

INTERNATIONAL CENTRE FOR SETTLEMENT  
OF INVESTMENT DISPUTES

ICSID CASE NO. ARB/09/18

Between

**Cambodia Power Company**

— Claimant —

And

**Kingdom of Cambodia**  
**Electricité du Cambodge**

— Respondents —

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**DECISION ON JURISDICTION**

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**Members of the Tribunal**

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

*Date of Dispatch to the Parties: 22 March 2011*

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**I. THE PARTIES**

**A. THE CLAIMANT**

1. The Claimant is Cambodia Power Company, a Cambodian limited liability company incorporated and existing under the laws of the Kingdom of Cambodia (“**Claimant**” or “**CPC**”). For the purpose of this matter the Claimant’s registered office is at 520 Savoy Street, Bridgeport, Connecticut 06606, U.S.A.
2. CPC is a company wholly owned by Beacon Hill Associates, Inc. (“**BHA**”), a Delaware corporation, which entered into the original contracts, the subject matter of this arbitration.
3. The Claimant is represented in this arbitration by:

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**B. THE RESPONDENTS**

4. The first Respondent is the Kingdom of Cambodia, a sovereign state (“**KOC**”), represented by the Ministry of Industry, Mines and Energy (“**MIME**”). For the purpose of this matter, the first Respondent’s address is at 45 Norodom Boulevard, Phnom Penh, Cambodia.
5. The second Respondent is Electricité du Cambodge, a Cambodian limited liability company owned by KOC (“**EDC**”). For the purpose of this matter, the second Respondent’s registered office is at Yukuntor Street, Wat Phnom, Daun Penh District, Phnom Penh, Cambodia.
6. The first Respondent and the second Respondent are each referred to as “**Respondent**”, or jointly as “**Respondents**”.

7. The Respondents are represented in this arbitration by

**FRESHFIELDS BRUCKHAUS DERINGER**

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8. The Claimant and the Respondents are each referred to as a “**Party**”, or jointly as “**the Parties**”.

**II. ARBITRATION CLAUSES**

9. This Arbitration arises under three different agreements.
10. The Power Purchase Agreement entered into between KOC, CPC and EDC dated 20 March 1996 (“**PPA**”) contained in Section 16 the following agreement to arbitrate:

*“16.1 Mutual Discussions*

*If any dispute or difference of any kind whatsoever shall arise between Edc and the Company in connection with or arising out of this Agreement, including in relation to any termination of this Agreement or rights arising thereafter or if the Parties are unable*

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*to agree upon any matter as required under the terms of this Agreement (a “Dispute”) the provisions of this Section 16 shall apply.*

...

*16.3 Arbitration*

*(a) ...*

*(b) Any Dispute falling within Section 16.3(a) shall be referred to arbitration which shall be conducted in accordance with the Rules of the International Chamber of Commerce (ICC) (as modified herein) or as otherwise agreed upon in writing by the Parties.*

*(c) The arbitral tribunal may consist of a single arbitrator if the Parties can agree thereon otherwise it shall consist of three (3) arbitrators. Each Party shall appoint one arbitrator with, in case of a Dispute of a technical nature, knowledge and experience in such technical matters. The two arbitrators so appointed shall appoint the third arbitrator who shall serve as the chairman of the arbitral tribunal.*

*(d) If a Party fails to appoint its arbitrator within a period of ten (10) days after receiving notice of the arbitration, or if the two arbitrators cannot agree on the third arbitrator within a period of ten (10) days after appointment of the second arbitrator then such arbitrator shall be appointed pursuant to the procedures of the ICC, or as otherwise agreed to by the Parties.*

*(e) All arbitrators appointed pursuant to Section 16.3(c) shall comply with the criteria set out in Section 4.6(a)(iii)-(v). In the event that the ICC is required or requested to appoint an arbitrator, it shall be requested to appoint only a person who (i) complies with these criteria; (ii) has experience in international commercial agreements and in particular the implementation and interpretation of contracts relating to the design, engineering, construction, operation and maintenance of electric power generation facilities; and (iii) if the Dispute concerns a technical issue, a person who has knowledge and experience in technical matters.*

*(f) The arbitration shall be conducted in Singapore (or in such other nearby location as may be agreed by the arbitrators which is a Contracting State under the New York Convention on the*

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*recognition and Enforcement of Foreign Arbitral Awards) using the English language. All documents or evidence presented at such arbitration in a language other than English shall be accompanied by a certified English translation. The arbitrators shall decide the Dispute by majority and shall state in writing the reasons for their decision. The arbitrators shall be bound by the decision of any Expert under Section 16.2(g) and shall not have the power to review or appeal such decision other than in the circumstances set out in Section 16.3(a)(iii).*

- (g) The Parties hereby waive any rights to appeal or to review of any arbitral award by any court or tribunal. The Parties further undertake to carry out without delay the provisions of any arbitral award or decision and each agrees that any such arbitral award or decision may be enforced by any court or tribunal having jurisdiction. Either Party may, subject to Section 21.4, publicise or otherwise disclose to others the contents of any award or decision of the arbitral tribunal.*
- (h) The arbitral award shall be in Dollars. The cost of such arbitration shall be determined by the arbitral tribunal in its award.*
- (i) Each Party hereby irrevocably agrees not to bring legal proceedings in any court except:*
  - (A) obtaining interim and conservatory measures to protect or enforce its rights under this Agreement as provided in Article 8(5) of the ICC Rules;*
  - (B) bringing any action to enforce an arbitral award or a decision of the Expert which is final, conclusive and binding under Section 16.2(g); and/or*
  - (C) carrying actions to give effect to this Section 16.*
- (j) For the purposes set out in sub-Section 16.3(i), each of the Parties irrevocably submits to the jurisdiction of the courts of Cambodia and of any other competent jurisdiction.*
- (k) The Parties irrevocably and unconditionally waive all the provisions of Cambodian Law which may be inconsistent with this Section 16 and which may otherwise override the provisions hereof.”*

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11. The PPA dated 20 March 1996 was novated on 30 September 1996, and amended on 9 October 1998. As amended, Section 16 reads as follows:

*“16.1 Mutual Discussions*

*If any dispute or difference of any kind whatsoever shall arise between Edc and the Company in connection with or arising out of this Agreement, including in relation to any termination of this Agreement or rights arising thereafter or if the Parties are unable to agree upon any matter as required under the terms of this Agreement (a “Dispute”) the provisions of this Section 16 shall apply.*

...

*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*



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- (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.*
- (c) *The arbitral tribunal may consist of a single arbitrator if the Parties can agree thereon otherwise it shall consist of three (3) arbitrators. Each Party shall appoint one arbitrator with, in case of a Dispute of a technical nature, knowledge and experience in such technical matters. The two arbitrators so appointed shall appoint the third arbitrator who shall serve as the chairman of the arbitral tribunal.*
- (d) *If a Party fails to appoint its arbitrator within a period of ten (10) days after receiving notice of the arbitration, or if the two arbitrators cannot agree on the third arbitrator within a period of ten (10) days after appointment of the second arbitrator then such arbitrator shall be appointed pursuant to the ICSID Rules or the ICC Rules, or as otherwise agreed to by the Parties.*
- (e) *All arbitrators appointed pursuant to Section 16.3(c) shall comply with the criteria set out in Section 4.6(a)(iii)-(v). In the event that the ICC or the Centre, as the case may be, is required or requested to appoint an arbitrator, it shall be requested to appoint only a person who (i) complies with these criteria; (ii) has experience in international commercial agreements and in particular the implementation and interpretation of contracts relating to the design, engineering, construction, operation and maintenance of electric power generation facilities; and (iii) if the Dispute concerns a technical issue, a person who has knowledge and experience in technical matters.*

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- (f) *All documents or evidence presented at such arbitration in a language other than English shall be accompanied by a certified English translation. The arbitrators shall decide the Dispute by majority and shall state in writing the reasons for their decision. The arbitrators shall be bound by the decision of any Expert under Section 16.2(g) and shall not have the power to review or appeal any decision other than in the circumstances set out in Section 16.3(a)(iii).*
- (g) *The Parties hereby waive any rights to appeal or to review of any arbitral award by any court or tribunal. The Parties further undertake to carry out without delay the provisions of any arbitral award or decision and each agrees that any such arbitral award or decision may be enforced by any court or tribunal having jurisdiction. Either Party may, subject to Section 21.4, publicise or otherwise disclose to others the contents of any award or decision of the arbitral tribunal.*
- (h) *The arbitral award shall be in Dollars. The cost of such arbitration shall be determined by the arbitral tribunal in its award.*
- (i) *Each Party hereby irrevocably agrees not to bring legal proceedings in any court except any action to enforce an arbitral award or unless a dispute cannot legally be arbitrated. Each Party hereby irrevocably consents to the jurisdiction of the courts of Cambodia and any other court of competent jurisdiction in another country for any action or proceeding filed by any other Party (i) to enforce a judgement entered by a Cambodian court of competent jurisdiction recognizing any award or decision of any arbitrator(s) or Experts who were duly appointed under this Agreement to resolve any dispute between the Parties (ii) to enforce any award or decision of any arbitrator(s) or experts who were duly appointed under this Implementation Agreement to resolve any dispute between the Parties and (iii) regarding any matter or issue that cannot be arbitrated because any arbitrator declines or is not competent to resolve such matter issue. With respect to any such action or proceeding, including without limitation, any proceedings for the enforcement of any award against the assets of MIME or EDC:*
- (a) *Each Party shall maintain in London, England a duly appointed agent for the receipt of service of process and shall notify the other Party of the name and address of such agent and any change in such agent/or the address of such agent;*

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- (b) Each Party agrees that the failure by any such agent for the receipt of service of process to give it notice of any process that has been served on such agent shall not impair the validity of such service or of any judgment based thereon; and*
- (c) Each Party waives any objection that it may have or hereafter have to the venue of an action or proceeding brought as consented to in this Section 16.3 and specifically waives any objection that any action or proceeding was brought in an inconvenient forum and agrees not to plead or claim the same. Each Party agrees that service of process in any such action or proceeding may be effected in the manner set forth in this Section 16.3 or in any other manner permitted by applicable law.*
- (j) The Parties irrevocably and unconditionally waive all the provisions of Cambodian Law which may be inconsistent with this Section 16 and which may otherwise override the provisions hereof.*

12. The Implementation Agreement entered between KOC and CPC dated 20 March 1996 (“**IA**”) contained 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 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.*

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(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.*

*12.3 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”) by one or more arbitrators appointed in accordance with the ICC Rules. The arbitration proceedings shall be held in Singapore or in such other nearby location as the arbitrators may agree provided it is a Contracting State under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The language of the arbitration shall be English.*

*12.4 Legal Proceedings*

*Where Section 12.2 or Section 12.3 applies:*

(a) *Each party hereby irrevocably agrees not to bring legal proceedings in any court except:*

(i) *seeking interim and conservatory measures to protect or enforce its rights under this Agreement as provided in Article 8(5) of the ICC Rules or carrying out actions to give effect to Section 12.3; or*

(ii) *bringing any action to enforce an arbitral award;*

(b) *each of the parties irrevocably submits, subject to sub-section 12.4(c), to the exclusive jurisdiction of the courts of Cambodia; and*

(c) *for the sole purpose of the enforcement of any arbitral award, each of the parties irrevocably submits to the jurisdiction of any court of competent jurisdiction.”*

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13. The IA was novated on 30 September 1996, and amended on 20 July 1998. As amended, Section 12.2 reads as follows:

*“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”) 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 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.*

*12.3 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*

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*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.*

**12.4 Legal Proceedings: consent to jurisdiction**

*Each party hereby irrevocably agrees not to bring legal proceedings in any court except any action to enforce an arbitral award or unless a dispute cannot legally be arbitrated. Each party hereby irrevocably consents to the jurisdiction of the courts of Cambodia and any other court of competent jurisdiction in another country for any action or proceeding filed by any other party (i) to enforce a judgement entered by a Cambodian court of competent jurisdiction recognizing any award or decision of any arbitrator(s) or experts who were duly appointed under this Implementation Agreement to resolve any dispute between the parties, (ii) to enforce any award or decision of any arbitrator(s) or experts who were duly appointed under this Implementation Agreement to resolve any dispute between the parties and (iii) regarding any matter or issue that cannot be arbitrated because any arbitrator declines or is not competent to resolve such matter or issue. With respect to any such action or proceeding, including without limitation, any proceedings for the enforcement of any award against the assets of MIME:*

- (a) Each party shall maintain in London, England a duly appointed agent for the receipt of service of process and shall notify the other party of the name and address of such agent and any change in such agent/or the address of such agent;*
- (b) Each party agrees that the failure by any such agent for the receipt of service of process to give it notice of any process that has been served on such agent shall not impair the validity of such service or of any judgement based thereon; and*
- (c) Each party waives any objection that it may have or hereafter have to the venue of an action or proceeding brought as consented to in this Section 12.4 and specifically waives any objection that any action or proceeding was brought in an inconvenient forum and*

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*agrees not to plead or claim the same. Each party agrees that service of process in any such action or proceeding may be affected [sic] in the manner set forth in this Section 12.3 or in any other manner permitted by applicable law.”*

14. The Deed of Guarantee entered between KOC and CPC dated 24 March 1998 (“**DOG**”) contains in Section 7.2 the following agreement to arbitrate:

*“7.2.1 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 Sections 7.2-7.5 shall apply.*

*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.*

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7.3 *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”) by one or more arbitrators appointed in accordance with the ICC Rules. 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.”*

**III. PROCEDURAL HISTORY**

15. Following the Claimant’s Request for Arbitration (“**Request**”) and Supplement No. 1 to the Request for Arbitration (“**Supplement to Request**”) dated 30 July and 21 August 2009 respectively, the Secretary-General of the International Centre for Settlement of Investment Disputes (“**Secretary-General**” and “**Centre**” respectively) registered the present dispute on 16 September 2009.
16. On 15 December 2009, the Parties agreed that the Tribunal would be constituted of three arbitrators, one arbitrator appointed by each party and the third, the President of the Tribunal, appointed by agreement of the Parties. Subsequently, the Claimant and the Respondents appointed Messrs. John Beechey and Toby Landau respectively. Both arbitrators accepted their appointments. The Parties then agreed to appoint Mr. Neil Kaplan as presiding arbitrator. Mr. Kaplan accepted his appointment and, on 8 January 2010, the Secretary-General sent a letter to the Parties announcing the constitution of the Arbitral Tribunal (“**the Tribunal**”).
17. On 9 April 2009, the Parties and the Tribunal met for the First Session at the Permanent Court of Arbitration in The Hague, the Netherlands. Shortly thereafter, the Minutes of the First Session were served on the Parties (“**Minutes**”). In accordance with the relevant articles of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“**ICSID Convention**” or “**the Convention**”) and the Rules of Procedure for Arbitration Proceedings (“**Arbitration Rules**”), these Minutes addressed, in relevant part, the following points:
  - (a) apportionment of costs and advance payments to the Centre;
  - (b) fees and expenses of the Tribunal members;



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- (c) applicable Arbitration Rules: the 2006 ICSID Arbitration Rules;
  - (d) place of the proceedings: The Hague, Netherlands;
  - (e) procedural language: English;
  - (f) transcription service at the hearing;
  - (g) means of communications and submissions;
  - (h) quorum of arbitrators at the hearing;
  - (i) convening of a pre-hearing conference;
  - (j) procedure to adopt with regards to the production of evidence through witness statements and expert reports;
  - (k) decisions of the Tribunal and appropriate means of communication;
  - (l) delegation of power to fix and extend time limits;
  - (m) written and oral procedures; and
  - (n) sequence of pleadings according to the following timetable which distinguished whether the issue on jurisdiction would be bifurcated or not.
18. In accordance with the Minutes, on 2 July 2010, the Claimant served its Memorial on the Merits Part 1 – Jurisdiction and Liability.
19. On 12 July 2010, the Respondents wrote to the Tribunal stating that the Claimant had omitted to request any relief in its Memorial of 2 July 2010. Accordingly, Respondents stated that they would rely upon the requests for relief contained in the Claimant’s Request unless Claimant clearly identified the relief that it sought within 24 hours.
20. On the same day, Claimant responded that since the Merits were split in two parts, the first addressing liability, and the second addressing quantum, it was clear that the appropriate measure of damages would not be sought by Claimant until Part 2 of the submissions. In any event, Claimant contended that the opening and concluding paragraphs of its last submission included the relief sought. Claimant reiterated its reliefs as follows:
- (a) to hold EDC liable in damages for its repudiation of, defaults under and/or other breaches of the PPA;

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- (b) to hold KOC liable in damages for its repudiation of, defaults under and/or other breaches of the IA;
  - (c) to hold KOC liable pursuant to its obligation in the DOG to pay all amounts owed by EDC to CPC under the PPA; and
  - (d) to hold KOC liable in respect of EDC's repudiation of, defaults under and/or other breaches of the PPA that are attributable to KOC under the state responsibility doctrine.
21. On the next day, the Respondents denied that the relief sought by the Claimant should be included in Part 2 of the submissions which were intended only to deal with the pure quantification of damages. The Respondents asserted that the factual and legal bases of the damages sought had to be set out in Part 1 of the submissions and therefore could not be modified in Part 2.
  22. On 20 July 2010, the Respondents served their Preliminary Objections and requested that the proceedings be bifurcated.
  23. On 30 July 2010, the Claimant served its Response to Respondents' Preliminary Objections, and objected to the request for bifurcation.
  24. By letter on the same day, the Respondents took issue with Claimant's allegations of corruption against officials of the Cambodian government contained in Claimant's submissions. The Respondents maintained that these allegations were unfounded and unsupported by any documents, and asked the Tribunal to strike out paragraphs 78, 93, 218 and 273 of the witness statement of Mr. William Garret ("**Mr. Garret**"). In addition, Respondents objected to the "*unsupported allegations made in reliance on documents not submitted by the Claimant.*" The Respondents maintained that the Claimant should have submitted all documents upon which it intended to rely in these proceedings with its Memorial on the Merits. A list of these unsupported allegations was annexed to the letter.
  25. On 3 August 2010, the Respondents wrote a letter to the Tribunal stating that the Claimant's Response to the Respondents' Preliminary Objections was in contravention of the agreed timetable as this submission was not limited to a brief description of arguments concerning bifurcation, but instead it articulated most of Claimant's case on the merits. The Respondents also stated that the Claimant had misinterpreted the Respondents' position.

