day 1, page 15, lines 7-12.

[16] Second Witness Statement, pages 9, 10, 12, 13-14, paras. 23-25, 27, 34, 36; Lobit Transcript, Day 1, page 15, lines 7-12.

[17] Second Witness Statement, page 9, para. 22.

On the basis of its consideration of all the evidence, the Tribunal is of the view that the relationship between Mr Lobit/PDC and the Claimant lacks one of the main features of an agency relationship.

99. As far as the second main feature is concerned, the Tribunal concluded that PDC was an independent contractor, performing its obligations according to its own internal procedures[18] while acting on the Claimant's broad instructions.[19]

100. The level of control exercised by the Claimant was defined in the Engagement Letter as follows:

> *PDC's personnel shall report to, and take direction from, yourself [redacted], [redacted] of CPC and any other person identified by either of you.*

101. On the basis of all the evidence, it is clear to the Tribunal that the level of the Claimant's control over PDC was not high enough to match that of a Principal over an Agent. Mr Lobit or PDC were in control of the manner in which they performed their obligations under the Engagement Letter. Indeed, the Tribunal notes that the fact that PDC acted with a high level of independence was all the more understandable when one considers the relative lack of experience of the representatives of CPC in the planning, management and execution of projects similar to the C-4 Project.[21] Overall, the Tribunal concluded that the relationship of agency was missing as between the Claimant and PDC.

102. The Tribunal finally wishes to make the following observations with respect to the other factors that it also took into account to determine this issue (as enumerated at paragraph 95 above):

[18] Second Witness Statement, page 14, para. 36.
[19] Second Witness Statement, page 13, para. 34; Lobit Transcript, Day 1, pages 20-23.
[20] R209.
[21] Lobit Transcript, Day 1, pages 19-22.

a. Mr Lobit made it clear that PDC had extensive experience in "*efforts to complete the development, finalise the contract documentation that was necessary to support the project financing, so the financing could be achieved and the project could be built*".[22] The Tribunal observes that particular emphasis was indeed put on PDC's particular skills, which in this context is another indication that PDC was not the Claimant's agent;

b. The Tribunal is convinced that the Parties understood that PDC was to perform its obligations as an independent services provider, and not an employee of the Claimant. This is established by the wording of the Engagement Letter, and Mr Lobit's evidence.[23]

103. The Claimant based Mr Lobit's alleged duty of confidentiality on an alleged agency relationship as between him and the Claimant. Since the Claimant failed to establish that Mr Lobit or PDC can be considered as Agents of the Claimant under California law, it logically follows that neither can be bound by California law agency-related duties and obligations, and in particular, by the duty of confidentiality alleged by the Claimant.

B. Mr Lobit's Status as "Trusted Adviser" to the Claimant

104. In the alternative, the Claimant argued that due to his status as a "trusted adviser" to the Claimant, Mr Lobit owed a duty of loyalty to the Claimant, and was thereby under an obligation not to disclose private or confidential communications of the Claimant, and not to testify against his former employer.

[22] Lobit Transcript, Day 1, page 23.

[23] R209. The Engagement Letter reads: [redacted] See also for example Lobit Transcript, Day 1, pages 20-23.

105. The Tribunal was puzzled by the way in which this argument was developed by the Claimant. It seemed to the Tribunal that the Claimant failed clearly to define a "*trusted adviser*" and its legal status under California law (merely repeating that Mr Lobit was the Claimant's fiduciary).[24] Similarly, it appeared to the Tribunal that the Claimant was unable clearly to distinguish the precise source of the alleged duties of confidentiality under this alternative thesis, and to distinguish this from general fiduciary duties that might arise from an agency relationship. Indeed, the Claimant referred to Mr Lobit's status as "agent" and his "advisor's" status as two interchangeable sources of the alleged duties.

106. The Tribunal concludes that, in fact, the Claimant's inability to state a clear basis for both duties stems from the fact that the "*trusted adviser*" concept is not a legal concept capable of being clearly defined in law. This is the reason why the Claimant repeatedly referred back to the agency concept to support its submissions regarding both duties.

107. In order to illustrate this finding, the Tribunal refers to the Claimant's reply on the Lobit Issue, in which the Claimant stated, at Section 4.3.4:

> *Another legal impediment requiring the exclusion of Lobit's witness statement and testimony is his duty of loyalty to [the] Claimant. As noted in the [Lobit] Application, an agent or other fiduciary owes "a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship* (emphasis added).[25]

108. Overall, having carefully considered each of the Claimant's submissions, the Tribunal concluded that the Claimant had failed to establish any alternative basis for the duties it sought to impose. Since the Engagement Letter did not expressly provide for a fiduciary status for PDC, and nor did any other document upon which the parties' relationship proceeded, the burden was on the Claimant to show that PDC was in fact

[24] Claimant's reply on the Lobit Issue, Section 4.3.3.

[25] Claimant's reply on the Lobit Issue, Section 4.3.4. By reading this excerpt, one can see that the Claimant fails to identify a clear alternative basis to the agency theory to support Mr Lobit's alleged duties towards CPC.

the Claimant's fiduciary. It failed to do so.

109. Accordingly, the Tribunal found that Mr Lobit was neither bound by a duty of confidentiality nor by a duty of loyalty towards the Claimant, under California law.

110. As a result, in relation to the Lobit Objections Schedule, the Tribunal gave the Claimant the opportunity to challenge the admissibility of Mr Lobit's testimony and derivative evidence only on the ground of California law attorney-client privilege.

VI. THE [redacted] AND BIT ISSUE

111. On 13 February 2012, the Claimant filed two further applications relating to the involvement of [redacted] (CPC's former legal counsel) in the dispute, and the position of [redacted], a Cambodian lawyer who had submitted a legal opinion in these proceedings. The Claimant sought orders to prevent the Respondent from discussing the proceedings with [redacted], on the basis that he was alleged to have aided the Respondent's legal team. The Claimant also requested the Tribunal to order that no action be taken against [redacted], who was alleged to have suffered from retaliatory actions carried out by the Respondent due to his cooperation with the Claimant.

112. On 21 February 2012, the Respondent filed a response to the [redacted] and [redacted] applications, denying the allegations. In the end, these applications were not pursued.

VII. FACTUAL BACKGROUND TO THE MERITS

113. In 1994, KOC announced a tender process to select an independent power producer to invest in, construct, own and operate a 60MW electric power plant in Phnom Penh, Cambodia, known as the C-4 power plant project, and to sell that plant's capacity and electricity to EDC for a 20 to 25-year term.

114. In July 1995, BHA, a Delaware corporation, was invited by the [redacted] of Cambodia to participate in a competitive bidding process, and submitted an application in response to EDC's request for proposals.

115. At this time, EDC was a department within MIME, and was therefore part of the Government of KOC.

116. In late 1995, BHA was selected as winner of the tender. BHA, KOC and EDC then negotiated the legal documentation for the investment by BHA into the Cambodian state power industry, which later resulted in two main agreements, the PPA and the IA, as well as numerous annexed forms of other agreements to be entered into at various stages of the project.

117. On 9 March 1996, a Royal Decree declared the establishment of a new EDC. KOC transformed EDC into a state-owned limited liability enterprise duly organized and validly existing under the laws of KOC. Following this change, the rights and obligations which were those of the old EDC were diluted between the new EDC and a newly created state agency: the Electricity Authority of Cambodia ("***EAC***"). The new EDC remained fully owned by KOC which was also empowered to appoint its board of directors.

118. The PPA and IA were signed on 20 March 1996. The PPA was signed by BHA, KOC and EDC. However, EDC was not a party to the IA which was entered into only by BHA and KOC. As set out in **Section III.1** above, the PPA contained an arbitration clause providing for an arbitration administered by the International Chamber of Commerce ("***ICC***") in case of a dispute. By contrast, the IA contained an arbitration clause providing for ICSID arbitration, or, as a default forum, for ICC arbitration if ICSID arbitration was not available.

119. BHA subsequently formed the Claimant (CPC) as a limited liability project company under Cambodian law, and on 5 June and 30 September 1996, KOC, EDC, BHA and CPC entered into two Novation Agreements ("***Novation Agreements***") substituting CPC

for BHA in the IA and PPA respectively.

120. On 9 October 1998, KOC, EDC and CPC amended the PPA ("***PPA Amendment No. 1***"). This included an amendment to the dispute resolution clause of the PPA, to provide for ICSID arbitration or, consonant with the provision contained in the IA, for ICC arbitration if ICSID arbitration was not available. This ICSID arbitration clause was drafted in similar terms to the ICSID arbitration clause contained in the IA, albeit with some differences (the importance of which is contested). Under this amendment, the new EDC joined the PPA as a party replacing the old EDC.

