

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID CASE NO. ARB/09/18

Between

Cambodia Power Company

— Claimant —

And

Kingdom of Cambodia

— Respondent —

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

29 January 2012

Members of the Tribunal

Neil Kaplan CBE QC SBS – Presiding Arbitrator -

John Beechey – Co-Arbitrator -

Toby Landau QC – Co-Arbitrator -

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

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

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

1. The Tribunal finds that International Law governs the question of the admissibility of Mr. Lobit's evidence in this Arbitration. In applying International Law, the Tribunal finds that questions of impediment, privilege, agency, confidentiality and fiduciary duties, that have been relied upon by CPC, are governed by Californian law. In reaching its determinations on the Claimant's application, the Tribunal considers that it may be guided, as agreed by the Parties, by the IBA Rules on the Taking of Evidence in International Commercial Arbitration.
2. The Tribunal declines to exclude Mr. Lobit's testimony from these proceedings, and to prevent him from participating in these proceedings, on the sole basis of his or PDC's status or relationship with CPC and its legal representatives, including objections based on agency, confidentiality, and fiduciary duties.
3. The Claimant remains at liberty, however, to object to any specific communications about which Mr. Lobit has testified, or to which the Respondent has referred, on the basis that the communication itself is subject to attorney-client privilege as a matter of Californian law.
4. For these purposes:
 - (a) Within 14 days of the date of this Decision, the Respondent shall serve on the Claimant and the Tribunal a schedule of all the documents relied upon in its Counter-Memorial which have emanated from Mr. Lobit;
 - (b) Within 14 days thereafter, the Claimant shall:

- i. particularise any objection it may have to the use of each of the documents identified by the Respondent, as a matter of attorney-client privilege, applying Californian law (excluding any objection based solely upon Mr. Lobit's or PDC's status or relationship with CPC and its legal representatives, or agency, confidentiality and fiduciary duties);
 - ii. identify by means of a Redfern Schedule, with reasons, any specific passages in Mr. Lobit's 1st witness statement that are said to refer to communications that are covered by attorney-client privilege under Californian law (excluding any objection based solely upon Mr. Lobit's or PDC's status or relationship with CPC and its legal representatives, or agency, confidentiality and fiduciary duties).
 - (c) Within 14 days thereafter, the Respondent may respond to any objections; and
 - (d) Within 7 days thereafter, the Claimant may reply.
5. Further, within 21 days of the date of this Decision, the Respondent shall serve on the Claimant and the Tribunal a schedule (the "**Full Schedule**"), with sufficient particularity, of all the documents received from Mr. Lobit, save those scheduled under paragraph 4(a) above and, within 14 days thereafter, the Claimant shall be permitted to inspect such documents as it wishes.
 6. Any application for production in respect of the documents referred to in paragraph 5 above, must be made within 21 days of receipt of the Full Schedule. If the Respondent maintains any objection to the production of any of the documents referred to in paragraph 5 above, it must state its reasons in the Full Schedule with sufficient particularity. The Claimant may respond to any such objection(s) within 7 days of the filing of the Full Schedule. The Respondent may reply within 7 days thereafter.
 7. The Tribunal will rule on any objections to production or claims to privilege as soon as reasonably practical.
 8. Having regard to Articles 21 and 22 of the ICSID Convention, the Claimant is hereby restrained from taking any action in any court against Mr. Lobit personally in relation to his involvement and continuing involvement in these proceedings.
 9. Save insofar as the Parties' applications have been dealt with herein, the same are dismissed.
 10. The costs of this Application are reserved.
 11. The Tribunal will now look at the Respondent's Counter-Memorial and Mr. Lobit's 1st Witness Statement *de bene esse*.

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