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26. On the next day, the Claimant objected to the Respondents' letter which presented other arguments and new legal authorities not permitted by the timetable contained in the Minutes. The Claimant added that it was unfair not to have afforded it an opportunity to respond. Finally, the Claimant denied the Respondents' allegations that the Claimant had set out its case on the merits rather than addressing the bifurcation issue in its Response to the Respondents' Preliminary Objections.
27. On 23 August 2010, the Tribunal decided to bifurcate the proceedings and to hold a hearing on jurisdiction on 6-7 December 2010 in Hong Kong ("**the Hearing**"). The Tribunal also provided the following directions with regard to the issues to be addressed at the Hearing (by reference to the list of issues proposed by the Respondents):
- (a) *Issue 1: Does the Tribunal have a jurisdiction over EDC? In other words whether or not EDC is an "agency" for the purposes of Article 25 of the ICSID Convention.*
  - (b) *Issue 2: The admissibility of two separate claims under a single proceeding.*
  - (c) *Issue 3: Claims under the Deed of Guarantee. The only claim here that will be heard in December is the issue relating to the allegation that no claim under the Deed was advanced in the Request for Arbitration. All other issues relating to the Deed of Guarantee will be heard in a merits hearing.*
  - (d) *Issue 4: Whether under Cambodian company law the claimants' corporate decisions relating to the commencement of this arbitration are valid or invalid.*
  - (e) *Issue 5: Time bar. This will be heard in a merits hearing.*
  - (f) *Issue 6: Objections to claims of State Responsibility. The only issue here that can be heard in December is the effect of the allegation that such claims were not pleaded in the request for arbitration. The argument that the claimants' case on customary international law is wrong in principle will only be heard in a merits hearing.*
  - (g) *Issue 7: Force Majeure. This will only be heard in a merits hearing.*

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28. On 16 September 2010, the Respondents withdrew their objection to the Claimant's authority to bring the present proceedings as articulated in Section IV of the Respondents' Preliminary Objections dated 20 July 2010.
29. On 27 September 2010, after discussion between the Parties, the Tribunal ordered that Skeleton Arguments were to be exchanged on or before Monday 29 November 2010 at 5 pm E.S.T.
30. On the same day, the Claimant submitted to the Tribunal an application for permission to amend its 2 July 2010 submissions and to submit additional documentary evidence.
31. On 28 September 2010, the Respondents objected to the Claimant's application and assured the Tribunal that they would respond to this application after they had filed their Memorial on Preliminary Issues due on 6 October 2010.
32. On 6 October 2010, the Respondents served their Submissions on Preliminary Objections.
33. On 14 October 2010, the Respondents applied for the Tribunal's permission to introduce into evidence a recent decision rendered by an ICSID tribunal, namely *Gustav F W Hamester GmbH & Co KG v The Republic of Ghana, ICSID Case No. ARB/07/24, Award (18 June 2010)* ("**Hamester**").
34. On 15 October 2010, the Respondents wrote a letter to the Tribunal stating that three matters remained outstanding between the Parties. Respondents requested that:
  - (a) the Claimant's corruption allegations articulated in the Claimant's Memorial on the Merits be struck out;
  - (b) the Claimant's claims under customary international law be struck out; and
  - (c) the Claimant's application for permission to amend its Memorial on the Merits and witness statements and to submit additional documentary evidence be denied.
35. In addition, the Respondents asked the Tribunal to issue a ruling on the costs incurred by the Respondents in reviewing and addressing the Claimant's application.
36. On the next day, the Claimant accepted the Respondents' late submission of the referenced authority, i.e. *Hamester*, but requested that Respondents submit a supplement to their submissions by 22 October 2010 so that the Claimant had a reasonable opportunity to address the Respondents' arguments in its Counter-Memorial.

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37. On 20 October 2010, the Respondents submitted a letter setting out the relevance of the recent *Hamester* case.
38. On 21 October 2010, the Claimant responded to the Respondents' requests of 15 October 2010. The Claimant said that:
- (a) the Respondents' request to strike out portions of Mr. Garrett's testimony were without merit and not ripe for a ruling by the Tribunal;
  - (b) the Respondents' request to strike out Claimant's claims under customary international law should be denied as those claims were properly articulated in the Claimant's Memorial on the Merits dated 2 July 2010; and
  - (c) the Claimant's application to amend its submissions and to submit additional evidence should be granted as they did not constitute new claims.
39. On 3 November 2010, the Tribunal ruled on the three outstanding issues together with the question of costs raised by the Respondents. First, with regard to the Respondents' claim of unsupported and defamatory allegations of corruption made by the Claimant, the Tribunal decided that this was not a matter with which it could deal, and thus the Tribunal declined to strike out these allegations. Had the Claimant's allegations been defamatory, it was neither the Tribunal's mission nor within the Tribunal's power to investigate and condemn such behaviour. Second, with regard to the Respondents' objections concerning Claimant's claim under customary international law, the Tribunal decided that at this time it was premature to rule on this point. Accordingly it refused the Respondents' application to strike out the Claimant's claim based on customary international law. Thirdly, with regard to the Claimant's application for permission to amend its Memorial on the Merits and witness statements and to submit additional documentary evidence, the Tribunal noted that paragraph 14(d) of the Minutes gave it an element of discretion in this regard and therefore decided to grant the request. Fourthly, with regard to the Respondents' request for an award on costs, the Tribunal declined to make such an order at this stage.
40. On 12 November 2010, Claimant served its 167-page single-space Counter-Memorial on Respondents' Preliminary Objections ("**Claimant's Counter Memorial**").
41. On 29 November 2010, the Parties submitted their Skeleton Arguments.
42. On 30 November 2010, the Parties and the Presiding Arbitrator, on behalf of the Tribunal, had a case management conference by telephone.

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43. The main Hearing took place from 6-7 December 2010 at the Hong Kong International Arbitration Centre (“**HKIAC**”). At the Hearing, the Claimant was represented by Mr. Richard Keck, who was assisted by Mr. Blechman both from Macmillan Keck. On the Claimant’s side were also present Mr. Garrett, witness and employee of CPC and Ms. Se Muy Tan, employee of CPC. The Respondents were represented by Mr. Peter Turner and Ms. Marie Stoyanov, who were assisted by Mr. Sami Tannous and Dr. Kate Parlett, all from Freshfields Bruckhaus Deringer. On the Respondents’ side were also present H.E. Ith Praing from MIME and H.E. Keo Rottanak from EDC. Other attendees of the hearing were Ms. Martina Polasek, Secretary of the Tribunal and Mr. Olivier Darcq, Legal Assistant to the President of the Tribunal.
44. On 13 December 2010, the Secretary of the Tribunal, acting upon instruction of the Tribunal, informed the Parties that ICSID had recently posted the award of 28 December 2009 in *Government of the Province of East Kalimantan v. P.T. Kaltim Prima Coal, et al* (ICSID Case No. ARB/07/3) (“**East Kalimantan**”) on its website, and invited them to submit any observations on this decision by 20 December 2010.
45. By emails dated 20 December 2010, the Claimant and the Respondents submitted their observations.

**IV. FACTUAL BACKGROUND TO THE DISPUTE**

46. 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 Respondent EDC for a 20 to 25-year term.
47. In July 1995, BHA, a Delaware corporation, was invited by the Prime Minister of Cambodia to participate in a competitive bidding process and submitted an application in response to EDC’s request for proposals.
48. At this time, EDC was a department within MIME. EDC was therefore part of the Government of KOC.
49. 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.

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50. 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.
51. 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. 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.
52. As understood by the parties to those contracts, 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.
53. 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, similarly to the provision contained in the IA, for ICC arbitration, if ICSID arbitration was not available. This ICSID arbitration clause was drafted in similar terms, albeit with some differences (the importance of those differences is contested), to the ICSID arbitration clause contained in the IA. Under this amendment, the new EDC joined the PPA as a party replacing the old EDC.
54. MIME, as a ministry of KOC, executed PPA Amendment No.1 for and on behalf of KOC. According to PPA§16.3(b)(iii)(A) as amended by PPA Amendment No.1:
- “MIME agrees to procure that the Kingdom of Cambodia ... 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.”*
55. 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.

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56. On 27 March 1998, the DOG was signed between KOC (Ministry of Economy and Finance, “**MoEF**”) and CPC. The DOG contains an arbitration clause similar to the one contained in the IA.
57. 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.
58. On 20 December 2004, KOC ratified the ICSID Convention, which entered into force in Cambodia on 19 January 2005.
59. On 30 July 2009, the Claimant commenced this arbitration by submitting its Request to the ICSID Centre.

**V. THE DISPUTE IN BRIEF**

60. According to the Claimant, following the signature of the PPA and IA, CPC had taken all preliminary steps to design, obtain all permits for and was prepared to build and operate the C-4 power plant. It had also arranged the requisite debt and equity financing, including having obtained the approval of the board of directors of the World Bank to proceed with financing the project as anchor lender.
61. However, according to the Claimant, from 1998 to 2004, the Respondents persistently breached their obligations to support the project and habitually took actions that were inconsistent with those obligations. As a consequence of the Respondents’ acts and omissions, the power plant anticipated under the investment contracts was never built. The Claimant concludes 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.
62. The Claimant commenced an ICSID arbitration against KOC and EDC. However, the Respondents objected to the Tribunal’s jurisdiction on the ground that the Claimant’s claims made under the PPA, the IA and the DOG cannot be heard in a single arbitration proceeding. In addition, the Respondents contend that EDC is not an agency of KOC and has never been designated to the ICSID Centre as required by the Convention. Finally, Respondents argue that the Claimant’s claims under the DOG and international



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customary law are inadmissible and outside the Tribunal's jurisdiction and, in any event, unsuitable to be pursued as additional claims under Article 46 of the Convention.

**VI. REQUESTS FOR RELIEF**

63. In its most recent request for relief, the Claimant requests the Tribunal to dismiss all the preliminary objections of the Respondents heard in this bifurcated proceeding, and to award the following additional and/or other relief:
- (a) Declare that the claims under the PPA, IA and DOG are properly brought in this proceeding;
  - (b) As an alternative, declare that claims under each of the PPA, IA and DOG are claims over which the Tribunal has jurisdiction in multiple parallel proceedings and order those proceedings to proceed to the merits phase on the already-agreed timetable;
  - (c) As a further alternative, if the Tribunal decides that multiple claims are not permissible in the same proceeding, then afford the Claimant the choice of which claims to continue in this proceeding and which to voluntarily dismiss without prejudice to bringing such claims in another proceeding, and order the remaining claims to proceed on the already-agreed timetable;
  - (d) Declare that EDC is an agency of the Kingdom of Cambodia within the meaning of Article 25(1) of the Convention;
  - (e) Declare that EDC has been designated to the ICSID Centre by KOC;
  - (f) And therefore declare that the Tribunal has jurisdiction over EDC;
  - (g) Declare that Claimant's claims against KOC under the DOG are properly brought and within the jurisdiction of the Tribunal and fully admissible;
  - (h) As an alternative, admit the claims against KOC under the DOG as additional claims under Article 46 of the Convention;
  - (i) Declare that Claimant's claims against KOC based on state responsibility under principles of customary international law are properly brought and within the jurisdiction of the Tribunal and fully admissible;

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- (j) As an alternative, admit the claims against KOC under the state responsibility doctrine as additional claims under Article 46 of the Convention;
- (k) Order Respondents to pay all of the fees, costs and expenses incurred by the Claimant in responding to their preliminary objections; and/or
- (l) Decide such further issues, make such further or alternative declarations, orders and awards, and grant such other and further relief as may be just or proper.

64. In its most recent request for relief, the Respondents request the Tribunal:

- (a) As regards the objection to the Arbitral Tribunal's jurisdiction *rationae personae* over EDC:
  - a. to declare that EDC has not been designated to the ICSID Centre by KOC;
  - b. further or alternatively, to declare that EDC is not an agency of KOC within the meaning of Article 25(1) of the Convention;
  - c. to find that it has no jurisdiction over EDC; and
  - d. to dismiss all claims made against EDC.
- (b) As regards the objection to the Arbitral Tribunal's jurisdiction over claims under more than one agreement:
  - a. To declare that claims under the PPA, the IA and the DOG ought to have been brought in separate proceedings; and
  - b. To dismiss all of CPC's claims in these proceedings.
- (c) As regards the objection to the Arbitral Tribunal's jurisdiction over claims under the DOG, and to the admissibility of such claims:
  - a. to declare that CPC's claim under the DOG is a new claim that does not fall within its jurisdiction;
  - b. alternatively, to declare that CPC's claim under the DOG is inadmissible for failure to comply with the requirements of Article 46 of the Convention; and

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- c. to dismiss CPC's claim under the DOG.
- (d) As regards the objection to the Arbitral Tribunal's jurisdiction over claims under principles of customary international law, and to the admissibility of the same:
  - a. to declare that CPC's claims under principles of customary international law are new claims that do not fall within its jurisdiction;
  - b. alternatively, to declare that CPC's claims under principles of customary international law are inadmissible for failure to comply with the requirements of Article 46 of the Convention; and
  - c. to dismiss CPC's claims under principles of customary international law;
- (e) To order the Claimant to pay all of the costs and expenses incurred by the Respondents 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 Respondents' counsel, and interest, on a full indemnity basis.

**VII. ISSUES FOR DETERMINATION**

65. The Parties requested the Tribunal to consider the following issues:
- (a) Does the Tribunal have jurisdiction to decide claims arising out of the three separate agreements, namely the PPA, the IA and the DOG, in a single proceeding?
  - (b) Does the Tribunal have jurisdiction *rationae personae* over EDC?
  - (c) Was EDC properly designated to the Centre as an agency of KOC within the meaning of Article 25(1) of the Convention?
  - (d) Does the designation requirement of Article 25(1) of the ICSID Convention require some form of communication to the Centre?
  - (e) If yes, what type of communication is acceptable within the meaning of the Convention?
  - (f) If yes, must such communication be made exclusively by the Contracting State itself?

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- (g) Is EDC an agency of Cambodia for the purpose of Article 25 of the Convention?
- (h) Are the Respondents estopped from arguing that EDC is not an agency of KOC and/or that EDC has not been designated to the Centre as required by Article 25(1) of the Convention?
- (i) Does the Tribunal have jurisdiction to decide claims arising out of the DOG?
- (j) Did the Claimant need to identify the relevant consent instrument, i.e. the DOG, and indicate that a claim was made in respect of the DOG in the Request for Arbitration?
- (k) If yes, did the Claimant identify the DOG as a consent instrument in the Request for Arbitration?
- (l) If yes, did the Claimant properly articulate a claim under the DOG in the Request for Arbitration?
- (m) If no, can a claim under the DOG be admitted at a later stage under Article 46 of the Convention?
- (n) Did the Claimant properly and sufficiently articulate a claim under customary international law in the Request for Arbitration?
- (o) If no, can customary international law claims be admitted under Article 46 of the Convention as additional claims after the Request for Arbitration is filed?