121. MIME, as a ministry of KOC, executed PPA Amendment No.1 for and on behalf of KOC. According to PPA Article 16.3(b)(iii)(A) as amended by PPA Amendment No. 1:

122. In fact, KOC never notified the Centre of the designation, if any, of EDC as its agency for the purposes of Article 25(1) of the Convention.

123. On 27 March 1998, the DOG was signed between KOC (Ministry of Economy and Finance) and CPC. As set out in **Section III.3** above, the DOG contains an arbitration clause similar to the one contained in the IA.

124. The Claimant contends that from 1998 to 2004, KOC and EDC repeatedly and deliberately breached their contractual obligations. As a result, CPC was not able to build the power plant, and finally decided to accept KOC's and EDC's repudiation of the project contracts. Such alleged repudiation is said to have caused CPC to lose its entire investment and the benefit of its bargain.

125. On 20 December 2004, KOC ratified the ICSID Convention which entered into force in Cambodia on 19 January 2005.

126. On 30 July 2009, the Claimant commenced this arbitration by submitting its Request to the Centre.

VIII. THE DISPUTE IN BRIEF

127. According to the Claimant, following the signature of the PPA and IA, CPC took all preliminary steps to design and obtain all permits for the building and operation of the C-4 power plant, and was prepared to proceed. It contends that it had also arranged the requisite debt and equity financing, including obtaining the approval of the board of directors of the World Bank to proceed with financing the project as anchor lender.

128. However, according to the Claimant, from 1998 to 2004, the Respondent persistently breached its obligations to support the project, and repeatedly took actions that were inconsistent with those obligations. As a consequence of the Respondent's acts and omissions, so the Claimant argues, the power plant anticipated under the investment contracts was never built. The Claimant submits that KOC and EDC reneged on their commitments in the investment agreements; failed and refused to permit the Claimant to develop and profit from the C-4 power plant project; and denied the Claimant the fruits of its investment.

129. According to the Respondent, KOC's and EDC's alleged obligations could never have arisen, because there was never a realistic chance that the C-4 Project could be financed. It argues that the Claimant failed to show any breach of the PPA or the IA by the KOC or EDC. On the Respondent's case, the Claimant made misconceived excuses and fraudulent misrepresentations in order to obtain extensions of time under the agreements. In addition, according to the Respondent, the claim under the DOG is outside of the Tribunal's jurisdiction and/or is inadmissible.

130. As noted earlier, whilst this ICSID arbitration was commenced against both KOC and EDC, by its Decision on Jurisdiction dated 22 March 2011, the Tribunal declined jurisdiction over the Claimant's claims against EDC.

IX. THE PARTIES' PRAYERS FOR RELIEF

IX.1 The Claimant's Requests

131. The Claimant's latest prayer for relief, as submitted on 16 May 2012, is as follows:

> *I. In respect of CPC's claims against KOC for KOC's and EDC's repudiation of, default under and/or breach of the IA and PPA*
>
> *This portion of CPC's consolidated prayer for relief combines its prayers for relief as previously set forth in its Memorial on the Merits (Part 2) of 10 May 2011 and Additional Claim No. 2: Liability of KOC for Cross-Defaults under IA Caused by EDC's Material Breach of PPA, and as modified and supplemented in its Reply on the Merits of 13 May 2012.*
>
> *CPC seeks a monetary award against KOC based on the following findings of fact, conclusions of law, declarations, decisions and orders (including any subordinate, subsumed or additional findings of fact, conclusions of law, declarations or orders), which CPC prays that the Tribunal include in its final award:*
>
> *(1) For purposes of determining KOC's liability to CPC (a) under the DOG, (b) under the IA cross-default provisions and/or (c) under the state responsibility doctrine, declare that EDC repudiated, defaulted under and/or otherwise breached the PPA on or before 27 July 2001, bringing it to an end on or after 5 June 2004, when CPC accepted EDC's repudiation, or such other dates as the Tribunal may find based on the evidence and the law, and rendering EDC liable to pay CPC any and all damages caused by EDC at common law;*
>
> *(2) For purposes of determining KOC's liability to CPC (a) under the DOG, (b) under the IA cross-default provisions and/or (c) under the state responsibility doctrine, declare that EDC is liable under the PPA to indemnify CPC for its damages, losses and reasonable costs and expenses (including, but not limited to, legal fees and expert witness fees) in connection with, arising out of or resulting from EDC's repudiation of, defaults under and/or other breaches of the PPA;*
>
> *(3) Declare that CPC's claims against KOC under the DOG are within the jurisdiction of the Tribunal, admissible in this proceeding and fully within the scope of KOC's obligations under the DOG, including by declaring*

that (a) a legal dispute has arisen under the DOG, (b) CPC has fulfilled any conditions precedent for making its claims under the DOG, (c) CPC's claims are for amounts due and owing by EDC to CPC, and (d) CPC's claims are recoverable under the DOG without CPC first having to bring proceedings or obtain an award against EDC;

(4) Declare that KOC is liable under the DOG to pay CPC all amounts owed by EDC to CPC under or pursuant to the PPA as a consequence of EDC's repudiation, default under and/or other breach of the PPA and/or pursuant to the PPA indemnity provisions;

(5) Declare that KOC is liable to CPC for damages for breach of its duty to effect a cure of the cross-default under IA section 10.3 arising from EDC's material breach of the PPA, including declaring that CPC fulfilled any conditions precedent for bringing its claim;

(6) Declare that KOC is liable to indemnify CPC under IA section 11.2 based on the uncured cross-default under IA section 10.2(a) arising from EDC's material breach of the PPA, including declaring that CPC fulfilled any conditions precedent for bringing its claim;

(7) Declare that KOC is liable under the doctrine of state responsibility to pay CPC all liabilities of EDC to CPC arising under or pursuant to the PPA as a consequence of EDC's repudiation, default under and/or other breach of the PPA and/or pursuant to the PPA indemnity provisions;

(8) Declare that KOC had repudiated, defaulted under and/or otherwise breached the IA on or before 27 July 2001, bringing it to an end on or after 5 June 2004, when CPC accepted the repudiation, or such other dates as the Tribunal may find based on the evidence and the law, and rendering KOC liable to pay CPC any and all damages caused by KOC at common law;

(9) Declare that KOC is liable under the IA to indemnify CPC for its damages, losses and reasonable costs and expenses (including, but not limited to, legal fees and expert witness fees) in connection with, arising out of or resulting from KOC's repudiation of, defaults under and/or other breaches of the IA;

(10) Declare that KOC's liability to CPC under the IA as set forth in forth in [sic] (5), (6), (8) & (9) above or otherwise is not limited in amount by IA section 10.4(i) or otherwise;

(11) Declare that KOC is liable under the indemnity provisions in the IA, PPA and DOG, and otherwise under English law, to pay the costs of this arbitration proceeding and to pay CPC's own party costs;

(12) Declare that KOC is liable under the indemnity provisions in the IA, PPA and DOG, and otherwise under English law, to pay CPC pre-award and post-award interest on all damages assessed and awarded against KOC;

(13) In determining causation, declare that CPC had a real or substantial chance of successfully (a) completing its project financing for the C4 power plant, (b) completing construction of the C4 power plant and (c) operating the C4 power plant in accordance with the terms and conditions of the PPA throughout the term provided therein, and that any question of certainty of loss, if damages are calculated under the normal measure, will be accounted for in assessing quantum;

(14) Declare that EDC's repudiation of, default under and/or breach of the PPA and/or KOC's repudiation, default under and/or breach of the IA has caused CPC to incur damages in the form of CPC's loss of chance to receive the entire benefit of its bargain under the IA and PPA and that, prior to any discount for certainty of loss, those damages should be assessed in accordance with CPC's loss of expectation, the normal measure;

(15) Declare that CPC had a 95% chance of successfully completing its project financing for the C4 power plant, or such other percentage chance as the Tribunal assesses based on the evidence and the law (the "Financing Probability" or "FP");

(16) Declare that CPC had a 99% chance of successfully completing construction of the C4 power plant, or such other percentage chance as the Tribunal assesses based on the evidence and the law (the "Construction Probability" or "CP");

(17) Declare that CPC had a 97% chance of operating the C4 power plant in each of the 25 years of commercial operations during the term of the PPA, or such other percentage chance as the Tribunal assesses based on the evidence and the law (the "Operations Probability" or "OP");