**VIII. ARGUMENTS AND DECISION**

66. The Tribunal will consider the above issues on a step-by-step basis.

**A. TRIBUNAL'S JURISDICTION OVER CLAIMS ARISING OUT OF THE PPA, IA AND DOG BROUGHT IN A SINGLE PROCEEDING**

67. The fundamental disagreement between the Parties, simply put, is whether or not there was any intention for claims arising out of separate contracts to be consolidated, or the subject of concurrent arbitral proceedings, or whether claims under each agreement could only be heard and determined by separate tribunals in separate arbitral proceedings.

## 1. CLAIMANT'S POSITION

### **a. The negotiations of the contracts and the wording of the PPA, IA and DOG demonstrate the Parties' intention to consider the agreements as part of a unitary project, and to have a single proceeding in case of dispute**

68. The Claimant contends that when BHA negotiated the transaction with the Cambodian state, the Parties both agreed to model the transaction documents on those previously used in an IPP in Pakistan. This was the reason why the Parties negotiated two different agreements, i.e. the PPA and the IA, but both formed part of a single transaction for the implementation of a single project.

69. The Claimant supports its assertion through the witness statement of Mr. Garrett, who testified that:

*"[i]n the end, both sides agreed that we would be better off with the two-document framework purely as a matter of convenience and efficiency."*

70. According to the Claimant, the negotiations and drafting history support an inference that the Parties saw all the agreements (including the DOG) as part of one, unified transaction.

71. The Claimant submits that as a result of this understanding that there was a single project articulated through separate contracts, the project agreements were drafted and executed as an interrelated set of obligations among CPC, KOC and EDC, and were meant to be read, interpreted, and enforced together in a single proceeding against both KOC and EDC.

72. The Claimant also argues that KOC and EDC expressly agreed and consented in the PPA that that contract and the IA, together with the DOG, constituted a single "*understanding*" among all three Parties, and should be interpreted and enforced together. For instance, Section 21.2 of the PPA provides that both it and the IA:

*"together represent the entire understanding between the Parties in relation to the subject matter therein."*

73. A similar clause is included at Section 14.2 of the IA:

*"[t]his Agreement and the [PPA] represents the entire understanding between the parties in relation to the subject matter therein".*

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74. The Claimant contends that the fact that each of the PPA and IA contains this provision mirroring the other confirms that it was clearly the Parties' intention to have a unity of agreements.
75. The Claimant maintains that the three agreements were drafted as a suite of related agreements in such a way that it would be impossible to interpret or enforce any of them without reference to the others. In fact, so the Claimant argues, the documents must inherently be considered as one understanding, in order for there to have been valid consideration for their performance. Many obligations of KOC and EDC under each agreement can only be determined by reference to the performance or non-performance of obligations under the other agreements.
76. In support of this argument, the Claimant relies upon, among others, certain cross-default provisions in each of the agreements, as follows:
- (a) Section 15.2(a) of the PPA, which refers to "default by the Royal Government of Cambodia in the making of any payment in accordance with the terms of the Government Guarantee of Payments [i.e. the DOG]."
  - (b) Schedule 1 of the PPA, which defines the Government Guarantee of Payments as having "*the meaning ascribed thereto in the [IA].*"
  - (c) Section 15.2(d) of the PPA, which refers to "any Change-in-Law which makes invalid, unenforceable or void any material undertaking of EDC or [KOC] under this agreement or the [IA]."
  - (d) Section 15.2(g) of the PPA, which refers to an event of default by KOC having "occurred under the [IA] giving rise to the Company's right to terminate the [IA]."
  - (e) Section 10.2(a) of the IA, which refers to circumstances in which "*EDC commits any material breach of the [PPA].*"
  - (f) Section 10.2(b) of the IA, which refers to "default by the Royal Government of [KOC] in making any payment due and payable in accordance with the Government Guarantee of Payments [i.e. the DOG]."
  - (g) Section 1.1 of the DOG, which states that KOC "irrevocably and unconditionally guarantees and promises to pay [CPC] any and every sum of money which is due

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and owing by EDC to [CPC] under or pursuant to the [PPA] that EDC has failed to pay in accordance with the terms of the [PPA].”

77. The Claimant also cites other provisions of the PPA and the IA which contain intertwined rights and obligations of EDC, MIME (KOC) and CPC under the PPA, the IA and the DOG:

- (a) Section 3.6 of the PPA, which states that the Required Commercial Operations Date was to be extended in the case of certain delays, including those resulting from “*any breach of contract or default by [EDC] under this Agreement [the PPA] or by MIME under the [IA]*”.
- (b) Section 14.2 of the PPA, which sets out representations and warranties given jointly and severally in the PPA by both KOC and EDC.
- (c) Section 1.1(a) of the IA, which states all expressions used in the IA that were defined in the PPA shall have their PPA meanings.
- (d) Section 2.2 of the IA, which ties the IA to the PPA, providing for automatic termination of the IA, if the PPA should terminate on account of the Effective Date not having occurred.
- (e) Section 5 of the IA, which links Claimant’s PPA obligations with the IA and KOC’s IA obligations, providing that “*subject to [Claimant] complying with [its PPA obligations to apply for government consents]*”, KOC agrees to perform its main IA obligations.

78. The Claimant also argues that Common Law jurisdictions have looked to interrelated “*entire agreement*” clauses as evidence that two agreements comprise a single, unitary transaction. In support of this argument, the Claimant cites *Inveresk plc v Tullis Russell Papermakers Ltd* [2009] UKSC 19 (“*Inveresk*”), where the UK Supreme Court found that, under Scottish law, obligations arising out of two separate agreements depended “*upon one another and as each forming part of the same transaction.*”

79. The Court added that:

*“[t]he true significance of these agreements [wa]s to be found in the respects in which they were each linked expressly with each other.”*

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80. The Claimant also cites 684733 *Alberta Ltd. v. Money's Mushrooms Ltd.* [2003] B.C.J. No. 2475 ("*Alberta*"), where the Supreme Court of British Columbia decided that a share purchase agreement and a convertible promissory note were to be read together as one agreement since they were "*executed contemporaneously with each other.*"
81. With regard to the DOG, the Claimant refers to the second witness statement of Mr. Garrett, which articulates a practical reason as to why the guarantee was not provided in March 1996, i.e. at the same time that the PPA and the IA were signed. According to the Claimant, the budget approval of the Cambodian National Assembly was required, but had not yet been obtained. It was not therefore possible to sign the DOG on 20 March 1996. However, once signed, the DOG thus became integrated with the PPA and IA as an element of the single understanding of the Parties.

**b. The similar wording of the arbitration clauses of the IA and of the PPA, as amended on 9 October 1998, demonstrates the Parties' intention to hear claims under a single proceeding**

82. The Claimant contends that the similarity of Section 6 of the IA and Section 16(3) of the PPA, as amended by PPA Amendment No. 1, is evidence that the Parties positively saw the two agreements as providing a single dispute resolution mechanism.
83. Indeed, at the time of signature of the IA and the PPA, the latter contained no ICSID clause. The introduction of an ICSID arbitration clause in PPA Amendment No. 1 supports an inference that the Parties thereby brought the IA and PPA into line in order to harmonize their provisions, thereby allowing disputes to be heard in a single proceeding (i.e. an ICSID arbitration).
84. The Claimant submits that the variations between the dispute resolution clause of the PPA, as amended by PPA Amendment No. 1, and the dispute resolution clauses of the IA and the DOG, concern no more than minor details, and do not contradict the Parties' intention to have potential claims heard in a single proceeding. It is the Claimant's assertion that these differences reflect poor drafting, as opposed to an intention to avoid consolidation, or a single proceeding for a dispute involving claims under the PPA, the IA and/or the DOG.

**c. ICSID practice and Common Law jurisdictions support the consolidation of the proceedings under the present circumstances**

85. According to the Claimant, previous ICSID tribunals have interpreted parties' consent to jurisdiction in one agreement such as to cover related agreements, when such agreements



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collectively encompass one unified investment, and such analyses have found support with commentators.

86. In *Noble Energy Inc. and Machalapower Cia. Ltda. v The Republic of Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/5/12, *Decision on Jurisdiction* (5 March 2008) (“**Noble Energy**”), the tribunal found that it had jurisdiction over disputes arising out of multiple agreements where there was “an implied consent to have the pending disputes arising from the same overall economic transaction resolved in one and the same arbitration.” The tribunal relied upon the fact that (1) the disputes were closely related and arose out of the same investment project, and the same overall economic transaction, and (2) that the two main agreements were themselves closely linked. The Claimant contends that these two elements are also present in the instant dispute. Therefore, following the Noble Energy reasoning, the Tribunal should find it has jurisdiction over claims under the PPA, the IA and the DOG, and that those claims can be heard in a single proceeding.
87. In *Klöckner Industrie-Anlagen GmbH, Klöckner Belge SA and Klöckner Handelsmaatschappij BV v United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, *Award* (21 Oct. 1983) (“**Klöckner**”), the tribunal decided that it had jurisdiction to hear disputes arising under two agreements in a single proceeding (but not under a third). Although there was no cross-referred dispute settlement clause, the separate agreements referred disputes arising under each to ICSID arbitration, as is the case in the present dispute.
88. In *Société Ouest Africaine des Bétons Industriels v Senegal*, ICSID Case No. ARB/82/1, *Award* (25 February 1988) (“**SOABI**”), the tribunal found that a construction contract formed part of another contract, on the basis of an analysis of the relevant agreements as a whole. In *SOABI*, so the Claimant observes, the construction contract lacked an ICSID arbitration clause. In contrast, in the instant case, all the agreements in question provide for ICSID jurisdiction. Therefore, according to the Claimant, in the instant case there is better cause to conclude that the Parties intended to have claims arising out of separate agreements heard in a single proceeding. In addition, in *SOABI*, the main agreement did not make explicit reference to rights and obligations under the construction contract. The Claimant asserts that in the present case, the PPA, the IA and the DOG are explicitly, repeatedly and extensively interconnected. That makes the instant case a more compelling one for a finding that the Parties’ intended to have claims arising out of these contracts heard in the same arbitration.

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89. In *Ceskoslovenska obchodni banka, a.s. v The Slovak Republic*, ICSID Case No. ARB/97/4, *Decision of the Tribunal on Objections to Jurisdiction (24 May 1999)* (“*CSOB*”), the tribunal saw its task as finding the “common will of the parties.” This common will was reflected in one of the agreements which specifically referred to “a court of competent jurisdiction.” In the present case, all agreements contain ICSID clauses. On the basis of the approach in *CSOB* (albeit differently to the facts of that case), the Claimant argued that this leaves room for an inference that the Parties intended an ICSID arbitration to deal with their claims under these agreements, by a single tribunal, in one proceeding.
90. The Claimant further contends that under English law there is a presumption that the Parties intended their disputes to be heard in a single forum. The Claimant supports this assertion by citing two English cases.
91. In *Premium Nafta Products Ltd and others v Fili Shipping Co Ltd and others* [2007] UKHL 40 (“*Premium Nafta*”), the House of Lords held that there was a presumption that an arbitration clause in a main contract also governed claims regarding the validity or enforceability of an underlying contract “*unless the language makes it clear that certain questions were intended to be excluded from the arbitrator’s jurisdiction.*”
92. In *UBS AG v HAS Nordbank AG*, [2009] EWCA Civ 585 (“*UBS AG*”), the Court of Appeal held that sensible business people would not have intended that a dispute of this kind would have been within the scope of two inconsistent jurisdiction agreements. The Court found that the agreements were all connected and part of one package.
93. In light of all these cases, as there is no express language that could contradict the principle of consolidation, or concurrent proceedings, the Claimant contends that claims under the PPA, the IA and the DOG should be heard in a single proceeding.

**2. RESPONDENTS’ POSITION****a. The absence of express consolidation provisions in the PPA, the IA and the DOG demonstrates the Parties’ intention to have separate proceedings in case of dispute**

94. Respondents submit that claims arising out of the PPA, the IA and the DOG cannot be brought in one single proceeding since the Parties have not consented to a single tribunal having jurisdiction over all of them. The Tribunal can only take jurisdiction over claims arising out of more than one agreement if this is the Parties’ intention. In the present case,

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it was never the intention of the Parties to have claims arising under different instruments heard in the same proceeding.

95. According to the Respondents, the arbitration clauses are plain on their face: each vests an arbitral tribunal with jurisdiction over disputes arising solely under that agreement, and does not cover disputes arising under either of the other agreements. The Respondents contend that the dispute resolution clause in each agreement is limited, by clear and unequivocal terms, to disputes arising out of each specific agreement, and the clauses do not contemplate the resolution of disputes under separate agreements in a single proceeding:

- (a) Article 12 of the IA defines an arbitrable dispute as one:

*“aris[ing] out of or in connection with this Agreement”.*

- (b) Article 7.2 of the DOG defines a dispute as:

*“any dispute or difference aris[ing] out of or in connection with this Agreement.”*

- (c) Article 16.1 of the PPA also defines a dispute as a:

*“dispute or difference ... between EDC and [CPC] in connection with or arising out of this Agreement.”*

96. The Respondents accept the Claimant’s argument that the three agreements were *“carefully drafted”*, but the Respondents emphasise that the Parties nevertheless took great care not to include any provision for consolidation in any of them. This fact shows conclusively that the Parties did not intend disputes under more than one of the agreements to be heard together.

**b. Significant differences in the arbitration clauses of the PPA, the IA and the DOG demonstrate the Parties’ intention not to have a consolidated arbitration**

97. The Respondents contend that the Parties’ intention not to have claims arising under the PPA, the IA and the DOG heard together can be ascertained from the words of the arbitration clauses of the various agreements, which are materially different. The Respondents submit that such differences are obvious not only in the original arbitration clause of the PPA signed on 20 March 1996, but also in the arbitration clause of the PPA signed on 9 October 1998, when both are compared to the arbitration clauses of the IA and the DOG.

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**(i) The negotiations of the agreements and the final wording of the arbitration clauses demonstrate the Parties' intention to exclude any consolidation in case of dispute**

98. The Respondents contend that the initial versions of the arbitration clauses of the PPA, IA, and DOG were potentially incompatible, as the PPA only provided for ICC arbitration whereas the IA and the DOG provided for ICSID arbitration on Cambodia's ratification of the Convention. Therefore, it is clear that from the outset, the Parties contemplated different *fora* in case of disputes brought under the several agreements.
99. Indeed, Article 16.3 of the PPA, as executed on 20 March 1996, provided only for dispute resolution in accordance with the ICC Rules, with no alternative forum. By contrast, the IA, as executed on the same day as the PPA, provided for ICSID arbitration or, if ICSID arbitration was not available, ICC arbitration. The same is true for the DOG, which was signed on 27 March 1998, at which time the PPA still only referred to ICC arbitration.
100. The Respondents contend that the consent to ICSID arbitration was therefore never part of the bargain, as there was no ICSID arbitration clause in the PPA in 1996; and although there was a provision in the IA and the DOG for ICSID arbitration, it was subject to Cambodia's ratification of the Convention. Therefore it was never the Parties' intention that proceedings brought under the PPA, the IA and the DOG would be brought in a single proceeding since the arbitration clauses were incompatible.

**(ii) The wording of the PPA's arbitration clause signed on 9 October 1998 demonstrates the Parties' intention to exclude any consolidation in case of dispute**

101. The Respondents maintain that the Parties' intention not to have claims under the PPA, the IA and the DOG heard in a single proceeding can be deduced from the Parties' intentional omission of any consolidation provision, or the insertion of an identical dispute resolution clause, when the PPA was amended on 9 October 1998.
102. PPA Amendment No. 1 amended the dispute-resolution clause to provide for ICSID arbitration, with the default forum remaining ICC arbitration. Thus, although the Parties had the opportunity to insert consolidation clauses in their agreement or, at the very least, to include identical arbitration clauses at that stage, they did not do so. According to the Respondents, this is further proof that, not only in March 1996, but also in October 1998, the Parties neither intended that disputes under the three agreements be heard in a single proceeding, nor consented in advance to consolidated proceedings.

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103. The Respondents submit that the dispute-resolution clause in the PPA (as amended) is materially different from the dispute-resolution clauses contained in the IA and the DOG, and that they are incompatible.
104. According to the Respondents, the significant variations in the various clauses relate to:
- (a) The procedure for appointment of a single arbitrator;
  - (b) The procedure for appointment of the presiding arbitrator;
  - (c) The qualifications of the arbitrators;
  - (d) The need to have certified translations of documents not in English;
  - (e) That the arbitrators shall be bound by the decision of the “Expert”;
  - (f) That the parties may publicise or disclose the contents of any award;
  - (g) That the award shall be in dollars; and
  - (h) An express waiver of all provisions of Cambodian law which may be inconsistent with Article 16 of the PPA

**c. ICSID practice does not support consolidation of arbitration proceedings when there is no consent to consolidate and when the arbitration clauses are materially different**

105. The Respondents contend that neither the ICSID Convention nor the ICSID Arbitration Rules provide for proceedings under separate agreements, governed by separate arbitration clauses, to be brought in a single proceeding. ICSID practice is to appoint identical tribunals for separate but related claims, but only with the Parties’ consent. In support of their assertion, the Respondents cite Schreuer:

*“these cases remain exceptional since – in the absence of an express provision in the relevant treaty – consolidation requires the consent of the parties and this cannot always be easily achieved.” (C Schreuer, The ICSID Convention: A Commentary (2nd ed., 2009) (ICSID Commentary) §26-131)*

106. The Respondents maintain that the only potential basis upon which this Tribunal might assume jurisdiction over the three distinct contracts under which CPC’s claims arise is therefore the Parties’ intention itself, which to some extent can be derived from the

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circumstances. However, the Respondents deny the Claimant's interpretation of several ICSID cases upon which they rely.