(18) Declare that (a) the amount of loss-of-expectation damages suffered by CPC, i.e. the normal measure, should be assessed using the discounted cash flow method, (b) losses should be assessed at the scheduled dates for performance, (c) losses occurring at scheduled dates of performance after the date of the award should be discounted back to the date of the award,

(d) losses occurring at scheduled dates of performance before the date of the award should be increased to the date of the award by pre-award interest, (e) the discount rate should be a reasonable and appropriate rate consistent with the 10% rate stipulated by CPC, EDC and KOC in the PPA, and (f) the discount rate should not include any discount for the risk of default or breach by KOC or EDC;

(19) Declare that, as of the final hearing date, CPC's loss-of-expectation damages, i.e. the normal measure, caused by or resulting from EDC's repudiation of, default under and/or breach of the PPA and/or KOC's repudiation of, default under and/or breach of the IA, taking account of the Operations Probability but prior to any adjustment for Financing Probability or Construction Probability, is the amount calculated by CPC's experts, LBC International, in their third report or such other amount as the Tribunal assesses based on the evidence and the law (the "Gross Expectancy" or "GE");

(20) Declare that the quantum of damages suffered by CPC through the loss of chance of receiving its benefit of the bargain (the "Net Expectancy" or "NE") is equal to the amount calculated using the following formula:

NE = GE x FP x CP where:

NE means Net Expectancy, GE means Gross Expectancy, FP means Financing Probability, and CP means Construction Probability;

(21) Calculate and assess the quantum of CPC's Net Expectancy damages by applying the formula set out in (20);

(22) Declare that, in addition to its Net Expectancy damages, CPC is entitled, under the normal measure, to damages for its losses and expenses incurred or suffered in mitigation, including moneys spent in mitigation, sweat equity spent in mitigation and loss of use of investment capital suffered in mitigation (or, in lieu thereof, pre-award interest during periods of delay), including by declaring that such heads of damages are within the normal measure under the first leg of Hadley v Baxendale;

(23) Declare that the quantum of CPC's mitigation damages are the amounts set out in the third expert report of LBC International or such other amount as the Tribunal assesses based on the evidence and the law;

(24) In the alternative to (14-23), but only if the Tribunal properly finds based on the evidence and the law that the normal measure of damages under English contract law is unavailable, declare that the amount of

wasted costs damages suffered by CPC as a result of EDC's repudiation of, default under and/or breach of the PPA is the amount set out in the fourth expert report of LBC International, or such other amount as the Tribunal assesses based on the evidence and the law;

(25) Award CPC, and order KOC to pay, CPC's damages caused by EDC for which KOC is liable;

(26) Award CPC, and order KOC to pay, CPC's damages caused by KOC;

(27) Award CPC, and order KOC to pay, the costs of this arbitration proceeding and CPC's own party costs;

(28) Award CPC, and order KOC to pay, pre-award and post-award interest on all damages assessed from the date assessed to the date paid at the Default Rate specified in the PPA or such other rate as the Tribunal assesses based on the evidence and the law;

(29) Declare that CPC's claims under the IA are not time-barred based on the six-year limitation period applicable to the IA;

(30) Declare that CPC's claims under the DOG are not time- barred based either on the twelve-year limitation period applicable to the DOG or on the six-year limitation period applicable to the PPA;

(31) Declare that CPC had no duty to apply to the EAC for an electricity license from and after the date the EAC began accepting applications, in mitigation of damages or otherwise, because KOC and EDC had previously repudiated the IA and PPA, and such repudiation, which was continuing from on or before 27 July 2001 through on or after 5 June 2004, when CPC terminated the IA and PPA, created impossibility of performance by CPC in obtaining project financing for the C4 power plant; and

(32) Make such further decisions, rulings and findings and order and award such further relief as may be necessary, just or proper in connection with this proceeding.

II. In respect of CPC's claim against KOC for failure to designate EDC to the Centre

This section sets forth CPC's prayer for relief on its Additional Claim No. 1: Designation of EDC.

CPC seeks a monetary award and/or an order of specific performance and other equitable relief against KOC based on the following findings of fact, conclusions of law, declarations, decisions and orders (including any subordinate, subsumed or additional findings of fact, conclusions of law, declarations or orders), which CPC prays that the Tribunal include in its final award:

(33) Declare that EDC objectively qualifies as an agency of KOC within the meaning of Article 25(1) of the Convention;

(34) Declare that KOC had an implied obligation under the PPA to designate EDC as its agency under Article 25(1) of the Convention if and when it had implemented the Convention;

(35) Declare that KOC had an express obligation under the PPA to notify the Centre that it had designated EDC as its agency under Article 25(1) of the Convention if and when it had implemented the Convention;

(36) Declare that KOC has breached its express and implied obligations to designate EDC as its agency and to notify the Centre that it had so designated EDC;

(37) Order KOC to fulfill its undertakings to designate EDC to the Centre and to notify the Centre that it has so designated EDC;

(38) Declare that KOC is liable to Claimant for its damages (in an amount to be proved at a later stage in this proceeding) caused by KOC's failure to fulfill its undertakings to designate EDC to the Centre and to notify the Centre that it has so designated EDC;

(39) Award Claimant, and order KOC to pay, Claimant's damages caused by KOC's breach of its express and implied obligations to designate EDC as its agency and to notify the Centre that it has so designated EDC;

(40) Declare that KOC is barred by promissory estoppel from raising any procedural or substantive defenses that rest on EDC's absence from this proceeding as a party.

(41) Reject any procedural or substantive defenses raised by KOC in this proceeding that rest on EDC's absence from this proceeding as a party, including, without limitation, any defenses to CPC's right to claim or recover against KOC under the DOG;

(42) Order KOC to pay all costs incurred by Claimant in connection with the preliminary objections regarding jurisdiction over EDC and this

additional claim, which amounts will be shown when costs are assessed in this proceeding; and

(43) Make such further decisions, rulings and findings and order and award such further relief as may be necessary, just or proper in connection with this additional claim, including, without limitation, declaring that the limitation period in respect of CPC's claims against EDC under the PPA and against KOC under the DOG ceased to run (or was tolled or suspended) from the date this proceeding was registered by the Secretary General of ICSID until a reasonable time (at least six months) after KOC notifies CPC that it has designated EDC to the Centre .

III. In respect of KOC's counterclaims for rescission and damages based on fraudulent misrepresentation

CPC seeks dismissal of KOC's counterclaims and an award of costs against KOC based on the following findings of fact, conclusions of law, declarations, decisions and orders (including any subordinate, subsumed or additional findings of fact, conclusions of law, declarations or orders), which CPC prays that the Tribunal include in its final award:

A. As to both counterclaims

(44) Declare that CPC did not make any fraudulent misrepresentations to KOC;

(45) Declare that, in any event, all PPA extensions were approved by KOC after CPC's disclosure to KOC of all relevant and material circumstances regarding the bribery allegations and related suspension of work by the IFC;

(46) Declare that CPC had no duty to disclose the bribery allegations and IFC suspension of work to EDC insofar as KOC is concerned;

(47) Declare that EDC's PPA defenses do not relieve KOC from DOG liability;

(48) Make such further decisions, rulings and findings and order and award such further relief as may be necessary, just or proper in connection with KOC's counterclaims;

B. As to KOC's counterclaim for rescission

(49) Declare that KOC and EDC had unclean hands and this bars KOC from obtaining equitable relief;

(50) Declare that KOC is not entitled to rescind the PPA on EDC's behalf;

(51) Declare that KOC's rescission claim is barred by laches;

(52) Dismiss KOC's counterclaim for rescission;

(53) Award CPC its costs in defending KOC's counterclaim for rescission;

C. As to KOC's counterclaim for damages

(54) Declare that the Tribunal does not have jurisdiction over KOC's damages counterclaim because it is an action sounding in tort and the Parties did not consent to arbitrate tort claims;

(55) Declare that KOC has failed to state a claim on which relief can be granted with respect to its counterclaim for damages because KOC has not shown that CPC is subject to English tort law;

(56) Declare that KOC's counterclaim for damages is time-barred;

(57) Declare that KOC has not shown that the alleged tort caused any loss; and

(58) Declare that KOC has not shown any quantum of loss resulting from the alleged tort;

(59) Dismiss KOC's counterclaim for rescission; and

(60) Award CPC its costs in defending KOC's counterclaim for damages.

IX.2 The Respondent's Requests

132. In its Rejoinder on the Merits dated 7 August 2012, the Respondent formulated its prayer for relief as follows:

497. On the basis of the foregoing, the Respondent respectfully requests that the Arbitral Tribunal:
(1) Declare that the Respondent's election to rescind Amendments Nos 2, 3 and 4 to the PPA is effective and as a consequence the PPA and the IA should be considered to be validly terminated;

(a) as a consequence, dismiss all of the Claimant's claims in this proceeding;

(b) in the alternative, order the Claimant to pay the Respondent damages in the amount of any award made against KOC, plus costs incurred in defending against the Claimant's claims;

(2) In the further alternative:

*(a) **declare** that the Claimant's claim under the DOG is outside the Arbitral Tribunal's jurisdiction and/or inadmissible;*

*(b) **dismiss** all of the Claimant's claims in this proceeding, and*

*(3) In any event, **order** the Claimant to pay all of the costs and expenses incurred by the Respondent and by EDC in defending against the Claimant's claims, including, but not limited to, the Arbitral Tribunal's fees and expenses, the fees and expenses of the Respondent's and EDC's counsel and experts, and interest, on a full indemnity basis.*

X. THE PARTIES' POSITIONS ON THE MERITS

X.1 The Claimant's Position

A. The Claimant's Factual Submissions

1. The Respondent's Acts Prior to 2001

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

2. The Electricity Law of 2 February 2001

[redacted]

[redacted]

[redacted]

[redacted]

3. Other Events Subsequent to End 2000

[redacted]

[redacted]

[redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted]

[redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted]

[redacted]

4. The Repudiation of the Agreements

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

B. The Claimant's Legal Submissions

1. Introduction

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] [redacted]

2. The Legal Principles of Repudiation

[redacted] [redacted]

[redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted]

[redacted] [redacted].

[redacted]

[redacted]

3. KOC's and EDC's Conduct Amounted to Repudiation of the IA and the PPA

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

4. The Respondent's Incompatible Commitments to Buy Power from Vietnam

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

5. The Electricity Law

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

6. The Claimant's *Force Majeure* Argument

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

7. The Respondent's Liability for Damages

[redacted]

[redacted]

[redacted]

[redacted]

C. The Additional Claims

[redacted]

1. The Claimant's Additional Claim No. 1: Designation of EDC

[redacted]

[redacted]

[redacted]

2. The Claimant's Additional Claim No. 2: Liability of KOC for Cross-Defaults under the IA Caused by EDC's Material Breach of the PPA

[redacted]

[redacted]

[redacted]

X.2 The Respondent's Position

[redacted]

A. The Respondent's Factual Submissions

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

B. The Respondent's Legal Submissions

[redacted]

1. The Respondent's Claims for Rescission of the PPA and IA and Damages for the Claimant's Misrepresentations

[redacted]

[redacted]

[redacted]

2. The Respondent Did Not Breach the IA and/or the PPA

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

3. The Claimant's Claims under the DOG

[redacted]

[redacted]

4. The Claimant's Claims under Customary International Law

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

C. The Additional Claims

1. The Claimant's Additional Claim No. 1: Designation of EDC

[redacted]

2. The Claimant's Additional Claim No. 2: Liability of KOC for cross-defaults under the IA caused by EDC's Material Breach of the PPA

[redacted]

[redacted]

[redacted]

XI. DAMAGES

259. The damages finally sought by the Claimant have been quantified by its experts at USD [redacted] for a discounted loss of net cash flows from capacity and energy payments; USD [redacted] for mitigation costs; and USD [redacted] in pre-award interest.[183]

[redacted]

[redacted]

[redacted]

[redacted]

XII. THE TRIBUNAL'S ANALYSIS

XII.1 Overview

262. The Parties have argued their respective cases extensively and in great detail. The submissions are replete with complex factual scenarios and interesting legal questions. Before even considering the legal questions, it is essential for the Tribunal to decide what actually happened. The Tribunal has, of course, considered all the material both written and oral and makes no apology for not repeating it all in this award. Instead, it will concentrate on those parts of the facts and submissions which it considers most relevant to its determinations.

263. The Claimant's case is that there were breaches of the PPA and the IA for which the Respondent is responsible. These breaches include the acts and omissions of EDC. Although EDC is no longer a party to these proceedings, and although it is not a party to the IA, its conduct remains relevant, particularly due to the cross default provisions in the IA.

264. The Claimant contends that the actions of the Respondent/EDC caused the C-4 Project to fail. The Tribunal accepts that [redacted] firmly believes that those who had originally opposed the project within KOC eventually got their way. If he is correct that the Respondent/EDC committed breaches of the agreements, then the Tribunal needs to go on to decide a number of issues such as the valuation of a chance, causation and damage, as well as having to consider the counterclaim.

[redacted]

265. The Respondent on the other hand maintains that neither it nor EDC did anything to kill the project. The project, it submits, among other things, died because the Claimant could not get its finance together, in circumstances where it had made a legal commitment to finance the project prior to proceeding to more advanced stages, such as construction.

266. The Respondent relies on the lack of expertise of [redacted] and his team in what was a complex endeavour, exacerbated by the unusual circumstances surrounding a transaction involving KOC which had only recently emerged from a bloody and brutal civil war.

267. Although the facts have been set out at some length above, the Tribunal will need to go into more detail in the context of the contractual timeline which the Parties helpfully addressed on the last day of the hearing.

268. Mr Keck, who argued this case most tenaciously and strenuously on behalf of the Claimant, submitted that the case was about "*buyer's remorse*" and "*death by a thousand cuts*". Giving full credit to this advocatorial hyperbole, the Tribunal will bear this firmly in mind as it reviews the detailed facts.

XII.2 The Agreements

269. The starting point must of course be the Agreements, the relevant details of which are set out below.

270. The IA and PPA were signed by BHA. BHA's rights and obligations under these agreements were novated to the Claimant on 30 September 1996.

A. The PPA

271. As stated in its recitals, the PPA was intended to further KOC's policy to encourage and promote development of independent power producers for the generation of

electricity to meet consumer need.

[redacted]

[redacted]

[redacted]

B. The IA

283. The IA set out the terms upon which MIME on behalf of KOC would support the

implementation of the power plant construction.

[redacted] As part of this support, MIME agreed under Section 3.1 of [redacted]

[redacted]

C. The DOG

289. The Deed of Guarantee ("DOG") was signed on 27 March 1998 by the Claimant and

by the Ministry of Economy and Finance on behalf of the KOC. Section 1.1 of the DOG provides:

[redacted]

XII.3 Analysis of the Factual Timeline

A. 1994 - April 1998

[redacted]

292. The DOG was signed on 27 March 1998.

B. Amendment No. 1

[redacted]

[redacted]

C. The Bribery Allegation

[redacted]

[redacted]

[redacted]

304. The Tribunal is persuaded that the course of action determined by [redacted] led to the IFC suspending its involvement with the project until the matter had been cleared up. The Claimant has not shown evidence to contradict this finding. [redacted] actions – whether right or wrong – clearly caused delay which was attributable to the Claimant, and not the Respondent or EDC.

D. Amendment No. 2

[redacted]

[redacted]

[redacted]

[redacted]

312. One of the reasons asserted by the Claimant for a lessening of interest in the project on the part of the Respondent at this time was the suggestion that energy derived from a contract entered into with a company called [redacted] made the deal with the Claimant less attractive. The Tribunal cannot support this allegation. There were by this stage substantial delays in this project, and as a consequence, given the energy shortfall serious power outages in Cambodia. The deal with [redacted] was entered into as a temporary fix, pending the coming on line of electricity from the C-4 Project. Both EDC and KOC had a duty and a responsibility to provide power and this could not be put on hold.[191]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

F. IFC Involvement

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

G. BHA Internal Dispute

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

H. Extensions Granted in 2000

[redacted]

[redacted]

[redacted]

I. Amendment No. 4

[redacted]

[redacted]

J. Notices of Default

[redacted]

[redacted]

K. Events Subsequent To Notices of Default

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

XII.4 Analysis of Claimant's Claims

377. The position of the Claimant has shifted in various ways at different times during the proceedings. In the merits phase of the proceedings, the Claimant's written pleadings in Parts 1 and 2 of its Memorial on the Merits and its Reply on the Merits amounted to over 630 pages of closely argued fact and law, and this does not take into account the voluminous exhibits, the skeleton arguments and the post-hearing submissions.