107. In *Noble Energy (supra)*, while the tribunal concluded that it had jurisdiction over disputes arising out of three different instruments, this decision was premised on the finding that there was “*an implied consent to have the pending disputes arising from the same overall economic transaction resolved in one and the same arbitration.*” Importantly, this implied consent was based on several decisive factors, a number of which are not present in the instant case.
108. In *Klöckner (supra)*, the tribunal only assumed jurisdiction over a contract (*Establishment Agreement*) and a second agreement (*Protocol of Agreement*), which both contained an ICSID arbitration clause. However, the tribunal in that case did not assume jurisdiction over another contract (*Management Contract*) which contained an ICC clause.
109. In *SOABI (supra)*, four successive agreements were entered into by the parties. Only one of these agreements (*Establishment Agreement*) contained a dispute-resolution clause, referring to ICSID arbitration. The Claimant brought proceedings under two separate agreements. The tribunal assumed jurisdiction under the two agreements as they were:
- “of necessity incorporated into the [Establishment Agreement]”, and  
“therefore ... the disputes relating to their execution or to the  
rights and obligations arising thereunder fall within the scope of  
[the arbitration clause] of the Establishment Agreement.”*
110. However, the Respondents submit that the circumstances in that case materially differ from those of the instant case. Unlike the present case, in *SOABI*:
- (a) the respondent was a party to all the agreements, as was the claimant;
  - (b) the incorporated agreements did not contain any dispute-resolution clause; and
  - (c) the incorporating agreement (the *Establishment Agreement*) was deemed to incorporate the other two agreements.
111. The Respondents contend that in the present case, not only are the PPA and the IA not between the same parties, they also each impose precise and distinct obligations on EDC (the PPA), MIME (the IA) and the MoEF (the DOG).
112. In *CSOB (supra)*, the tribunal did not assume jurisdiction over other agreements pertaining to the wider investment operation. In its second decision on jurisdiction, and referring to

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its earlier finding, the tribunal forcefully stated that even though the first decision held that *CSOB*'s claims related to another loan facility could qualify as part of the investment, this did:

*“not mean, however, that the Tribunal thereby automatically acquires jurisdiction with regard to each agreement concluded to implement the wider investment operation. Other requirements have to be met for such jurisdiction to be established.”*

113. In *Duke Energy (supra)*, a “legal stability agreement” between the claimant and Peru contained an ICSID arbitration clause. The parties had entered into a series of other legal stability agreements with Peru which did not contain ICSID arbitration clauses. The tribunal made a finding regarding the qualification of the investment; however, it stated that it would not entertain any claims arising out of those other contracts and transactions. The tribunal added that:

*“in the peculiar circumstances of this case (successive agreements for the protection of the investment), the unity of the investment does not necessarily imply the unity of the protection of the investment.”*

114. The Respondents contend that this decision makes clear that, while the broader arrangements made in relation to an investment may be taken into consideration in finding a qualifying “investment”, or in determining a breach of a treaty, the jurisdiction of an arbitral tribunal is limited to the particular agreement which contains the relevant arbitration agreement.
115. In *Holiday Inns v Morocco*, ICSID Case No. ARB/72/1, *Decision on Jurisdiction* (12 May 1974) (“*Holiday Inns*”), the tribunal agreed that questions arising out of loan contracts, that had been concluded in the context of a main agreement containing an ICSID arbitration clause and which themselves contained choice-of-court clauses, were within the jurisdiction of the local courts - even if these questions “*affect[ed] the indirect or secondary aspects of the investment.*” The tribunal thus did not “hear a dispute” under the loan contracts; quite the opposite. It gave due deference to the jurisdiction of the local courts over disputes arising out of the loan contracts, while at the same time fully assuming its own jurisdiction over disputes based on a contract containing an arbitration clause.

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**d. The three agreements are not so interrelated that they cannot be heard separately**

116. The Respondents contend that while there are indeed cross-references to the PPA in the IA and vice-versa, a tribunal having jurisdiction over the PPA need not have jurisdiction over the IA to take the latter into account as a fact, to the extent necessary, and vice-versa. The PPA and the IA are therefore capable of being enforced on their own. This is all the more so with respect to the DOG, which can only be called upon once an award against EDC has been made.

**3. TRIBUNAL'S DECISION**

117. On 16 September 2009, the Secretary-General of ICSID registered this arbitration as a single proceeding as presented, notwithstanding that the Request for Arbitration (according to the Claimant) embodied claims under each of the PPA, the IA and the DOG.
118. The Respondents' principal objection is not to the determination of claims arising out of the PPA, the IA and the DOG by this Tribunal, in ICSID arbitration. There is, for example, no issue that each contract contains a valid ICSID arbitration clause; that three separate Requests for Arbitration could have been filed by the Claimant (one for each agreement); and that this Tribunal could have been constituted in each of the three separate arbitral proceedings. Rather, the Respondents' complaint is to the determination of claims under each of these agreements at the same time, in a single proceeding. According to the Respondents, the joining together of all claims in a single Request for Arbitration is impermissible, and itself has the effect of depriving this Tribunal of jurisdiction for all such claims.
119. It is clear that the decision of the Secretary-General to register a single arbitral proceeding does not bind this Tribunal, which has to consider the jurisdictional arguments raised *de novo*.
120. For the reasons set out below, in the circumstances of this case the Tribunal disagrees with the Respondents' analysis.



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**a. Relevant principles governing consolidation of claims in ICSID proceedings****(i) Consent**

121. The uncontroversial starting point is that the consolidation of claims in ICSID arbitration (as with most other systems) depends upon the consent of the parties. Such consent may be established before or after the dispute has arisen. Absent consent, the fundamental principle of party autonomy dictates that claims under multiple contracts may not be consolidated, however inconvenient and inefficient that result may be.
122. Whilst such consent usually takes the form of an express provision, whether in a contract or Treaty; by way of incorporated arbitration rules; or in a submission agreement; it can also be implied from the circumstances.
123. The various ICSID decisions that have been deployed by the Parties (as noted earlier) are significant in this regard, since they emphasise the need to interpret the parties' intentions in light of all the circumstances of each case. In the absence of an express provision on consolidation, the intentions of the parties remains the critical test in determining whether or not claims arising out of different agreements are to be heard together.
124. For example, in *SOABI (supra)* the tribunal held that:
- “the interpretation must take into account the consequences which the parties must reasonably and legitimately be considered to have envisaged as flowing from the undertakings. It is this principle of interpretation, rather than one of priori strict, or, for that matter, broad and liberal construction, that the Tribunal has chosen to apply.”*
125. In *CSOB (supra)*, the tribunal found that its task was to determinate the “*common will of the parties*” and held that, in doing so, “*each case must be assessed by reference to its specific facts*”.
126. Similarly, in *Noble Energy (supra)* the tribunal's conclusion that it had jurisdiction over disputes arising out of multiple agreements was premised upon “*an implied consent to have the pending disputes arising from the same overall economic transaction resolved in one and the same arbitration*”, such implied consent having been deduced from a number of factors related to the purpose and configuration of the agreements in question.

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**(ii) The Precise Type of “Consolidation”**

127. Establishing requisite consent entails, however, a further level of analysis, namely identifying the precise mechanism by which it has been agreed that claims be coordinated. Whilst it is clear that ICSID tribunals have accepted jurisdiction in a number of previous cases, where a single proceeding has been commenced and registered, arising out of more than one, albeit connected, agreement, such cases in fact span a number of different situations, and it is important to distinguish between them.
128. In particular, parties may agree that disputes arising out of multiple contracts are all to be brought within the scope of one particular arbitration agreement in one of the contracts. Alternatively, separate arbitration clauses in separate agreements might be interpreted as, in truth, one single arbitration agreement. Further still, claims under multiple contracts might be merged into one arbitration proceeding, and determined by way of one award. Alternatively, separate arbitration proceedings arising out of separate arbitration agreements might be heard and determined concurrently (i.e. synchronised), whilst maintaining a separate juridical nature. Whilst all of these variations might be described as “consolidation”, each is obviously different in nature.

**b. The Parties’ implied consent in this case**

129. During the Hearing, the Tribunal pressed the Claimant to clarify the precise mechanism by which the Parties had agreed that all claims could be heard in a single proceeding.
130. In this regard, the Tribunal suggested (by way of example – and without limitation) the three following *scenarii* (T/day1/p156/4-22; p160/1-16):
- (a) Consent for the Claimant to activate one arbitration agreement under one of the contracts, and to bring within its scope claims that arise under the two other contracts;
  - (b) Each of the arbitration clauses in the PPA, the IA and the DOG, in truth, constituting (as a matter of fact and law) a single arbitration agreement between the Parties;
  - (c) Consent for proceedings that arise out of three distinct arbitration agreements to be brought together before the same tribunal, through either consolidation or concurrent proceedings.

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131. On day 2 of the Hearing, the Claimant clarified its position, arguing that scenario (b) above was “*in perfect harmony with [its] pleadings*” (T/day2/p75/116-17), albeit if this could not be established, the Claimant then also relied upon the other possible analyses.
132. Having carefully considered all the circumstances of this case, the Tribunal finds no basis for scenario (b). This scenario seems far from the present situation, since the PPA, IA and DOG arbitration clauses were concluded separately, at different times, between different (albeit connected) parties, and each as a self-contained agreement, enforceable in its own right. The three clauses are not identical and do not refer to each other. In the Tribunal’s view, scenario (b) presents an *a priori* consolidation by unification of the proceedings which can only happen in two cases. First, where each arbitration clause expressly refers to the others as forming a single arbitration clause and providing for a single arbitration. Second, where there is no such express reference, but an implied consent can be inferred, for example because all arbitration clauses are identical, were concluded in parallel, are dependent upon one another or otherwise interconnected, and included in contracts which are themselves interrelated and arising out of a single project. In the Tribunal’s view, the agreements in this case cannot comfortably be analysed in either of these ways.
133. It follows that each of the three arbitration clauses constitutes a separate agreement, which could be activated separately. Thus, there would be nothing in principle to prevent the Claimant from commencing an arbitration, and pursuing claims, under only one of the PPA, the IA or the DOG. Were the Claimant to seek instead to commence one “*umbrella*” arbitration raising claims under all three agreements, it could not do so in the absence of consent of the other Parties to the agreements. That consent would necessarily have to extend to an acknowledgement that, notwithstanding any asserted incompatibilities in the three discrete arbitration agreements, no objection predicated on such a basis was raised. Such consent might be express, but there is none in this case. Alternatively, it might be implied by reference to the Parties’ conduct and/or by reference to their intentions as reflected in the terms of the PPA, the IA and the DOG. (See paragraphs 135-138 below).
134. Equally, the Tribunal finds no basis for scenario (a) above. Each of the PPA, IA and DOG contains its own valid arbitration clause, with a defined scope. There is nothing in the arbitration clauses themselves, or in the wider circumstances of the Parties’ arrangement, to suggest any consent that one arbitration clause take precedence over the other two. To this end, as the Respondents have argued, the presence of separate arbitration clauses in each contract in this case means that previous ICSID decisions in which one arbitration clause has been extended to cover multiple contracts are of no assistance here. It may be

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noted, in any event, that the Claimant in its Request for Arbitration purported to activate all the arbitration clauses in the relevant contracts, rather than relying upon just one.

135. But the fact that each arbitration clause constitutes a separate agreement does not answer the question whether, if a party elects to activate more than one of the arbitration agreements at or about the same time, that party is entitled to seek to co-ordinate or combine the several proceedings before a single tribunal.
136. That brings the Tribunal to scenario (c). With regard to this scenario, where multiple arbitration clauses have been separately activated, there are two options in coordinating the various proceedings, each option bearing different consequences. First, the separate proceedings flowing from each of the separate arbitration clauses might be merged into one proceeding, and heard and determined by a single tribunal in a single award. Secondly, the separate proceedings might be kept notionally separate, but with hearings and determinations synchronised, whether before a single or multiple tribunals, and usually by way of multiple awards (often termed: “*concurrent proceedings*” or “*de facto consolidation*”).
137. In the Tribunal’s view, the first of the two options accurately reflects the intentions of the Parties in this case.
138. The Tribunal has already set out the competing arguments at some length when summarising the Parties’ respective positions. Having considered all of them very carefully, and for the particular reasons elaborated below, the Tribunal concludes that the Parties in this case undoubtedly intended that there be an option to coordinate multiple proceedings. Specifically, where claims are brought by a party pursuant to more than one arbitration clause at or about the same time, the Parties clearly intended that the party in question should be entitled to combine the claims, in order that they be heard and determined before a single tribunal. Equally, the Tribunal is confident that in structuring their project contracts, the Parties never intended multiple, parallel proceedings arising out of the same dispute, with all the burdens and risks that this would entail, where this might practically be avoided.
139. It follows that the Claimant was entitled to commence proceedings under the PPA, IA and DOG at the same time by way of a single Request for Arbitration, and to compel the Respondents to appoint a single tribunal to hear and determine all such claims. The Tribunal notes, in this regard, that even if (contrary to the analysis above) the Respondents had been entitled to object to the constitution of the same tribunal for all

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claims, no such objection was actually raised in a timely fashion in this case in any event (see paras [ 162-4 ] below).

140. The Tribunal's conclusion is based on the following factors:

**(i) The three agreements all arise from a single investment for a single power project**

141. The agreements in this case all regulate aspects of a single project, and there exists a clear connectivity and interdependence between them. Any dispute arising out of the project would almost inevitably touch upon, and give rise to claims under, each agreement, and the Tribunal finds that the Parties' intention must have been to have such claims heard together, wherever possible.

142. In reaching this conclusion, the Tribunal has taken into account (*inter alia*) the drafting history of the agreements. The Tribunal accepts Mr. Garrett's testimony that the negotiations of the project led the Parties to model the transaction documents on those used in a successful IPP in Pakistan. It appears that the Parties structured the project through three separate agreements in order to attract potential lenders and as a matter of general efficiency. According to Mr. Garrett, consideration was given to combining the PPA and the IA in one single document. This option was later abandoned, because it would have resulted in an unreadable document which would have kept away any potential investor. Contrary to the Respondents' case, the fact that the project was structured by way of three contracts rather than one, therefore, had nothing to do with any motivated desire to have three separate arbitrations in the event of a dispute.

143. As noted earlier, the Respondents emphasised that the arbitration clause in each of the PPA, the IA and the DOG was drafted with a limited scope, and that this indicates an intention that claims under each contract be resolved separately.

144. The Tribunal disagrees with the Respondents' interpretation of the scope of each clause. In fact, each has a formulation which allows for a broad scope (e.g. "*aris[ing] out of or in connection with*" (Art 12 of the IA and Art 7.2 of the DOG); "*in connection with or arising out of*" (Art 16.1 of the PPA). Be that as it may, the Respondents' objection would only be relevant in any event if scenario (a) above had been in question (i.e. the activation of one arbitration agreement in one of the contracts, to cover claims under all of the contracts).

145. Once the precise form of coordination is identified, this objection falls away. Unlike scenario (a), the consolidation of claims (scenario (c)) entails the activation of each of the

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arbitration clauses (of whatever breadth), and the merger of the resultant arbitration proceedings. Even if each separate arbitration clause had been narrowly framed, the Tribunal does not consider that this negates the Parties' intention to consolidate the various proceedings themselves.

146. In addition, as the Claimant submits, both Section 21.2 and 14.2 of the PPA and IA respectively provide that they, "*together[,] represent the entire understanding between the Parties in relation to the subject matter therein.*" (emphasis added)
147. There is no doubt that by these provisions, the Parties' intention was to emphasise the unity of the investment under the separate agreements. The same intention dictates that, in case of dispute, those agreements would also be considered together as part of an indivisible project.