378. As crystallised in paragraphs 21 to 23 of its Skeleton Argument, the Claimant put its case as follows:

> *21. CPC's case is that from 1998 – 2004, KOC and EDC through the acts and omissions of C4 project opponents, repeatedly and deliberately*

> *breached and renounced their contractual obligations to CPC with the intent and effect of preventing CPC from financing and building the power plants. By these actions KOC repudiated the IA and EDC repudiated the PPA. CPC accepted their repudiation in June 2004 and commenced this arbitration in July 2009.*
>
> *22. The efforts of C4 project opponents within KOC and EDC were intended to cause the death of the C4 project by a thousand cuts, although such efforts were punctuated by a series of deep cuts that speak for themselves.*
>
> *23. In CPC's case, the deep cuts include: (a) the Finance Ministers resistance, communicated to CPC's lenders, to performing KOC's undertaking to give a guarantee of payments, (b) a bribery allegation lodged against BHA and* [redacted] *in an effort to take down both in a single act, (c) KOC's and EDC's failure to act on a variety of collectively significant legal requirements to ready the project for financial closing, (d) intimation from EDC of its unwillingness to proceed on the basis of the agreed prices and technology, coupled with direct interference by EDC with CPC's lenders through communication seeking to enlist their assistance in renegotiating the PPA, (e) KOC and EDC entering into inconsistent arrangements to purchase power from Vietnam and committing to make significant capital investment in building a transmission line that would render the C4 power plant a stranded investment, (f) EDC renouncing the PPA and, when ordered by KOC to reaffirm it, establishing a situation that left the PPA in continuous limbo from February 2000 through June 2001 while continuing to lobby KOC to cancel the C4 project, and (g) KOC enacting an Electricity Law that revoked CPC's power generating licence and a bridge to other contractual rights and then refusing to address these matters after CPC raised them.*

379. At the hearing, Mr Keck made it clear that the Claimant was no longer relying upon any implied terms of the PPA and IA, and thus the allegations made have to be considered in the light of the relevant express terms of the agreement set out above.[193] Having set out the allegations made, it is necessary for the Tribunal now to consider each one and evaluate it.

[redacted]

A. Finance Minister's Resistance to the DOG

380. It is alleged that the Finance Minister's resistance to performing the KOC's undertaking to give the DOG and his communication of this resistance to potential lenders is itself a breach. The fact is that it took a little time to persuade the KOC that it was normal for a host state guarantee to be given in these circumstances. But ultimately, the guarantee was in fact given.

381. [redacted] stated that investors would have been concerned about the actions of the Finance Minister even after he had signed the DOG.[194] The Tribunal understands [redacted] view.

382. On the other hand, this has to be looked at in its temporal context. The DOG was signed on 27 March 1998. A lot of things happened after that about which both Parties complained. There is no concrete evidence on record that potential investors were in fact put off by the deal due to the initial reluctance of the Minister to sign the DOG.

383. However, investors were entitled to conclude that once a sovereign State had executed the DOG, it would honour it if subsequently called upon to do so.

384. It is true that prior to the guarantee, [redacted] wrote this to [redacted] on 28 January 1998: [redacted] That may have been what Mr Steele thought at the time. There is no evidence of the World Bank trying to scuttle the project. Importantly, as a result of intervention by [redacted], a guarantee was signed.

[redacted]

385. What is more, [redacted] wrote to [redacted] on 17 April 1998 to inform him that [redacted]

386. Accordingly, the Tribunal cannot see how observations by the Minister prior to his signature of the DOG can amount to a breach. The Respondent agreed to provide a guarantee. It did so by signing the DOG. It is difficult to see how any breach has occurred in relation to the DOG.

387. In so far as it is contended that any delay in giving it was a breach, the Tribunal respectfully disagrees. In any event, there is no possible causal link between any such delay and the damage claimed.

B. Bribery Allegation

388. The bribery allegation is said to be a breach. However, although the Tribunal is prepared to accept that the allegation emanated from within Cambodia, there is simply insufficient evidence to attribute it to KOC or EDC. But in any event, as set out earlier, the major part of the delay that resulted from having to deal with the allegation was in fact caused by [redacted] insisting that a US DOJ investigation be undertaken as opposed to an internal legal review, as requested by [redacted] and IFC.

389. On the record is the letter dated 22 October 1999 from [redacted] President and CEO of [redacted] to [redacted], which states [redacted]

390. The Tribunal is satisfied that an internal inquiry would have been speedier and thus

[redacted]

would have reduced the period of delay. The Tribunal cannot see how this delay, even if causative of loss, can be attributed to KOC or EDC.

C. Failure to Act on Legal Requirements for Financial Closing

391. It is alleged that EDC failed to act on a variety of collectively significant legal requirements to ready the project for financial closing. This is a somewhat unparticularised allegation, the origin of which is in paragraph 502 of the Claimant's Memorial on the Merits. The Tribunal is not satisfied that the Claimant has established this complaint bearing in mind all the other delays to which reference has been made or will be made in this Award.

392. This allegation pre-supposes that the Claimant itself was ready for financial closing and this would obviously entail having finance available. The Tribunal will return to this crucial issue later as it is relevant to almost all of the Claimant's allegations.

D. EDC's Unwillingness to Proceed on Agreed Price and Technology and Its Interference with Lenders

393. The first part of this allegation depends to a large extent on whether EDC was entitled as a matter of law to impose conditions for its agreement to extend time. Because the PPA was not terminated by any of the parties after the effective date expired, a "*limbo period*" existed in which there was no effective date to work towards. The difficulties to which the situation gave rise, as far as the Claimant is concerned, are illustrated in the following exchange:

> *MR KECK: […] Then we get to 15th May. The government has directed EDC to give us an extension, to give Cambodia Power Company an extension. So they give them a 15-day extension to 30th May.*
>
> *THE PRESIDENT: Extend what?*
>
> *MR KECK: The effective date.*

THE PRESIDENT: But is it the contract? Is it the agreement to negotiate?

MR KECK: Well, this is the interesting thing, which is why I would say that certainly, if we're not beginning to pick up that there is some bad faith going on here, this one seems to be a very bright example of it. We have opened up the capacity rate, the utilisation factor, the escalation factor. And even if one could say, "Well, if there are only minor adjustments, we can just do those overnight and have a new contract," well, what about this fuel type and more efficient machines? It makes one wonder what was really in the mind of EDC back on 7th February when they wrote that letter, if they didn't really want those things. Certainly it was taken by the IFC to be a significant change in demands. And yet when we come up to it, then they say, "You only have 15 days." What are you going to accomplish in 15 days?

THE PRESIDENT: That's another matter. I want you to focus on what it is that is being extended to 30th May.

MR KECK: I think that what's been extended there, sir, is the agreement to negotiate. But that's not really clear, because now EDC is not really saying it wants to negotiate these things. And I would have taken the view that because we are no longer in a time-of-the-essence period, the amount of time would have been longer than 15 days to do anything anyway. So this thing is really just window-dressing; it doesn't really do anything. It is clear when the government gets involved and says, "Extend this thing," the government has something else in mind than what EDC does. They say, "Well, that's because he told us he could close at the end of May, back in January," and there is some back-and-forth about whether that was an extension request or whether that was just a projected closing date; you heard evidence on that. But that was all before things were reopened on February 7th anyway.

MR LANDAU: Can I just confirm my understanding of how you are characterising it. By this stage, on your case, here is a binding contract to negotiate?

MR KECK: Yes.

MR LANDAU: Binding, enforceable as a matter of its governing law?

MR KECK: As a matter of ...?

MR LANDAU: Its governing law, presumably.

MR KECK: Yes, and I think with some sense of reasonableness between the parties. I don't think it is a situation where one party could just ...

MR LANDAU: Presumably that would be a question of what the governing law will tell you about contracts to negotiate?

MR KECK: I think so, and the governing law here I think remains English law.

MR LANDAU: So we are into well-known English law as to what rights and obligations there may or may not be in a contract to negotiate?

MR KECK: I think that's right.

MR LANDAU: So, just to follow through on your characterisation, that means that, notwithstanding that the government directs EDC to give an extension of time for the effective date, that actually is simply a misunderstanding by the government of the operative contract, because at this stage --

MR KECK: I think so.

MR LANDAU: -- that's the wrong terms of reference, as it were.

MR KECK: I think that's right.

MR LANDAU: It's now an agreement to negotiate, so this has no contractual effect.

MR KECK: That would be my view. We've got some sort of indeterminate time period that's running right now, but certainly it would be quite a bit longer than 15 days.[198]

394. In the table below the Tribunal sets out the various effective dates for the PPA. As can be clearly seen, there was a gap in time between each expiry and amendment. When an effective date passed, either party had a right to insist on new and varied terms as the price of agreement for the extension. And the delay that had occurred had caused some terms to be out of date such as the escalation factor (see above), which would now kick in far earlier in the life of the project than it would have done had there been no delays.

[198] Transcript, Day 9, pages 21-24.

395. The Tribunal cannot see anything wrong in the Respondent attempting to renegotiate these factors or other terms as the price for an extension. The Claimant's allegation that the Respondent attempted to change some of the terms cannot amount to a breach in light of the timelines in this case. When the contractual date had passed, each party had the right to terminate or each had the right to agree on the terms of extension.

	Date signed	**Effective Date (Section 3.2(d))**
Original Contract	20 March 1996	
Amendment No. 1	9 October 1998	31 January 1999
Amendment No. 2	9 March 1999	31 July 1999
Amendment No. 3	24 August 2000	31 December 2000
Amendment No. 4	5 June 2001	31 July 2001

396. On the basis of the timeline of the contract set out above, once an effective date for the PPA passed and no extension was agreed, the contract still existed but could be determined by either party or either party could lay down their own terms in return for an extension.

397. If that analysis is correct, then any allegation based on an attempt to change some of the terms cannot succeed. All that would have happened is that one party would have exercised the right it had at that particular point in time having regard to the expiry of the Effective Date. No breach would be involved.

398. A great deal of emphasis was placed on the fact that EDC/KOC contacted IFC directly. An enormous amount of weight was placed in particular on the letter of 7 February 2000, referred to above. But the Tribunal cannot see why EDC/KOC should not have contacted the IFC directly given the delay in financing and the paucity of information being given to it about progress. In fact, [redacted] the Claimant's project finance expert, could not see anything wrong in this direct approach, given the

circumstances existing at the time.[199]

E. The Vietnam PPA

399. Although this allegation featured heavily in the Claimant's pleaded case and the witness statement of [redacted], it finds no place in the Claimant's post-hearing analysis of the evidence.

400. The Claimant had alleged that the entering into of a PPA with EVN in July 2000 constituted some form of breach. This allegation began as one of anticipatory breach but subsequently in the Reply it was put as simply part of the overall course of conduct.

401. The plain fact of the matter is that Cambodia was in dire need of power. On the basis of independent reports submitted in this arbitration, it is clear that Cambodia had legitimately explored all available sources of power. [redacted] agreed that it was reasonable for EDC to be sourcing supply from wherever possible.[200]

402. It has to be emphasised that the Vietnam PPA was not on take-or-pay terms and thus was not incompatible with the Claimant's PPA. [redacted] who gave evidence for the Claimant stated that from the viewpoint of a potential equity investor he did not see any problem with the Vietnam PPA, provided it was not on take-or-pay terms.[201]

403. [redacted] in the end frankly admitted that he did not consider the Vietnam PPA as a breach of any obligations undertaken by EDC.[202] However, he did consider that it might damage the economics of the project.

404. There are all sorts of obligations that EDC could have undertaken which might in the

[199] Transcript, Day 7, page 186.
[200] Transcript, Day 7, pages 171-172.
[201] Transcript, Day 2, page 29.
[202] Transcript, Day 3, pages 211-212.

long run have affected its ability to pay the Claimant, but it cannot be argued that there was any prohibition on EDC from taking on other commitments of whatever nature. There was nothing in the PPA which prevented that.

405. Accordingly, the Tribunal concludes that the entering into of the PPA with Vietnam was not a breach of any obligation owed to the Claimant and it cannot form the basis of any of the claims made in these proceedings.

F. EDC Renounced, Left in "Continuous Limbo" and Lobbied KOC to Cancel the C-4 Project

406. The Tribunal has given this allegation very careful thought in light of all the allegations made in this case. The Tribunal has dealt with and will deal with in subsequent paragraphs all the allegations of the Claimant. In the view of the Tribunal, this allegation is no more than a compendium of the other allegations. Taking everything into account, the Tribunal is not of the view that EDC ever unlawfully renounced the PPA. In relation to lobbying, it is clear that there were internal discussions within Cambodia as to the need for and viability of the C-4 Project. But in the end, the Project had the backing of the [redacted], all necessary agreements were signed, a sovereign guarantee was given and all necessary extensions were granted. The allegation that EDC established a situation that left the PPA in "*continuous limbo*" from February 2000 to June 2001 simply does not withstand scrutiny.

G. The Electricity Law

407. As noted earlier, [redacted] set out the Claimant's case on force majeure in a letter dated 30 April 2001. There then followed correspondence on the issue and eventually both sides took legal opinions.

408. [redacted] was in error when he said in his first witness statement that he had been unaware of the proposed Electricity Law prior to April 2001. It had in fact been referred

to in the original bidding document. It was clearly known to those working on the C-4 Project. [redacted] also recognised that the law was no different to any other Electricity Law he had come across. [redacted], too, accepted that the Electricity Law was considered as part of Ogden's (a potential funder) due diligence of the C-4 Project.

409. There is absolutely no evidence before the Tribunal that any potential investor or lender was concerned about the Electricity Law.

410. The weight of all the evidence indicates that this was known at the time, was expected and was not unusual. The Claimant's pre-existing rights were protected by virtue of Article 76 of the Electricity Law in any event. It is also worth noting that the Claimant did not even make an application for a licence under the new scheme, and its reason for not doing so was totally unconvincing. Section 2.4 of the PPA imposed on the Claimant the obligation to obtain any necessary consents and approval. Section 3.1 of the IA requires compliance with any licensing requirements.

411. On 15 May 2001, [redacted] wrote to [redacted] who had just been appointed as chairman of the EAC which had been created by the new Electricity Law. He sought a meeting with [redacted] to discuss the force majeure issue.

412. On the same day he wrote to EDC with regard to a meeting next day to discuss the execution of Amendment No 4. In this letter he discussed the tariff reduction that had been required by KOC.

413. On 22 May 2001, MIME wrote to [redacted] rejecting the force majeure allegation and pointing out that Article 76 of the Electricity Law protected [redacted]

414. On 24 May 2001, [redacted] wrote to EDC regarding revisions to Amendment No. 4 aimed at meeting requirements of EDC's letter of 22 May, and submitting a revised Amendment No. 4 for reconsideration by EDC.

415. On 24 May [redacted] wrote to [redacted] and stated:

[redacted]

416. On 4 June 2001, EDC wrote to [redacted] proposing to amend the utilisation factor ("***UF***") as set out therein.

417. On 5 June 2001, [redacted] wrote to MIME setting out a "*report on force majeure*".

418. On the same day [redacted] wrote to EDC with regard to Amendment No. 4 in which he resubmitted CPC's offers regarding adjustments to the UF and the corresponding reduced tariff that would be applicable to each UF table.

419. On 16 June 2001, [redacted] wrote to [redacted] stating:

[redacted]

420. On 19 June 2001, [redacted] wrote to [redacted] and informed him that:

(1) The allegation of force majeure was not acceptable;

(2) EAC under Article 76 would not issue any abridging or expanding measures which would affect the rights or obligations of a contract in existence;

(3) MIME's authorisation dated 18 August 1998 for CPC to establish and operate a 60 WM power plant on the C-4 site was valid; and

(4) An application for a licence was required to be made and if CPC encountered any serious difficulty it could seek assistance from MIME.

421. On 26 June 2001, [redacted] reiterated his stance on force majeure to [redacted]

422. On 30 June 2001, [redacted] wrote to EDC stating:

[redacted]

423. On 2 July 2001, [redacted] wrote to [redacted] readdressing his concerns about the Electricity Law and underscoring his concerns relating to possible restrictions on the transfer and assignment of shares and the licence, as well as matters relating to dispute resolution.

424. On 16 July 2001, [redacted] for CPC wrote to the Minister for [redacted] setting out the legal argument in support of force majeure.

425. On 19 July 2001, the Minister for [redacted] wrote to [redacted] in response to three of his previous letters stating [redacted]

426. The Tribunal's conclusion on this issue is that the Claimant made a desperate attempt to use the new Electricity Law to buy further time. It is quite clear on the evidence that the Electricity Law did not take anyone by surprise. It was in fact welcomed by the investment community. It was never an event of force majeure, which argument was correctly objected to by EDC, and affords the Claimant no comfort in these proceedings whatsoever.

H. Financing

427. The crucial issue in this case was whether the Claimant ever had its financing arranged. If it did not, the Tribunal cannot see how it can be argued that anything KOC/EDC did or did not do could have impacted on financial closing. If financing was not arranged, what were the chances that it would have been but for the activities of EDC/KOC?

428. On the totality of the evidence, it is clear to the Tribunal that throughout this project there were substantial uncertainties relating to debt and equity financing for the project.