**(ii) The three agreements contain cross-default provisions**

148. The agreements' cross-default provisions clearly demonstrate the Parties' intention that the claims arising out of the three agreements be heard together, wherever possible.
149. The Claimant emphasised at length the numerous cross-default provisions contained in the PPA, IA and DOG. These cross-default provisions show an interdependence of the Parties' rights and obligations. The Tribunal concludes that it would be impracticable to consider the rights and obligations of the Parties arising out of one agreement without considering at least one of the two other agreements, and that this impracticality must have been evident to the Parties at the time of contracting.
150. It is quite clear that the whole transaction could not have been implemented by way of one of the three agreements alone, and thus it is not surprising that the Respondents presented no evidence that the Parties ever had the intention to disconnect each agreement from the others.
151. The Tribunal finds that the interdependence of the three agreements reflects the intention of the Parties that there be an option for related claims arising out of the agreements to be considered together.

**(iii) The Parties' effort to reach similar arbitration clauses through amendments**

152. The Respondents' case is that the differences in the arbitrations clauses of the PPA, IA and DOG demonstrate that the Parties did not intend to have their claims heard together.

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153. The Tribunal notes that the initial PPA arbitration clause was clearly different from the IA and DOG clauses. However, in a conscious effort to unify and conform them, the Parties subsequently amended the PPA arbitration clause, with the obvious intention to have the same or very similar dispute resolution provisions in each of the three agreements.
154. Whilst it is true that the three arbitration clauses prior to amendment were very different, this deliberate attempt to conform them is, in the Tribunal's view, very significant, and sets this case apart from many others involving multiple contracts.
155. Following the amendment, the several arbitration clauses were substantially the same, with the remaining differences being – in the Tribunal's judgment – insignificant (and certainly not such as to be incompatible in practice). Each of the three clauses provided for ICSID arbitration after ratification of the ICISD Convention by KOC, and ICC arbitration prior to ratification, or if ICSID arbitration was otherwise not possible. The Tribunal accepts the Claimant's contention that the minor variations that remained between the clauses were likely the result of poor drafting, rather than an unconditional desire of the Parties to have their claims heard by different tribunals in separate proceedings in case of a dispute.
156. In conclusion, the Tribunal is satisfied that it could not have been the intention of the Parties, as prudent and reasonable organisations, and on the facts of this case, that any disputes arising out of this project should only be determined by different tribunals, with all the difficulties and risks that this would inevitably entail. On the contrary, the Parties took special steps to avoid this.

**(iv) The use of a single Request to activate several arbitration clauses**

157. The Respondents' objections also raise a distinct procedural question, namely whether the Claimant was entitled to activate the three arbitration clauses, and commence three concurrent arbitrations with the same Tribunal, by filing a single Request. In the Tribunal's view, this is not a matter of jurisdiction subject to Article 25 of the Convention, but rather a matter relating to the conduct of the procedure covered by Article 44 of ICSID Convention.
158. The Tribunal notes and concurs with the following statement in the *Noble Energy* decision (*supra*):

*“Article 44 of the ICSID Convention provides that arbitration proceedings are governed by the Convention, and, unless the parties agree otherwise, by the ICSID Arbitration Rules. Whenever*

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*the ICSID Convention and Rules are silent on an issue ‘the Tribunal shall decide the question’ in the exercise of its general powers.”*

159. The starting point of the Tribunal’s consideration of this issue must be the Convention itself and the Arbitration Rules. There is nothing in either which expressly prohibits an investor using a single Request to commence ICSID arbitration proceedings pursuant to more than one arbitration agreement relating to the same project and involving a single investment. Therefore, the Tribunal must exercise its power in light of its own judgment.
160. The filing of a single Request in such cases may well facilitate the consolidation of proceedings before a single tribunal, and thereby achieve a fair, expeditious and cost-efficient resolution of the dispute. Investments often are in the form of complex financial structures which require the implementation of several agreements. It would be contrary to the spirit of the Convention to require claimants in each case to file as many requests for arbitration as they have claims arising under different agreements, particularly where such claims are clearly connected as in the present case. Not only would this be onerous, but it would also represent a considerable waste of time and costs, and could lead to potential delaying tactics, and inconsistent determinations. More importantly such an approach is not mandated by the Convention or by the Rules.
161. Clearly, if one Request is used to activate more than one arbitration agreement, this may or may not actually achieve consolidation in any particular case, depending upon whether the respondent agrees, or (as here) is found to have consented previously to a single proceeding before a single tribunal.
162. In this case, as set out above, the Claimant is entitled to consolidation before a single tribunal. The Tribunal notes in this regard that, as recorded in the Minutes of the hearing held on 9 April 2010 in The Hague, “*the Parties confirmed their agreement that the Tribunal had been properly constituted and that they had no objection to any of its members.*” Whereas it is clear that the Respondents at The Hague meeting foreshadowed the possibility of jurisdictional issues, they did not then state that the Tribunal was wrongly constituted, and nor would there have been a basis to assert this.
163. Some six months after the Tribunal’s constitution, the Respondents suggested for the first time that they objected to the Tribunal’s constitution to arbitrate all claims together. Whilst this objection was not raised timeously, in light of the Tribunal’s findings as to the Parties’ implied consent, it must fail in any event.



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164. Accordingly, the Tribunal finds that the Claimant acted properly when it filed its Request which articulated claims under three separate agreements, i.e. the PPA, IA and DOG.

**B. DOES THE TRIBUNAL HAVE JURISDICTION *RATIONAE PERSONAE* OVER EDC?**

**1. Was EDC properly designated to the Centre as an agency of KOC within the meaning of Article 25(1) of the Convention?**

**a. Claimant's Position:**

165. The Claimant's position has varied on this issue.

166. First, in its Request, the Claimant maintained that EDC was apparently an agency of KOC, but that, to its knowledge, KOC had never designated EDC to the Centre (Request §40). As a response to a request for clarification made by ICSID, the Claimant stated that the designation requirement was satisfied because the KOC and EDC had consented to arbitration in the same clause and the communication of that consent had been made to ICSID through the submission of the Request (Supplement to Request).

167. Secondly, in its Memorial on the Merits, the Claimant submitted that KOC had expressly designated EDC as an "agency" for purposes of the Centre's jurisdiction, and that such designation was properly communicated to the Centre by CPC through the Request (Memorial on the Merits §134).

168. Finally, in the Claimant's last submission, it argues that EDC was properly designated as an agency of KOC within the meaning of Article 25(1) of the Convention. The Claimant contends that the designation requirement of Article 25(1) of the Convention does not require formal communication of the designation to the Centre. As an alternative, the Claimant says that if such communication is required by the Convention, it was properly effectuated by the Claimant when it submitted its Request to the Centre. In addition, the Claimant submits that the Respondents are estopped from arguing that EDC was not properly designated within the meaning of Article 25(1) of the Convention.

**(i) Article 25(1) of the Convention does not require notification of the designation**

169. According to the Claimant, once an entity has been designated as an agency, such designation does not require notification to the Centre. The Claimant argues that the term "notify" and its related forms clearly mean something different from the term "designate" and its related forms. In the case of "notify," the action of communicating is the essence

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of the term. In the case of “*designate*,” the essence is in the selection, appointment or setting apart itself; any communication of that act is secondary, and may be made to one or more different persons depending on the context. In support of its argument, the Claimant cites the definition of the terms “*designate*” and “*notify*” of the *American Heritage Dictionary* and the *Black’s Law Dictionary*.

170. The Claimant contends that since the Convention uses both the terms “*designate*” and “*notify*” in a number of instances with each concept having a distinct meaning from the other, Article 25(1) was specifically drafted not to include an element of notification. In support of its argument, the Claimant identifies the Convention’s use of “*notify*” referring to a formal communication made by a specified person to a specified person or persons, which can be compared to the Convention’s use of “*designate*.” E.g.:
- (a) “*Notify*”: Articles 28(3), 49, 66(1), 70, 71, 72 and 75;
  - (b) “*Designate*”: Articles 12, 13, 25(1), 52(3).
171. According to the Claimant, the use of the preposition “*to*” in the phrase “*designated to the Centre*” does not require an act of communication to the Centre. The term “*to*” in this instance points to the purpose for which the designation is made, i.e. pointing to the institution to which a person is designated. In this regard, the Claimant cites Mr. Aaron Broches, ICSID’s first Secretary-General who chaired the Legal Committee on the Settlement of Investment Disputes, and concludes that nothing in Mr. Broches’ summary of the purposes of the designation requirement suggests any communication to the Centre.
172. The Claimant submits that the interpretation of Article 25(1) by ICSID tribunals supports the view that formal communication of the designation to the Centre is not required.
173. According to the Claimant there is a consistent interpretation of Article 25(1) by the Secretary-General such that the lack of direct notification to the Centre by a Contracting State of its designation of an agency does not put a claim outside the jurisdiction of the Centre.
174. The Claimant cites several cases where the Secretary-General registered a request for arbitration, and relies upon two of them in particular, in which tribunals accepted jurisdiction over a respondent agency where no prior notice of designation had been given to the Centre by the Contracting State.
175. In *Manufacturers Hanover Trust Company v Arab Republic of Egypt and the General Authority for Investment and Free Zones*, ICSID Case No. ARB/89/1, *Decision on the*

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*Jurisdiction and the Constitution of the Arbitral Tribunal and on Recommendation of Provisional Measures (6 June 1991) (“Manufacturers Hanover”)* (unpublished but submitted in this case as a legal authority), there was no indication that the Arab Republic of Egypt, the Contracting State, had ever notified the Centre that it had designated GAIFZ as its agency. The tribunal held that:

“no particular form [wa]s required for such designation and approval. Whereas it may be assumed that a writing is needed, such writing can be contained in an Investment Law as Law No. 43”.

176. In *Klöckner (supra)*, whereas the Contracting State had not designated the relevant agency or notified the Centre of that designation when the request was registered, the tribunal made no mention of the requirement that the designation be made directly to the Centre, but instead referred to “an ad hoc designation of [the agency] as a party to the proceedings.”
177. In *Scimitar Exploration Limited v. Bangladesh and Bangladesh Oil, Gas and Mineral Corporation, ICSID Case No. ARB/92/2, Award (5 Apr. 1994) (“Scimitar Exploration”)*, the Secretary-General registered a request for arbitration by an investor against both a Contracting State and its agency as respondents, even though the Centre had apparently never received any notice of designation of the agency by the Contracting State. Although the tribunal dismissed the case based on the claimant’s lack of corporate authority to bring the proceedings, it did not address the issue of designation. According to the claimant, the case nevertheless stands as another example of the Secretary-General having determined that not receiving direct notification of designation by a Contracting State did not put the claim against the Contracting State’s agency “manifestly outside the jurisdiction of the Centre.”
178. In *Cable Television of Nevis Ltd. v The Federation of St. Christopher and Nevis, ICSID Case No. ARB/95/2, Award, (16 December 1996) (“Cable Television of Nevis”)*, the Secretary-General registered a request for arbitration lodged by investor claimants against a constituent subdivision of a Contracting State where there was no indication that the Contracting State had ever designated its constituent subdivision for the purposes of jurisdiction under Article 25(1).
179. Finally, the Claimant contends that in the *East Kalimantan* case (*supra*), the tribunal emphasised that the designation requirement concerned the intention of the Contracting State to designate the relevant agency or constituent subdivision for the purposes of

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Article 25, and not the formalities of communicating that intention to ICSID's administrative body:

*“the form and channel of communication [of designation to the Centre] do not matter, provided that the intention to designate is clearly established.”*

180. According to the Claimant, the tribunal in that case focused on evidence of the acts of the Government of Indonesia, and whether those acts showed its intention to designate East Kalimantan as being subject to the jurisdiction of the Centre. The instruments the *East Kalimantan* tribunal examined included: (a) minutes of meetings, (b) an investment agreement, and (c) a decision of a municipal court in Indonesia.
181. The Claimant then applies the *East Kalimantan* tribunal's reasoning to the present case, and draws the conclusion that no clearer evidence of KOC's intention to designate EDC for purposes of Article 25 can be imagined than KOC's negotiation and signature of PPA Amendment No. 1, in which it consented to ICSID arbitration alongside EDC, subject only to entry into force of the Convention, and explicitly stated that it had designated EDC to the Centre for the purposes of Article 25. The Claimant submits that the *East Kalimantan* tribunal also suggested that where a Contracting State joins with its constituent subdivision or agency in consenting to ICSID arbitration in the same investment agreement, that fact alone is sufficient to find an “*implied designation*” by the Contracting State.

**(ii) KOC designated EDC as its agency**

182. The Claimant submits that KOC designated EDC as an agency for purposes of Article 25(1) in PPA Amendment No. 1. In this agreement, KOC confirmed in writing that it had designated EDC as its agency subject to the jurisdiction of the Centre.
183. The Claimant emphasises that MIME expressly undertook:

*“to procure that the Kingdom of Cambodia . . . notifies the Centre that it **has designated** . . . EDC as . . . [an] agency of [KOC] which is subject to the jurisdiction of the Centre for purposes of Article 25(1) of the Convention”. (PPA §16.3(b)(iii)(A) as amended by Amendment No. 1 §82) (emphasis added)*

184. According to the Claimant, it is clear from this undertaking that the designation had already been made. The only promised future performance was to notify the Centre. The only condition was that KOC implement the Convention, which it did in 2005.

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185. The Claimant's argument is based on the use of the present perfect tense of the verb "designate" in "has designated", which, according to the Claimant, indicates that KOC had already perfected the action expressed by the verb. Regardless of whether or not the designation as an agency was later communicated to the Centre by KOC, its designation of EDC as an agency in PPA Amendment No. 1 was self-effectuating and became an irrevocable element of EDC's consent. Such designation had significance in that CPC could rely on it.

186. Further, the Claimant contends that because a state will generally only approve agencies' consents under Article 25(3) if it considers them to be eligible, the designation (confirmation of eligibility) might be inferred from the provision of consent. Therefore, the approval of consent that is notified to the Centre may be interpreted as an *ad hoc* designation of the constituent subdivision or agency.

**(iii) As an alternative, CPC was entitled to communicate to the Centre the designation of EDC as an agency of KOC**

187. The Claimant submits that because neither Article 25(1) nor any provision of the Convention indicates the specific wording, manner, form or timing in which designation of an agency of a Contracting State must be made, the Claimant, even though the investor, was entitled to communicate the designation to the Centre by filing its Request for Arbitration.

188. In support of its alternative argument, the Claimant emphasises that the *East Kalimantan* tribunal explicitly adopted this view:

*"the designation requirement may in particular be deemed fulfilled when a document that emanates from the State is filed with the request for arbitration and shows the State's intent to name a specific entity as a constituent subdivision or agency for the purposes of Article 25(1)."*

189. Applying the analysis in the *East Kalimantan* decision to the facts of the present case, the Claimant contends that the delivery of PPA Amendment No. 1 to the Centre with the Request for Arbitration, assuming Amendment No. 1 manifests KOC's intention to designate EDC, fully satisfied any requirement that the designation be communicated to the Centre.

190. According to the Claimant, the decision of the tribunal in *East Kalimantan* demonstrates each of the propositions it advances, namely that the act of designation is separate and

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distinct from notifying the Centre of that act; that the Contracting State must manifest its intention to designate in writing; but that the communication of that designation to the Centre can be made by an adverse party in its Request for Arbitration.

**(iv) KOC is estopped from arguing that EDC was not properly designated within Article 25(1) of the Convention**

191. The Claimant submits that the circumstances surrounding KOC's and EDC's unequivocal consent to ICSID jurisdiction should estop the Respondents from now contending that the Tribunal does not have jurisdiction based on the argument that EDC has not been properly designated to the Centre.
192. The Claimant contends that, through the PPA's arbitration clause, the Respondents unequivocally promised that EDC's designation would be notified to the Centre. On this basis, the Claimant relied on the promises of the Respondents that any potential dispute would be resolved through ICSID arbitration. Therefore, the doctrine of estoppel under international law must prevent the Respondents from asserting now that the Tribunal lacks jurisdiction over EDC.
193. According to the Claimant, on the basis of the promises of Respondents regarding dispute resolution, CPC invested considerable money and time in the C-4 power plant project with the expectation that any disputes with the Respondents would have the benefit of ICSID arbitration. The Respondents made these promises deliberately and solemnly, and intended that the Claimant rely on them. The Respondents should therefore be estopped from objecting to the Tribunal's jurisdiction over EDC due to KOC's failure to fulfil its promise to notify the Centre of its designation.
194. The Claimant also argues that the present case differs from *East Kalimantan* in one important respect: in that case, the tribunal found that the claimant had not proved the necessary elements of estoppel and that, even if it had, estoppel could not overcome a failure to meet the mandatory jurisdictional requirements under the Convention. The Claimant contends that, in contrast to *East Kalimantan*, it has shown that the Respondents' promise to notify the Centre of EDC's designation, and the reliance placed upon this promise by the Claimant, satisfy the elements of estoppel.

**b. Respondents' Position**

195. The Respondents contend that no designation of EDC has been made properly, within the meaning of Article 25(1) of the Convention. In addition, the Respondents object to the application of the doctrine of estoppel on two grounds. First, the elements required to

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apply this doctrine are not met in this case. Secondly, even if they were met, estoppels cannot grant jurisdiction to an ICSID tribunal, where the requirements for such jurisdiction have not objectively been satisfied, and where jurisdiction would not otherwise exist. As long as KOC has not in fact designated EDC to the Centre, the Tribunal has no jurisdiction over EDC.

**(i) EDC was not designated to the Centre by KOC as required by Article 25(1) of the Convention**

196. The Respondents contend that the designation requirement in Article 25(1) of the Convention requires some form of communication of the designation to the Centre by the Contracting State, which was not accomplished in the present case.

*(a) Article 25(1) of the Convention requires communication of the designation to the Centre*

197. The Respondents submit that Article 25(1) of the Convention is plain on its face: it requires that the entity be “**designated to the Centre by that State**” (Emphasis added). It makes no distinction between the act of designating and the notification of that act to the Centre. In other words, the act of “designation” has implicit in it a notification to the Centre by the state, such that absent such notification, no “designation” would have taken place.

198. The Respondents maintain that while some commentators accept that “*designation by a Contracting State can take any form that gives it general notoriety and comes to the Centre’s attention*”, such as the promulgation of legislation containing an express designation, the key requirement remains that: “[t]here must be some communication by the host State to the Centre.”

199. In this respect, the Respondents cite Professor Schreuer:

*“an agreement of the Contracting State with the investor or a promise to make the designation to the Centre will not suffice. There must be some communication by the host State to the Centre.”* (Emphasis added.) (Schreuer *supra* at §25-252)

200. The Respondents also cite Ms. Lamm (who cites Mr. Amerasinghe):

*“Arguably, a clear intention on the part of the Contracting State to file a designation may be sufficient to satisfy the designation requirement so long as that intention is somehow brought to the Centre’s attention.”* (emphasis added) (C Lamm, “Jurisdiction of

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*the International Centre for Settlement of Investment Disputes*  
(1991) 6 ICSID Rev-FILJ 462, p 469)

201. In support of their argument, the Respondents further refer to the interpretation of the designation requirement by previous ICSID tribunals.
202. First, the Respondents contend that the Claimant's reliance upon certain cases that it cites is inapposite. No one challenged the categorisation of the respondent entities as "constituent subdivisions or agencies", or their designation to the Centre by the state, in *Scimitar Exploration* or *Klöckner*. However, the fact that no such challenge was brought in most cases obviously does not mean that no such challenge could have been brought. Furthermore, according to the Respondents, these cases are noteworthy because, in all of them, the entity in question had been designated to the Centre by the state, i.e. it was either on the ICSID list of designated constituent subdivisions and agencies before a request for arbitration naming it as respondent was registered, or, in the case of *Socame in Klöckner*, it was designated by the respondent state to the Centre after proceedings had already begun.
203. Secondly, the Respondents submit that the Tribunal should not rely on the unpublished *Manufacturers Hanover* decision to decide that it may depart from the clear wording of the Convention, which requires designation to the Centre to be made by the state. The Respondents maintain that the only other case dealing with designation, which is publicly available and can therefore be examined, explained, debated and relied upon by the Parties and the Tribunal is *Cable Television of Nevis*. However, the Respondents argue, this case defeats the Claimant's proposition.
204. In *Cable Television of Nevis (supra)*, the tribunal held that in the absence of the NIA's designation to the Centre, the tribunal had no jurisdiction to hear a claim against it. The tribunal added that it could not simply ignore the Federation's failure to designate the NIA, even though its decision effectively invalidated the arbitration clause in the underlying agreement. The Respondents emphasise that in this case, there was no doubt that the NIA was a constituent subdivision of the Federation as this was expressly provided for in the constitution of St Kitts and Nevis, nevertheless the tribunal found the lack of designation fatal.
205. Finally, the Respondents presented some observations on the *East Kalimantan* case. In this case, no formal designation had been made and it was undisputed that the Province of East Kalimantan was a constituent subdivision of Indonesia. The Respondents contend that in considering whether or not a designation had been made, the *East Kalimantan*



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tribunal misinterpreted Professor Schreuer's words. According to the Respondents, it is clear that Professor Schreuer is not of the view that a clear intention to designate coupled with some form of communication is enough to satisfy the requirements of Article 25(1) of the Convention. In any event, the *East Kalimantan* tribunal did not decide this point, as it found that there was no intention to designate.

*(b) KOC never designated EDC to the Centre and the Claimant could not do so by filing its Request*

206. Article 25(1) of the Convention clearly provides that there must be a designation (1) "to the Centre" and (2) "by that State". The Respondents contend that even assuming that designation under Article 25(1) of the Convention could be effected in two steps and by two different parties (which it denies), KOC has never designated EDC, whether in the PPA or otherwise, so that the Claimant had no instrument of designation to bring to the Centre's attention.
207. The Respondents submit that the wording of the PPA does not contain KOC's designation of EDC as an agency. In any event, the alleged designation was never brought to the attention of the Centre by KOC. The Respondents emphasise that even the Claimant itself admits in its Request that "*designation could not be given at the time the parties gave their consent*", because the ICSID arbitration clause would only enter into effect upon ratification of the Convention by KOC (which had not at that stage yet occurred).
208. The Respondents maintain that it is obvious from the plain language used in the relevant provision in PPA Amendment No 1 that the Parties intended such designation could only be made at a later date. Such designation could indeed only be made if and when KOC had implemented the Convention, which implementation did not occur until 19 January 2005, by which time the PPA had, on the Claimant's own case, already been terminated.
209. According to the Respondents, in the absence of a clear intention on behalf of KOC to designate EDC for the purposes of the Convention in the PPA, the communication of the PPA to the Centre by the Claimant through its Request is not, even on the interpretation most favourable to the investor, sufficient to fulfill the designation requirement in Article 25(1) of the Convention.

**(ii) Claimant's estoppel argument is not applicable to the case**

210. The Respondents contend that the Claimant's estoppel argument does not fulfil the three fundamental conditions necessary for this doctrine to apply. First, there must be a clear and unequivocal statement. Secondly, there must be a reliance on that statement by one

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party. And thirdly, there must be a detriment to the party invoking the estoppel or an advantage to the party who made the statement. The Respondents submit that none of these conditions is met in the instant case.

211. According to the Respondents, there is no suggestion of any clear and unequivocal statement in the PPA of consent to ICSID jurisdiction. First, the Respondents emphasise that there was no ICSID jurisdiction clause in the PPA as signed in March 1996, and that it was only in 1998, with PPA Amendment No. 1, that an ICSID jurisdiction clause was introduced in the PPA. Secondly, the ICSID jurisdiction clause was subject to a number of pre-conditions, one of which was ratification of the Convention by KOC, which only happened some seven years later, in January 2005. Therefore, when entering into PPA Amendment No. 1, it was clear that ICSID jurisdiction could not be invoked at the time and that the existing ICC jurisdiction clause would govern any disputes between the Parties.
212. The Respondents contend that because the possibility of having an ICSID arbitration clause was purely hypothetical and was at this time ineffective, the Claimant could not have relied on any statement by KOC or EDC as to ICSID jurisdiction. Indeed, the Claimant was perfectly content to continue investing in the project as from 1998 with no certainty that KOC would ever ratify the Convention, and thus no certainty as to whether ICSID jurisdiction would ever be available.
213. Finally, the Respondents emphasise that the Claimant was not able, and has not even attempted, to show any relevant detriment to the Claimant, or relevant advantage to KOC or EDC.
214. In any event, the Respondents rely on the *East Kalimantan* case to argue that even if there was an estoppel, such an estoppel could not operate to grant an ICSID tribunal jurisdiction where the requirements for such jurisdiction were not objectively met (i.e. where jurisdiction would not otherwise exist). The Respondents also note that the *East Kalimantan* tribunal found that the existence of an alternative dispute resolution mechanism in the underlying contract, which is the situation in the present case, was fatal to any argument that the claimant had suffered detriment in reliance on the respondents' alleged conduct.

**c. Tribunal's Decision**

215. This is a crucial issue because unless the designation provision contained in Article 25 of the Convention has been complied with, the claim against EDC must fail.

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216. The Tribunal must deal with two separate issues. The Tribunal will first decide whether EDC was properly designated as an agency of KOC within the meaning of Article 25(1) of the Convention. If the answer is negative, the Tribunal will then consider if an estoppel argument prevents the Respondents from arguing that such designation was not properly made.

**(i) EDC was not properly designated as an agency of KOC so as to comply with Article 25(1) of the Convention**

217. The first issue that the Tribunal needs to consider is whether designation in conformity with Article 25(1) of the Convention requires actual communication of the designation to the Centre. The second issue is, if designation requires communication, what are the forms and channels that such communication could take? Finally, a correlative question is who can communicate the designation to the Centre for the purposes of Article 25(1) of the Convention?

*(a) The need for communication*

218. On the issue of whether a designation pursuant to Article 25(1) requires some sort of communication, the Claimant relies upon observations by Aaron Broches, who chaired the Legal Committee on the Settlement of Investment Disputes which ultimately produced the phrase “*designated to the Centre by that state*”. Broches stated:

*“The limited purpose of the requirement of designation is to avoid doubt whether an entity is a constituent subdivision or agency and thus qualified to be a party to a dispute before the Centre. Failure of a formal designation should therefore not itself defeat jurisdiction if the entity concerned is proved or conceded to be a constituent, subdivision or agency of a contracting state.”* (A. Broches, “*Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965, Explanatory Notes and Survey of its Application*” 18 YCA 627, 642 (1993))

219. However, more recently, Professor Schreuer has considered the issue of designation and has stated that:

*“[t]here must be some communication by the host state to the Centre.”* (C Schreuer, *The ICSID Convention: A Commentary* (2nd ed., 2009) (ICSID Commentary) §25-252)

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220. The issue whether Broches was correct in his view that the lack of formal designation does not defeat jurisdiction was recently considered by a strong tribunal in the *East Kalimantan* case, which stated as follows:

*“[t]he Tribunal considers that the lack of a valid designation is a bar to its jurisdiction under the ICSID Convention. While holding so, the Tribunal is mindful of Aaron Broches’ view that failure of a formal designation should ... not by itself defeat jurisdiction if the entity concerned is proved or conceded to be a constituent subdivision or agency of a contracting state’. With Christoph Schreuer, the Tribunal considers, however, that Broches’ view ‘goes too far’ and that designation cannot be dispensed with altogether. Accepting jurisdiction in the absence of designation by the state would not be in line with the ICSID Convention, which expressly constrained the possibility for constituent subdivisions to submit to ICSID arbitration within specified limits.”(Schreuer supra at §186-187)*

221. The present Tribunal agrees with the *East Kalimantan* decision and Professor Schreuer’s position that Mr. Broches’ view “goes too far” and that “there must be some form of communication”.
222. In order properly to interpret Article 25(1) of the Convention, the Tribunal must of course be guided by the Vienna Convention on the Law of Treaties of 23 May 1969 (“**Vienna Convention**”), as a reflection of customary international law. Article 31(1) of the Vienna Convention provides that:

*“[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”*

223. This is a very familiar provision, that needs little elaboration here. The starting point is obviously the text of the treaty itself, and, in the words of Sir Ian Sinclair:

*“[t]he true meaning of a text has to be arrived at by taking into account all the consequences which normally and reasonably flow from the text.”* (Ian Sinclair, *The Vienna Convention on the Law of Treaties* 121 (2<sup>nd</sup> ed. 1984))

224. The text of Article 25(1) of the Convention is clear. It imposes the following requirements as jurisdictional thresholds for constituent subdivisions or agencies of a Contracting State: (1) “*designation*”, (2) “*to the Centre*”:

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*“Chapter II: Jurisdiction of the Centre**Article 25*

*(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, ...”*

225. If “*designation*” alone, without any communication, were sufficient for these purposes, the words “*to the Centre*” would be otiose. Indeed, as the Respondents submitted, communication is inherent in the very notion of “*designation*” as used in this provision.
226. Beyond the text itself, the Tribunal finds further support for this proposition in the Convention’s object and purpose. As elaborated in the Parties’ submissions, the Convention is intended to promote foreign investment within a secure framework. Article 25 plays a critical role in delimiting the scope of the Convention regime. In this context, the designation requirement in Article 25(1) itself serves at least two specific purposes.
227. First, the designation requirement provides both clarity and a guarantee of protection to investors (or at least some certainty in this regard) as to which entities within (and in addition to) a given Contracting State may be subject to the Convention regime. This information may, for example, be critical in an investor’s choice of contractual counterparty. For such clarity and certainty to be achieved, a structured and standardised system of notification is obviously necessary, which in Article 25(1) consists of communication to the Centre.
228. Secondly, the designation requirement also serves a “*gate-keeping*” function for Contracting States. As Schreuer states, it embodies the:
- “desire on the part of the State to preserve control over semi-autonomous entities in their dealings with foreign investors”* (C.Schreuer, “*Commentary on the ICSID Convention*” (1996) 11 ICSID Rev-FILJ 318, §152).
229. To this end, the designation requirement is not for the sole benefit of investors. Broches himself recognised in this specific context that:

*“while in some instances the Contracting State’s approval may not be required, it retains the right of designation in all cases.”* (A Broches, “*Awards Rendered Pursuant to the ICSID Convention:*

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*Binding Force, Finality, Recognition, Enforcement, Execution*" (1987) 2 ICSID Rev-FILJ 287, p.298).

230. Contracting States have an obvious interest in such "gate-keeping", given (for example) that any award rendered against a constituent subdivision or agency could, arguably, be binding on the State itself (e.g. per Article 54(1) of the Convention). The State might also – at least arguably - have to "abide by and comply with the terms of the award" in accordance with Article 53(1) of the Convention, even if it were not a party to the arbitral proceedings. According to Broches:

*"If a constituent subdivision or an agency of a Contracting State meets the requirements of the Convention as regards designation and approval and has consented to submit or has submitted a dispute with a national of another Contracting State to arbitration under the Convention, the former Contracting State is responsible for compliance with a resulting award, whether or not the subdivision or agency is acting for or on behalf of that Contracting State"* (A Broches, "Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution" (1987) 2 ICSID Rev-FILJ 287, p.298)

231. According to Schreuer, this responsibility would:

*"arise from [the Contracting State's] role as designating and approving authority under Art. 25(1) and (3), from the obligation of Art.54 to recognize and enforce awards, and generally from the principle of good faith."* (Schreuer *supra* at §53-15).

232. Just as with the first object and purpose identified above, for this second purpose to be achieved, a structured and standardised system of notification is also necessary. Again, in Article 25(1) this consists of communication to the Centre. If uncommunicated approvals were sufficient, Contracting States would be vulnerable to arguments from investors that designations had occurred when this may be denied.
233. The clarity of the text of Article 25(1), in the Tribunal's view, is such that no recourse to supplementary means of interpretation (e.g. per Article 32 of the Vienna Convention) is necessary. But even if it was, the materials that have been put before the Tribunal in this case support the same conclusion.
234. In particular, reference may be made (for the sake of completeness only) to the Convention's drafting history. "Political subdivisions and instrumentalities" (as they were initially called) were added to the Preliminary Draft of the Convention during the

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original Regional Consultative Meetings as a recognition that states may well act through other entities (e.g. *Draft provision on extension of the jurisdiction of the Center to disputes involving political subdivisions or instrumentalities of states* (COM/AF/7), circulated during the Addis Adaba consultations (*ICSID, History of the ICSID Convention: Documents Concerning the Origin and Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (1968), Vol II, p.288). This first draft of the Convention included a requirement that any such subdivision or instrumentality be approved by the Contracting State in question. When the Working Group discussed this extension of the Centre's jurisdiction, it was considered that this approval requirement was not itself sufficient, and it was therefore proposed that:

*“each State party to the Convention could deposit a list indicating the bodies regarded by it as ‘political subdivisions’ for the purposes of this Convention.”* (Proposal of the representative for the UK at the Legal Committee Proceedings, 25 Nov 1964 – which was later clarified as applying to both constituent subdivisions and agencies).

235. This proposal was finally approved by the Legal Committee, which agreed that, for the Centre's jurisdiction to extend beyond the Contracting State itself, to a given constituent subdivision or agency, the entity in question had to have been designated by the Contracting State to the Centre (Legal Committee Proceedings, 9 Dec 1964).
236. It is therefore clear that the requirement of “*designation*” was intended to be distinct from, and additional to, mere uncommunicated “*approval*” by a Contracting State.
- (b) *The mode of communication*
237. Now turning to the question whether a communication of the designation can be made through a channel other than the Centre, the Tribunal is again guided by the text of Article 25(1) of the Convention, in its context and in light of the Convention's object and purposes.
238. The clear language of Article 25(1) requires that the designation be “*to the Centre*”. As a matter of simple language, this naturally excludes designation without communication to the Centre. If this were not so, different language would obviously have been used.
239. As noted above, the requirement of a communicated designation serves the needs of both investors and Contracting States. In each case, the system is regulated and standardised

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by the Centre acting as (in effect) the depository of information in this regard. The Centre is the commonly accepted channel of communication between Contracting States and investors. As a matter of convenience, and with the objective of communicating the designation to all potential investors, as well as clarifying each Contracting State's potential exposure, it is logical that Article 25(1) requires designation of an agency or subdivision to be brought to the Centre's attention.