429. As has already been stated, there were obvious commercial risks in financing this project in Cambodia at this time. Those risks led to potential lenders such as [redacted] and CDC withdrawing interest in the project. In August 1999, the [redacted] (at the time an important potential lender) wrote to [redacted] saying that it was [redacted] Concern was expressed at EDC's credit worthiness – a concern shared by [redacted] himself.

430. By late 1998, [redacted] argued it was necessary to *"reorganise the lending"*. At

[redacted]

this time it will be recalled that IFC had suspended work on the project.

431. By the summer of 1999, IFC returned to the fold. [redacted] accepted in cross-examination that in January 2000 none of the major documents required for financial closing had been finalised.[204] Further, by late 1999 [redacted] and [redacted] had yet to begin their due diligence. [redacted] formerly of [redacted], part of the [redacted], agreed that there was real doubt as to whether OPIC would ever join as a lender. [redacted] himself agreed that by late 1999 OPIC was not *"on board"*.[205]

432. In his first witness statement, [redacted] had expressed the view that KEXIM and OPIC [redacted] By [redacted] own admission, this was not an accurate statement. It was one of several such inaccuracies in his testimony.

433. Another major factor was that, even if everyone had lent that which they had originally suggested, there would still have been a shortfall in required funds, as was put by the Respondent in its post-hearing brief:

[redacted]

[204] Transcript, Day 3, page 143.

[205] Transcript, Day 3, page 114.

[redacted]

The Tribunal is not satisfied on the evidence it has heard from [redacted] that [redacted] was a realistic investor.

434. Having regard to the state of interest in the project and the progress made to secure the necessary financing, it is clear that any case based on the allegation that EDC/KOC interfered with or prevented the financing from being made available, cannot be sustained. There was still a lot to do and no certainty at all that anyone would in fact sign up to the deal.

435. The withdrawal of the IFC for reasons unconnected with any actions on the part of EDC/KOC, was the death knell for the project. Mr Lobit's notes of a telephone conversation he had with [redacted] on 19 June 2000 state that [redacted]

436. In the Tribunal's view, after the withdrawal of IFC there was no real or substantial chance of financing this project.

437. It was, however, argued that IFC could have been re-engaged. The experts disagreed. However, the best evidence before the Tribunal is the statement of [redacted] that in 17 years at IFC this had never occurred. The Tribunal also observes that this position is confirmed by [redacted] notes of his conversation with [redacted], which indicate [redacted] saying on 19 June 2000 that [redacted] On this issue the Claimant fails to meet its evidential burden.

438. Another factor that the Tribunal considers relevant to the failure to obtain finance is [redacted] inexperience in a major power project development. During the Main

[redacted]

Hearing, [redacted] confirmed that the C-4 Project was his first power project. He was asked by Mr Turner to explain paragraph 15 of his Third Witness Statement, in which he wrote [redacted] acknowledged that his and [redacted] skill sets were not related to power station building experience.[209]

439. Also at the Main Hearing both project finance experts ([redacted]), as well as [redacted], agreed that it was unusual to enter into a power purchase agreement and an implementation agreement without first having the project finance in place. But this is exactly the way [redacted] approached the C-4 Project. Further, [redacted] and [redacted] agreed that BHA lacked experience in power purchase projects.[210]

440. Another example of [redacted] inexperience was the original proposal to unload highly volatile naphtha to the Phnom Penh cargo port, which was a dry cargo port.

441. Adding to the lack of experience in power plant development was the manner in which [redacted] worked with his project partners or potential equity partners. His working approach evidently had a tendency to create deep-rooted antipathy. This problem is manifest in [redacted] letter to [redacted] on 22 October 1999, which merits quotation in full:

[redacted]

[209] Transcript Day 2, pages 60, 63 and 66-67.

[210] Transcript Day 2, pages 107 and 176-177.

[redacted]

[redacted]

442. But this was not an isolated flare-up in which these points of contention were openly aired. Previously, on 1 December 1998, [redacted] wrote to [redacted] about differences concerning how to deal with the bribery allegation that echoed the type of complaints expressed in his October 1999 letter:

[redacted]

443. Moreover, these types of issues were not confined to [redacted] dealings with [redacted]. They also resonate in [redacted] relations with HEI Power Corp, as can be seen from the letter dated 6 May 1996 from [redacted] of that company to [redacted]:

[redacted]

[redacted]

[redacted]

I. Designation of EDC

444. Section 16.3 of the PPA is the arbitration clause which has been set out above. Section 16.3(b)(iii) is relevant to this inquiry and for the sake of convenience the Tribunal will set it out again:

[redacted]

[redacted].

[redacted]

445. The Claimant contends that this provision imports an obligation on KOC to designate EDC as a sub-division or agency of the State for the purposes of Article 25(1) of the ICSID Convention. If it contains such an obligation then clearly it has not been complied with. Further, in the jurisdictional phase of the arbitration KOC argued that EDC was not "*an agency or sub-division of KOC*" and the Tribunal did not find it necessary to decide that issue.

446. The point at issue now is a straightforward question of construction. Does this clause impose an obligation on KOC to designate EDC or is it merely an obligation to notify the Centre if and when that event occurs?

447. In its decision on jurisdiction, the Tribunal concluded that as a matter of fact EDC had not been designated to the Centre by KOC as required by Article 25(1) of the Convention. The Tribunal declined to accept the argument that designation was complete at the time when MIME agreed to procure designation upon implementation.

448. In paragraphs 258 and 259 in its Decision on Jurisdiction, the Tribunal concluded:

> *258. Therefore, even if the Claimant had persuaded the Tribunal that designation was properly communicated to the Centre, the Tribunal is not convinced that the wording of the arbitration provisions that were so communicated demonstrated KOC's unequivocal designation of EDC as its agency.*
>
> *259. In conclusion on this point, it is clear to the Tribunal that not only does designation require a public communication by the State, but that such designation must also represent an unequivocal intention of the State to consider the entity as its agency or sub-division.*

449. The Tribunal now returns to the wording of Section 16.3(b)(iii). Having considered all the arguments helpfully deployed on this issue by both sides, the Tribunal concludes that the provision involves an obligation of notification of something yet to occur. On a plain reading it cannot be taken to mean that KOC had already designated EDC/MIME,

or that KOC was undertaking to CPC to do so. This provision and the one immediately preceding it are clearly looking to the future. KOC was promising to perfect any designation, by notifying the Centre - if and when any such designation occurred, which it had clearly not at the time of execution of the PPA. Even if the Tribunal is wrong about this, it is difficult to see what possible loss the Claimant could have suffered consequent on such a breach.

450. Accordingly, the claim made on the basis of a breach of Section 16.3(b)(iii) of the PPA fails and it is thus unnecessary for the Tribunal to consider the interesting question whether in fact EDC was "*an agency or sub-division*" of KOC.

J. Termination

451. Although neither party has contended that the agreements are still on foot, it may be helpful if the Tribunal briefly records its analysis of their termination.

452. On the basis of the Tribunal's conclusions, the notices of default served on both MIME and EDC were clearly not valid. Indeed, it is apparent on the evidence that attempts were made thereafter to continue with the contract. There is then a long silence from the Claimant between 2004 and 2009 when it hurriedly commenced these proceedings at a time which it acknowledged might give it certain limitation problems. It is difficult to point to any specific moment in time when the Claimant purported to accept the alleged repudiation of EDC and KOC.

453. However, in the light of the various positions of the parties in this arbitration, it is clearly common ground that these contracts are no longer in effect. Both parties, albeit on different grounds, have asserted that all project contracts in this case have been terminated.

K. Conclusion

454. As will be readily apparent from all of the above, the Tribunal rejects all of the

Claimant's claims in the merits phase of this arbitration. The Claimant has been quite unable to pinpoint any provision in the relevant agreements in respect of which the Respondent or EDC has committed a breach, or for which under the cross default provisions, KOC is liable.

455. The breach of contract claim fails completely. The Claimant's claim against KOC based on breaches of customary international law is quite unsupportable. As there was no breach of the agreements by EDC, there was no conduct on the part of KOC which can form the basis of an international law claim. None of the evidence presented in this case can support any claim based on the "*state responsibility doctrine*" whether put as expropriation or in any other way. The Claimant does not rely upon any implied term of the agreements. In so far as the Claimant relies on an accumulation of conduct on the part of EDC and KOC, this does not advance the Claimant's case in the absence of an identifiable breach of a specific provision of the agreements. None has been established.

456. In conclusion, it is clear to the Tribunal that the Claimant's claims in the merits phase of this arbitration have been a moving target in that they have developed and then changed during the course of the various rounds of memorials and in the oral phase of the arbitration.