240. This is not to say, however, that a formal notification to the Centre is the only means by which a designation might be brought to the Centre's attention. So long as the designation of an entity as an agency or subdivision of a Contracting State is given public notoriety by the Contracting State such as to come to the Centre's attention, the use of other channels of communication can attain the objective of Article 25(1) of the Convention and thus comply with its designation requirement.

241. The Tribunal's interpretation is shared by Professor Schreuer who wrote:

*"It has been argued that where there is a clear intention to designate, it does not matter how and through whom the communication reaches the Centre. Broches has said that failure of a formal designation should not defeat jurisdiction if the entity concerned is proved or conceded to be a constituent subdivision or agency of a Contracting State. It seems that this goes too far. Designation cannot be dispensed with all together. But it is submitted that designation by a Contracting State can take any form that gives it general notoriety and comes to the Centre's attention. Legislation by the Contracting State that clearly includes a designation in the sense of Article 25 should suffice. This would also apply to a designation in a Bilateral Investment Treaty. Despite all this, it is advisable that the Contracting State sends a clear and separate notification of the designation to the Centre in order to avoid any misunderstandings and jurisdictional difficulties."* (Schreuer *supra* at §25-252)

242. The key requirement, therefore, is that the designation is so communicated by the Contracting State that it comes to the Centre's attention.

243. In the *East Kalimantan* case, the tribunal appears to misquote Professor Schreuer's view. This led the tribunal to conclude mistakenly that:

*"the form and channel of communication do not matter provided that the intention to designation is clearly established."*



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244. It is clear that in the passage cited above Professor Schreuer simply records the view of some commentators that “*it does not matter how and through whom the communication reaches the Centre.*” However, it is not Professor Schreuer’s position that anybody through any type of channel or form can communicate the designation of an agency of a Contracting State. Quite the contrary, as the Tribunal concludes in the present case, Professor Schreuer favours a serious threshold in that the form of designation must give “*general notoriety*” to the designation, such as to come to the Centre’s attention.
245. Schreuer’s position was endorsed in the *Manufacturers Hanover* case where it was held by an ICSID tribunal that “*no particular form is required for such designation*” besides the exchange of a writing. However, in that case, the tribunal limited the channels of communication to those by which designation would achieve public notoriety. The tribunal held that since communication took place by the publication of the designation in an investment law (Law No. 43), it achieved public notoriety and complied with Article 25(1) of the Convention in this regard. Whether or not that case was correctly decided, the fact remains that the circumstances of the present case are far removed from it. Publication by a Contracting State in national legislation is quite a different act to the insertion of a reference to a designation in a private contract. The former reflects an intention to notify the world. The latter is a private act, without any public notoriety. In circumstances where the Contracting State has taken no step to bring the private contract to the attention of the Centre, the Tribunal considers that the requirements of Article 25(1) have not been met.
246. Therefore, the Tribunal finds that in order for there to be a “*designation*” of an agency or subdivision of a Contracting State under the Convention, there has to be a written designation which is communicated to the Centre. It may be possible for this to be done other than in a direct communication from the Contracting State to the Centre, such as in a Treaty or Legislation that would inevitably have public notoriety. But in most cases, it would be by direct communication and thus cannot be complied with by the investor itself providing a document to the Centre which contains, or is said to contain, a designation.
247. (c) *Communication by whom?*
248. There is then the question as to who is competent to communicate a designation of an agency or subdivision to the Centre.
249. Once again the language of Article 25(1) is clear. It provides that the designation to the Centre must be “*by that State*”. This is unambiguous, and susceptible of little further elaboration.

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250. If needed, the analysis above as to the functions of this provision explains why it is only the Contracting State that may communicate the designation. In particular, for Article 25(1) to serve a “*gate-keeping*” function, whereby each Contracting State has some form of control with regard to the scope of the Convention, it is obviously essential that communication be the sole preserve of the State itself – and not a function which investors can discharge.

251. Therefore, in the Tribunal’s view, communication of a designation to the Centre by anyone else than the Contracting State does not comply with Article 25(1) of the Convention.

252. In the present case, the Claimant contends that communication of the designation of EDC as an agency or subdivision of KOC was properly completed when it filed its Request.

253. However, the Tribunal agrees with Professor Schreuer’s view that:

*“designation in an agreement with the investor is not enough. It is clear that the entity concerned cannot designate itself. But even an agreement of the contracting state with the investor or a promise to make the designation to the Centre will not suffice.”(supra)*

254. The Tribunal therefore concludes that the alleged designation of EDC as an agency or subdivision of KOC by the Claimant through its Request does not comply with the requirements of Article 25(1) of the Convention.”

255. Even if the Tribunal had concluded that the communication of the designation of EDC as an agency of KOC could be effected by the Claimant through its Request, the Claimant still faces the additional problem that the wording associated with designation in the amended agreements remains, at best, ambiguous. The relevant part of the clause states:

*“If and when the Kingdom of Cambodia has implemented the Convention ...*

*(3) 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”*

256. The Tribunal finds that until KOC implemented the Convention, there could be no question of any designation having been made. MIME’s agreement upon implementation

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was to procure that KOC would thereafter designate EDC as its agency or subdivision. The language looks to the future and the designation of EDC was an action that KOC could only have implemented once the Convention was ratified. However KOC admittedly did nothing after ratification of the Convention.

257. Accordingly, the Claimant's argument that the designation was complete at the time when MIME agreed to procure designation upon implementation is not accepted. The Tribunal fails to see how it can be said that designation was completed at the time of the amendment of the agreements, namely on 9 October 1998. The linguistic arguments of the Claimant ("*has designated*") do not appear availing to the Tribunal in the light of all of the surrounding facts. (As the Respondents stated, the formulation "*has designated*" need not refer to a completed event, just as: "*tell me when you have arrived*"). KOC could not have designated EDC prior to January 2005. It did nothing thereafter.
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 subdivision.

**(ii) The Respondents are not estopped from arguing that EDC was not properly designated within the meaning of Article 25(1) of the Convention**

260. The Claimant has a further argument in the event that the Tribunal rules that designation as required by Article 25(1) has not taken place. The Claimant contends that the Respondents are estopped from denying that KOC has designated EDC.
261. Both Parties accepted that an estoppel could apply if the necessary elements were met. Both Parties agreed on Sir Derek Bowett's statement of the principles involved (D.W. Bowett, *Estoppel before International Tribunals and Its Relation to Acquiescence*, 33 Brit. Y.B. Int'l L. 176, 183-184); namely that there has to be :
- (a) a clear and unequivocal statement or conduct;
  - (b) reliance on that statement or conduct by one party; and

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(c) detriment to the party invoking the estoppel or an advantage to the party who made the statement.

262. With regard to the first requirement, the Claimant relies upon the PPA arbitration clause (as amended in PPA Amendment No.1). It contends that this clause contains an unequivocal promise that: (1) EDC was an agency of KOC, and that (2) EDC's designation would be notified to the Centre.
263. This alleged promise can only stem from the amendments introduced in 1998 since at the time the Parties entered into the initial transaction, i.e. 20 March 1996, the Parties were all content to rely on the original ICC arbitration clause. It is plain that when the original documents were signed, there was no promise relating to either (1) or (2) above. Further, the alleged promise contained in the 1998 version of the PPA was conditional upon ratification of the Convention by KOC which did not occur until January 2005.
264. Accordingly, the Tribunal finds it hard to see how in this case an unequivocal statement or conduct can be found. A statement producing an effect only upon the occurrence of a potential future event unquestionably prevents this statement from being qualified as "*unequivocal*". Therefore, the Tribunal considers that the Claimant fails in establishing the first leg of its estoppel argument.
265. With regard to the reliance requirement, it appears that Claimant faces an even more difficult burden. In order to satisfy this requirement, the Claimant must have assumed that KOC would definitely ratify the Convention or that any claims it had might materialise after ratification. However, the Parties were content to rely on the ICC clause either *pro tempore* or forever if no ratification took place and thus it is difficult to see how the Claimant relied upon this alleged statement.
266. With regard to the detriment requirement, the Tribunal finds that Claimant produced no evidence of detriment. Whatever was the situation, the Claimant always had recourse to arbitration under ICC Rules in the absence of ratification of the Convention by KOC, and therefore it is hard to see what detriment could have been suffered.
267. Accordingly, the Tribunal concludes that in relation to designation by estoppel the Claimant fails to make out a case.
268. Had the Tribunal been satisfied that designation had taken place or that the Respondents were estopped from denying such, the Tribunal would have had to consider whether an estoppel ran in relation to the statement in the arbitration clause that EDC was a subdivision or agency of KOC. The Tribunal can see more merit in this point, because it

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was only when the defence was filed that KOC denied that EDC was an agency or subdivision of KOC. This led to a report from Professor Reisman as to what is required in international law for an organisation to be an agency or subdivision of a State. All this was very interesting indeed and the Tribunal does not think that the estoppel would necessarily have failed merely because the estoppel relating to designation itself failed. There could have been two estoppel arguments on the facts of the case. However, again as interesting as it would have been to determine, it is of no help to the Claimant, because it fails at the designation hurdle and the issue of whether EDC was or was not an agency or subdivision thus becomes unnecessary to determine.

269. In conclusion, the Tribunal comes back inevitably to the language used in Article 25(1) of the Convention. The Tribunal acknowledges all the interesting points made by the Claimant, but cannot conclude that there has, in this case, been a sufficient designation of EDC communicated to the Centre so as to comply with Article 25(1) of the Convention. By way of summary, the Tribunal decides that:

- (a) designation of an entity as an agency or subdivision of a Contracting State must be communicated to the Centre by that State;
- (b) communication of a designation within Article 25(1) of the Convention must be in a written form and can be made through channels other than direct and formal communication to the Centre, so long as the communication by the Contracting State achieves public notoriety such as to come to the Centre's attention;
- (c) public notoriety of a designation cannot be achieved through the Claimant's communication to the Centre of a private investment contract annexed to the Request for Arbitration;
- (d) in any event, the text of the arbitration agreements in this case was not sufficiently clear as to constitute an unequivocal designation of EDC by KOC as its agency; and
- (e) KOC is not estopped from arguing that EDC was not properly designated.

270. This means that claims against EDC cannot proceed in this ICSID arbitration. The Tribunal notes, however, that recourse against EDC may well still be available by way of ICC arbitration, and that the Parties specifically maintained this route in case ICSID arbitration was not possible.

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**2. Does EDC qualify as an agency of KOC within the meaning of Article 25(1) of the Convention?**

271. The Respondents have raised the issue as to whether or not EDC is, in fact, an agency or subdivision of KOC. As the Tribunal has found that no designation pursuant to Article 25(1) of the Convention has taken place, there is now no need to decide this issue.

**C. DOES THE TRIBUNAL HAVE JURISDICTION TO DECIDE CLAIMS ARISING OUT OF THE DOG?****1. Claimant's Position**

272. The Claimant contends that its claims against KOC under the DOG are within the Tribunal's jurisdiction and competence and fully admissible. The Claimant asserts that those claims are central to the dispute as described in the Request and are within the scope of the Parties' consent to ICSID arbitration.
273. The Claimant submits three arguments. First, the Claimant contends that the proper articulation of the claims in the Request for Arbitration is not a jurisdictional matter, but rather a procedural issue. The Claimant adds that incomplete or imprecise claims comply with the Convention and the Institution Rules. Secondly, and in any event, the Claimant argues that it properly identified the DOG in its Request. Thirdly, and in the alternative, the Claimant maintains that it is entitled to bring claims arising out of the DOG under Article 46 of the Convention.

**a. Imprecision in the Request is a procedural matter which does not prevent the Tribunal hearing claims arising out of the DOG**

274. The Claimant submits that it commenced this proceeding by lodging the Request with the Centre on 31 July 2009 in compliance with Article 36((2) & (3)) of the Convention and Rule 2(1) of the Institution Rules. Before the Secretary-General registered the Request, Claimant supplemented the Request with the submission of Supplement No. 1 on 21 August 2009.
275. The Claimant maintains that, upon registration, it was entitled to plead in detail all claims and make all arguments relating to the dispute.
276. The Claimant argues that it provided ample notice in its Request of its intention to assert a claim against KOC under the DOG. According to the Claimant, such a matter is a

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procedural issue and its Request was sufficiently articulated to meet the requirement in Institution Rule 2(1)(e) which provides:

*“[t]he request shall: ...*

*(e) contain information concerning the issues in dispute indicating that there is, between the parties, a legal dispute arising directly out of an investment ...”*

277. According to the Claimant, the request for arbitration in ICSID proceedings is not meant to be a comprehensive listing of all facts, legal arguments or causes of action in a dispute. These are to be pleaded in a claimant’s memorial on the merits pursuant to Arbitration Rule 31(3). Rather, as the text of Institution Rule 2(1) confirms, the claimant must merely make a showing that a legal dispute exists for the purposes of jurisdiction.
278. In support of its argument, the Claimant cites the case *ADF Group Inc. v United States of America*, ICSID Case No. ARB(AF)/00/1, Award (9 Jan. 2003) (“**ADF Group**”), where the tribunal, in its analysis of the requirement under the Arbitration (Additional Facility) Rules, construed the requirement of Institution Rule 2(1)(e) such that imprecision or incompleteness in the setting out of issues in dispute in a request for arbitration would not adversely impact upon its jurisdiction, and observed that Article 36(2) of the Convention should be similarly construed.
279. Therefore, the Claimant contends that any review by the Tribunal of its jurisdiction is now conducted *de novo*. Claimant’s previous compliance or non-compliance with the Institution Rules does not bear on whether or not the Tribunal has jurisdiction over the dispute and the claims registered. In support of this argument, Claimant cites Professor Schreuer:

*“[R]eliance on Institution Rule 2 to determine jurisdiction is inappropriate. Institution **Rule 2 does not set out jurisdictional requirements** in addition to Art. 25. It is merely a rule of procedure. It lists the information and documentation that must be contained in the request. Its purpose is to enable the Secretary-General to decide whether a request should be registered in accordance with Art. 36(3)... Omissions, errors and other deficiencies in the request for arbitration are not an independent basis for the Tribunal to decline jurisdiction.”* (Emphasis added) (Schreuer *supra* at §367)

280. The Claimant also refers to the ICSID case *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v Argentine Republic*, ICSID Case No. 97/3, *Decision on Jurisdiction*

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(14 November 2005) (“*Vivendi*”), where the respondent objected to jurisdiction on the grounds that the claimants had failed to comply with Institution Rule 2(f) in their request for arbitration. The tribunal rejected the respondent’s objection and explicitly endorsed Professor Schreuer’s approach.

**b. The claims under the DOG were properly identified in the Request**

281. The Claimant contends that it identified in its Request that the DOG as a legal obligation of KOC would be one of the subjects of the arbitration. Paragraph 2 of the Request referred to the:

*“Power Purchase Agreement and Implementation Agreement, as well as numerous annexed forms [to the PPA and IA] of other agreements to be entered into at various stages of the project.”*  
(emphasis added)

282. It is undisputed that the DOG is one of the “*other agreements*” referred to in paragraph 2 of the Request.
283. The Claimant also submits that it provided a copy of the DOG in the Supplement to the Request which contained a lengthy discussion as to why EDC’s consent to ICSID arbitration in the PPA extended to the ancillary agreements referenced in the PPA and IA. The Supplement to the Request introduced the DOG as follows:

*“[t]he referenced Government Guarantee of Payments was embodied in a Deed of Guarantee entered into on 24 March 1998 (a copy of which is being electronically submitted with this letter and which is being identified as Annex 18 to the Request). In Section 1.1 of the Deed of Guarantee, KOC guarantees payment to Claimant of “any monetary damages that may be assessed or awarded against EDC and that arise out of failure by [EDC] to perform its obligations under the Power Purchase Agreement.”*

284. Therefore, the Claimant maintains that the DOG was properly articulated in the Request and that the Tribunal has jurisdiction over the claims arising out of this agreement.

**c. Alternatively, the Claimant is entitled to bring claims under the DOG under Article 46 of the Convention**

285. Alternatively, the Claimant argues that if the Tribunal were to find that the claims under the DOG were not properly articulated in the Request, the Tribunal may nevertheless admit these claims as additional claims under Article 46 of the Convention.