457. The Tribunal has some sympathy with the position of the Respondent who has had to deal with a changing case. The Claimant's approach has been of a scatter gun nature and although set out at enormous length, when stripped of hyperbole, exaggeration and inaccuracy, it is "*as a thing writ in water*". As the Tribunal said at the outset, it recognises that [redacted] and his team feel EDC/KOC prevented this deal, on which they had been working for many years, from coming to fruition. Unfortunately, many of the problems in getting this project to the finishing post have to be laid at the door of the Claimant.

458. As has already been said, [redacted] and [redacted] were complete novices in the complex field of large-scale power generation projects. [redacted] clearly had some connections in Cambodia, but neither she nor [redacted] had any experience in the

financing of an international power project, let alone all the other myriad issues that needed addressing for successful conclusion.

XIII. RESPONDENT'S COUNTERCLAIM, CLAIMANT'S CLAIM FOR DAMAGES AND MISCELLANEOUS OTHER POINTS

459. Mr Turner accepted in his oral closing submission that if the claim was to fail in its entirety there would be no need to consider the Respondent's counterclaim.[213] Accordingly, the Tribunal makes no findings of fact or law on the counterclaim, which is dismissed.

460. The Tribunal having dismissed all of the Claimant's claims on the merits, it is not necessary for this Tribunal to analyse the Claimant's claims for damages or the KOC's damage limitation clause defence.

461. The Tribunal has decided all points that it considers necessary for the decision to dispose of the claims and counterclaim.

XIV. COSTS

462. Pursuant to an order of the Tribunal, the Parties submitted their cost schedules on 29 November 2012. The Claimant's costs schedules were accompanied by an 11 page letter together with authorities. As directed by the Tribunal, the Parties divided up their costs to cover costs and expenses incurred during the following phases of the arbitration: (a) jurisdiction; (b) the Lobit Application and (c) the merits. The Parties' claims for costs may be summarized in United States dollars as follows:

[redacted]

	Claimant	**Respondent**
Jurisdiction	[redacted]	[redacted]
Lobit Application	[redacted]	[redacted]
Merits	[redacted]	[redacted]
Total	[redacted]	[redacted]

463. In addition, each party has contributed USD 600,000 to ICSID to cover the costs of the proceedings.

464. Article 61(2) of the ICSID Convention confers on the Tribunal a wide discretion to deal with the costs and expenses of the proceedings. It is not unusual for ICSID tribunals to follow the principle that "costs follow the event". It could be said that the three events in this case are represented by the three phases of this arbitration.

465. The Respondent clearly won in the Lobit Application as well as on the merits. On the jurisdictional issue, both Parties enjoyed some success. The Claimant managed to sway the Tribunal to permit this arbitration to proceed despite the jurisdictional objections of the Respondent, but on the other hand the Respondent was successful in persuading the Tribunal that EDC for the various reasons stated in the Decision on Jurisdiction this should no longer be a party.

XIV.1 Jurisdiction

466. In the jurisdictional phase the Claimant succeeded most because it persuaded the Tribunal that this arbitration could continue in the form it had been commenced save that EDC was dismissed from the proceedings due to the lack of designation. Leaving each Party to pay for its own costs of the jurisdictional phase, although superficially attractive, would not reflect fully the outcome of the phase. Taking everything into account and exercising the Tribunal's undoubted wide discretion as to costs, the

Tribunal decides that the Respondent shall contribute USD 250,000 towards the Claimant's legal costs of the jurisdictional phase.

XIV.2 Lobit Application

467. With regard to the Lobit Application, the Tribunal can see no reason why the Claimant should not pay the Respondent's reasonable costs as quantified by the Tribunal.

468. The claim for Freshfields' legal fees on this issue totals USD 674,452 and they also incurred USD 90,745 in expenses. This totals USD 765,197.

469. As the Lobit Application raised matters of California law, the services of Quinn Emanuel were engaged by the Respondent. This was perfectly proper and necessary. Their fees amounted to USD [redacted] and they incurred expenses of USD [redacted] making a total of USD [redacted]. It seems that Quinn Emanuel spent approximately [redacted] hours on the Lobit matter. In contrast Mr Valle and his colleagues from the firm Valle Makoff LLP, who were engaged by the Claimant on issues related to Californian law, spent approximately [redacted] hours.

470. The Respondent also claims USD [redacted] in respect of the fees of Sciaroni and Partners, bringing the total of fees and expenses of the Respondent's legal representation on the Lobit Application to USD [redacted]

471. In the exercise of the Tribunal's discretion and having regard to all the circumstances surrounding this issue, the Tribunal considers it fair and reasonable for the Claimant to pay the Respondent the sum of USD 1,000,000 in respect of the Lobit Application.

XIV.3 Merits

472. For their legal representation on the merits phase, Freshfields charged USD

[redacted] together with expenses of USD [redacted].

473. For this phase, Quinn Emanuel billed USD [redacted] in fees together with USD [redacted] in expenses.

474. [redacted] charged USD [redacted] together with expenses of USD [redacted].

475. The experts called by the Respondent have charged a total of USD [redacted] together with expenses of USD [redacted]. The various experts retained by the Claimant charged a total of just over USD [redacted].

476. Thus the Respondent's total claim in United States dollars for the merits claim may be broken down as follows:

	Fees	**Expenses**	**Total**
Freshfields	[redacted]	[redacted]	[redacted]
Quinn Emanuel	[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]
Experts	[redacted]	[redacted]	[redacted]
			[redacted]

477. In the exercise of the Tribunal's discretion, it considers that it would be fair and reasonable in all the circumstances of the case if the Claimant paid USD 4,500,000 in respect of the Respondent's legal costs of the merits phase of the arbitration.

478. Accordingly, the Tribunal orders Claimant to pay the Respondent USD 5,500,000 in respect of the Respondent's costs and expenses relating to the Lobit Application and the merits phase of this arbitration. The Claimant is entitled USD 250,000 credit for its fees and expenses of the jurisdictional phase leaving a net balance in favour of the Respondent of USD 5,250,000, which the Tribunal orders the Claimant to pay the

Respondent.

XIV.4 Costs of Proceeding

479. The fees and expenses of the Tribunal and ICSID's administrative fees and expenses are the following:[214]

	USD
Mr Neil Kaplan	486,275.10
Mr John Beechey	158,739.24
Mr Toby T. Landau	203,871.56
ICSID's administrative fees and expenses (estimated)	267,448.54
Total	**1,116,334.44**

480. The Tribunal's fees and expenses as well as ICSID's administrative fees and expenses are paid out of the advances made by the Parties.[215] As a result, each party's share of the costs of arbitration amounts to USD 558,167.22. The Tribunal estimates that approximately one third of these costs relates to the proceeding on jurisdiction and two thirds to the Lobit Application and the merits. As a result, the Claimant should pay two thirds of the Respondent's costs of the proceeding, *i.e.* USD 372,111.29 to the Respondent.

481. The Tribunal further orders that the Claimant shall pay interest at a rate of 2% per annum, compounded annually, on the amounts due under this Section XIV, from the date of dispatch of this Award until the date of payment.

[214] The ICSID Secretariat will provide the Parties with a detailed financial statement of the case account as soon as all invoices are received and the account is final.

[215] The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

XV. AWARD

482. For the reasons stated above, the Tribunal unanimously decides that:

(i) The Respondent did not breach the IA, PPA or DOG directly or indirectly through the actions of EDC;

(ii) All of the Claimant's other claims are dismissed;

(iii) The Respondent's counterclaim is dismissed;

(iv) The Claimant shall pay to the Respondent USD 5,250,000 for the Respondent's legal costs and expenses in this arbitration, plus interest on this amount as from the date of dispatch of this Award at the rate of 2% per annum compounded annually until the date of payment;

(v) The Claimant shall pay to the Respondent USD 372,111.29 in respect of the Respondent's costs of these proceedings, plus interest on this amount as from the date of dispatch of this Award at the rate of 2% per annum compounded annually until the date of payment;

(vi) All other claims and requests by the Parties are dismissed.

[redacted]

John Beechey
Arbitrator
Date: 8 April 2013

[redacted]

Toby Landau QC
Arbitrator
Date: 10 April 2013

[redacted]

Neil Kaplan CBE QC SBS
President
Date: 15 April 2013

ANNEXES

1. Decision on Jurisdiction of 22 March 2011
2. EDC Decision of 19 April 2011
3. Lobit Decision of 29 January 2012
4. Amended Lobit Decision of 14 February 2012