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286. According to the Claimant, under Article 46 of the Convention, there is no requirement that consent to ICSID arbitration be contained in the same instrument or instruments identified in the request for arbitration. It is sufficient that additional claims “*aris[e] directly out of the subject-matter of the dispute*”. The Claimant contends that, in the instant case, claims under the DOG are inextricably related (1) to the claims against EDC under the PPA, as the latter form the basis for KOC’s liability under the DOG, and (2) to the claims against KOC under the IA, as the DOG was executed and delivered pursuant to the IA.
287. Furthermore, the Claimant contends that Article 46 provides no procedural requirements for an additional claim, and simply directs that the Tribunal “*shall, if requested by a party, determine*” such a claim that otherwise satisfies the requirements. There is no formal requirement that Claimant identify its claims under the DOG as additional claims under Article 46. In any event, were the Tribunal to determine that they are indeed additional claims that meet the requirements of Article 46, it has full authority and power to admit them now.

**2. Respondents’ Position**

288. The Respondents contend that the Claimant’s claims made under the DOG are outside the jurisdiction of the Tribunal and are inadmissible since they were not properly articulated in the Request.

**a. Claimant’s claims are limited to those properly articulated in the Request**

289. According to the Respondents, the jurisdiction *rationae materiae* of an arbitral tribunal is defined at the outset of the proceedings. The Respondents submit that while ancillary claims can be admitted at a later stage under certain conditions to expand the Tribunal’s mission, they cannot expand the Tribunal’s jurisdiction. Therefore, claims arising out of or under agreements not used to define the Parties’ consent are outside the Tribunal’s jurisdiction and must be dismissed. In support of their argument, the Respondents cite the decision of the Annulment Committee in *Helnan International Hotels A/S v Arab Republic of Egypt (ICSID Case No. ARB/05/19) Decision of the ad hoc Committee, 14 June 2010 (“Helnan”)* where it was found that:

*“[t]he question whether an ICSID arbitral Tribunal has exceeded its powers is determined by reference to the agreement of the parties... In the case of an investment treaty claim, this agreement*

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*is constituted by the BIT and by the ICSID Convention ... as well as **by the filing of the investor's claim.***" (emphasis added)

**b. Claimant's claims under the DOG were not properly articulated in the Request and thus fall outside the Tribunal's jurisdiction**

290. The Respondents contend that since the DOG was not listed in the Claimant's Request as an instrument in which the Parties consented to ICSID arbitration, the claims under the DOG are outside the Tribunal's jurisdiction.
291. According to the Respondents, Claimant's claims under the DOG appeared for the first time in the Claimant's Memorial on the Merits filed on 2 July 2010. There was no mention of the DOG in the Request, which was filed on 30 July 2009, nor was the DOG initially annexed to the Request for Arbitration. The only mention of the DOG before 2 July 2010 was in a list of attachments included in the Supplement to the Request dated 21 August 2009 as "*Annex 18 – Deed of Guarantee...*"
292. Therefore, KOC argues, that when the Request and its Supplement were registered on 16 September 2009, the Tribunal's jurisdiction was limited to claims arising under the PPA and the IA. Since disputes under the DOG are not within the scope of the arbitration clauses of either the IA or the PPA, it follows that CPC's claim under the DOG is outside the Tribunal's jurisdiction, and should accordingly be dismissed.

**c. In the alternative, Claimant's claims under the DOG are not admissible under Article 46 of the Convention**

293. The Respondents contend that, in any event, were the Tribunal minded to assume jurisdiction over claims under the DOG, no request for admittance of a new claim under Article 46 of the Convention has been brought by the Claimant, so that its claim is inadmissible.
294. The Respondents maintain that the scope of the Tribunal's jurisdiction as defined by the consent instruments listed in the Request and the scope of the relevant arbitration clauses is immutable and cannot be later varied. However, a party may introduce an ancillary claim, which will expand the mission of the Tribunal but not its jurisdiction, if it conforms with Article 46 of the Convention. In support of their argument, the Respondents cite Professor Schreuer:

*"[t]he inclusion of ancillary claims under Art. 46 does not extend the Centre's jurisdiction. Rather, the existence of jurisdiction over*

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*an ancillary claim is a precondition for the operation of this provision.*” (Emphasis added) (Schreuer *supra* at §46-86)

295. The Respondents submit that, in the instant case, the claims under the DOG are new, as they were not advanced in the Request. As such, they can only be admitted in accordance with Article 46 of the Convention. However, the Claimant has expressly indicated that:

*“the claims set forth in this Memorial ... do not include any incidental or additional claims required to be within the scope of consent of KOC and EDC under Article 46 of the Convention.”* (Memorial on the Merits at §87).

296. Therefore, having not sought to introduce additional claims under Article 46 of the Convention when it had the opportunity to do so, and having instead maintained that the claims under the DOG did not qualify as additional claims, the Claimant should be estopped from doing so now.

**3. Tribunal’s decision**

297. Two questions arise from the Respondents’ objections on this issue. The first question is whether a claimant is required to articulate its precise case, including facts, legal arguments or causes of action, in its request for arbitration filed with the Centre. The second issue is whether the Claimant complied with the ICSID Rules when it filed its Request and Supplement to Request.

298. With regard to the first question, the Tribunal notes that ICSID Rule 2(1)(e) only requires the request for arbitration to:

*“contain information concerning the issues in dispute indicating that there is, between the parties, a legal dispute arising directly out of an investment.”*

299. At no point do the Rules require the request for arbitration to articulate all legal arguments or specific causes of action that the claimant relies upon.

300. In any event, such a matter is not a jurisdictional issue. The Claimant’s compliance or non-compliance with the Rules is a procedural issue that the Tribunal has power to decide. As Professor Schreuer puts it:

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*“[o]missions, errors and other deficiencies in the request for arbitration are not an independent basis for the Tribunal to decline jurisdiction.”* (Schreuer *supra* at §36-36)

301. Accordingly, the Tribunal finds that the Respondents are wrong in arguing that the Claimant’s imprecise Request bars the Tribunal’s jurisdiction over the DOG.
302. With regard to the second question whether the Claimant properly complied with the Rules when filing its Request, the Tribunal notes that even though there is little doubt that the claims under the DOG were clumsily made, two points remain in the Claimant’s favour.
303. First, §2 of the Request as cited above refers to *“numerous annexed forms of other agreements to be entered to at various stages of the project”*. The Claimant submits that it is undisputed that the DOG is one such agreement. The Tribunal is ready to accept this.
304. Secondly, the Claimant actually did provide a copy of the DOG in its Supplement to the Request and included the DOG in the language cited above.
305. It seems clear to the Tribunal, and must have been so to the Respondents, that the Claimant was making a claim under the DOG. After all, this was the agreement by which the State underpinned the liability of EDC and it is doubtful in the extreme whether the project would have advanced at all had that state guarantee not been provided. KOC could not have been under any misapprehension when it agreed to guarantee EDC liabilities to the Claimant, nor would these proceedings have been instituted had the Claimant not been relying on the guarantee.
306. Further, the Tribunal is entitled to have regard to both the unity of the investment and the transaction to determine whether the three agreements were sufficiently interconnected as pointed out by the Claimant in its submission.
307. The Tribunal is satisfied that the Request and Supplement sufficiently referred to the DOG to enable the Tribunal to conclude that it does have jurisdiction over such claims.

**D. DOES THE TRIBUNAL HAVE JURISDICTION TO DECIDE CLAIMS BASED ON CUSTOMARY INTERNATIONAL LAW?****1. Claimant's Position: claims under customary international law are admissible and within the Tribunal's jurisdiction**

308. The Claimant presents three arguments in response to the Respondents' contentions that its claims under customary international law are inadmissible and outside the Tribunal's jurisdiction. First, the Claimant submits that it properly identified its claims in its Request and Supplement to the Request. Secondly, the Claimant asserts that its claims under customary international law are within the Tribunal's jurisdiction since even in the absence of an express reference to international law in a choice of law clause, international law is always available. Thirdly, the Claimant maintains that the scope of the Parties' consent to arbitrate as set out in the arbitration clauses of the IA and PPA is sufficiently broad to cover claims of state responsibility for EDC's repudiation of the PPA.

309. The Claimant contends that it sufficiently identified potential claims of state responsibility in its Request, which stated at paragraph 64(e):

*“Respondents' acts and omissions ... otherwise amount to breaches of duty actionable by Claimant and contravene established **principles of international investment law** ..., for which Claimant is entitled to and claims such remedies and relief as may be just and proper.”* (Emphasis added)

310. Therefore, the Claimant's claims under customary international law were properly identified in the Request and are thus admissible.

311. The Claimant also denies the Respondents' argument that because the PPA, IA and DOG are governed by English law, the adjudication of claims under customary international law is beyond the scope of the Parties' consent to arbitration. The Claimant contends that in the context of ICSID arbitration, commentators have held that even when parties agree that a dispute shall be decided in accordance with a particular national law pursuant to Article 42(1) of the Convention, claims under customary international law may still be pleaded. In support of its argument, the Claimant cites Professor Schreuer:

*“[t]he mandatory rules of international law, which provide a minimum standard of protection for aliens, exist independently of any choice of law made for a specific transaction. They constitute a*

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*framework of public order within which such transactions operate. Their obligatory nature is not open to the disposition of the parties. This assertion is quite different from questions of applicable law under the conflict of laws. International law does not thereby become the law applicable to the contract. The transaction remains governed by the domestic legal system chosen by the parties. However, this choice is checked by the application of a number of mandatory international rules such as the prohibition of denial of justice, the discriminatory taking of property or the arbitrary repudiation of contractual undertakings.” (Schreuer supra at §42-70)*

312. Claimant also supports its argument by citing Broches, who noted that any agreement among the parties to exclude the applicability of international law must be express. (A. Broches, “*Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965, Explanatory Notes and Survey of its Application*” 18 YCA 669, §121 (1993))
313. Therefore, as the Parties have never indicated in the IA, PPA, DOG or otherwise an express desire to exclude claims under customary international law, Claimant contends that its state responsibility claims are properly within the Parties’ scope of consent to arbitration, and thus within the Tribunal’s jurisdiction.
314. With regard to the Respondents’ argument that a claim for expropriation under customary international law is “*a significant incursion on state sovereignty*”, the Claimant submits that whether or not such assertion has merit is clearly outside the scope of the issues that the Tribunal decided it would hear at this stage of the proceedings.
315. The Claimant also submits that the PPA and IA arbitration clauses provide that “*any Dispute*” falls within the Parties’ consent to arbitrate. Therefore, any event that might lead to a dispute arising out of or in connection with those agreements extends the scope of consent to “*any remedies as may be available to it in law and equity.*”
316. Finally, and in the alternative, the Claimant argues that were the Tribunal to determine that Claimant’s state responsibility claims are not within the scope of the dispute as registered, the Tribunal may nevertheless admit these claims as additional claims under Article 46 of the Convention.

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**2. Respondents' Position: claims under customary international law are inadmissible and outside the Tribunal's jurisdiction**

317. The Respondents' contentions on the Claimant's claims made under customary international law are threefold. First, the Respondents contend that such claims are inadmissible as they were not properly articulated in the Request. Secondly, the Respondents submit that under English law those claims fall outside the Tribunal's jurisdiction. Thirdly, the Respondents maintain that a plain reading of the arbitration clauses demonstrates the Parties' consent to exclude claims made under customary international law.

318. The Respondents contend that the Claimant did not properly articulate any claim under customary international law in the Request, in which it merely stated that the acts and omissions of the Respondents:

*“contravene established principles of international investment law and Cambodian law, for which Claimant is entitled to and claims such remedies and relief as may be just and proper.”*

319. The Respondents submit that even if the vague reference in the Request to “*principles of international investment law*” could be construed as a reference to customary international law, it fell far short of an articulation of a claim for breach of a specific principle of customary international law.

320. According to the Respondents, it was only when the Claimant filed its Memorial on the Merits or, rather, the Prayer for Relief, that a claim against Cambodia under principles of customary international law was made. However, such claim had still not been sufficiently articulated either to establish the Arbitral Tribunal's jurisdiction over it or to allow the Respondents to respond to such a claim on the merits.

321. The Respondents argue that even in its Prayer for Relief, the Claimant did not identify a primary rule of international law on which it based its claim. The Claimant merely asked the Tribunal to:

*“hold [Cambodia] liable in respect of EDC's repudiation of, defaults under and/or other breaches of the [PPA] that are attributable to [Cambodia] under the state responsibility doctrine.”*

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322. The Respondents also submit that since the Claimant does not seek leave to bring the claims under customary international law pursuant to Article 46 of the Convention, the Claimant is precluded from amending its claim now. In any event, an application under Article 46 of the Convention must fail as to bring the claims under customary international law would have the effect of extending the Tribunal's jurisdiction, which Article 46 cannot do.
323. The Respondents also contend that even if a claim for expropriation under customary international law could be said to have been sufficiently articulated by the Claimant in its Request, such a claim would not fall within the Tribunal's jurisdiction since the adjudication of claims alleging violations of customary international law is a significant incursion on state sovereignty; that is a fundamental principle of international law. To do so in the present case would go beyond the Parties' consent to arbitration.
324. Indeed, according to the Respondents, the Tribunal's jurisdiction is confined to the Parties' arbitration agreement. Each of the PPA, the IA and the DOG is a contract governed by English law, and an arbitration clause in a contract with a sovereign state cannot be said to confer jurisdiction to determine a claim that the state has violated principles of customary international law.
325. The Respondents maintain that it is one thing for an arbitral tribunal constituted under an arbitration agreement governed by English law to find that claims in tort are admissible in relation to a contractual dispute; however, it is quite another for that tribunal to consider itself competent to decide whether a state has complied with its international law obligations relating to expropriation. In support of their argument, Respondents cite the case *Premium Nafta Products Limited (20th Defendant) and others v Fili Shipping Company Limited (14th Claimant) and others* [2007] UKHL 40 ("**Fiona Trust**"),
326. Finally, the Respondents emphasise that a plain reading of the relevant dispute resolution clauses leads to the inevitable conclusion that a claim for expropriation under customary international law is outside the scope of the Parties' consent. Indeed, the PPA imposes no obligations on Cambodia, but only on EDC, whereas the Claimant nevertheless purports to bring its claims under customary international law, which, by definition, must be against Cambodia. A dispute between the Claimant and KOC as to KOC's international law obligations is not a dispute between EDC and CPC in connection with, or arising out of, the PPA, and hence such a dispute cannot be within the scope of the Tribunal's jurisdiction.



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**3. Tribunal's Decision**

327. The Tribunal finds no basis for the Respondents' first objection to the Claimant's claim based on customary international law. In its Request, the Claimant sufficiently articulated that:

*“Respondents’ acts and omissions ... contravene established principles of international investment law ... for which Claimant is entitled to and claims such remedies and relief as may be just and proper”.*

328. It is true that the Claimant's phrasing did not identify specific breaches on which it planned to base its claims. However, the Claimant made clear that it was seeking to raise claims under customary international law. At the stage of the Request for Arbitration, the Claimant is not required to set out its precise case by identifying the specific rules of customary international law upon which it sought to rely. This can be for a later stage when Parties exchange pleadings or memorials on the merits.

329. Further, the Respondents cannot contend that they were taken by surprise or that they did not understand what the Claimant meant by “*principles of international investment law*”. The body of “*international investment law*” includes the principles of state responsibility. For that matter, the Respondents themselves acknowledged that it was “*probable that the Claimant [wa]s making a claim for expropriation*”. The Claimant's reference was unequivocal. The wording used, combined with the commencement of an ICSID arbitration which is the typical forum where customary international law claims are raised, should have made it clear to the Respondents that the Claimant intended to pursue claims under customary international law.

330. Therefore, the Tribunal finds that the Claimant sufficiently articulated in its Request that it was seeking to frame claims under customary international law.

331. With regard to the second objection raised by the Respondents, the Tribunal is not convinced by the argument. The Respondents submit that the Parties intentionally left customary international law outside of their consent to arbitration when they decided that the agreements were governed by English law. The Respondents also try to interpret *a contrario* the plain wording of the arbitration clauses. In doing so, they state that:

*“‘State responsibility claims’ do not relate to the parties’ inability to agree upon a matter as required under the terms of the PPA”,*

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and that:

*“the parties are more likely to have intended the term ‘remedies’ to refer to remedies available under English law ... than under customary international law.”*

332. The Respondents are wrong in their approach to this issue. First, as it is clearly explained by Professor Schreuer, customary international law exists and may be applied independently of any choice of law (Schreuer *supra*). The Tribunal also shares Mr. Broches’ view that:

*“[i]t is unreasonable to assume that the specification of an applicable national law is intended to or should have [as its] effect” to “exclude any recourse at all to international law”.*  
(Broches *supra*)

333. Secondly, and additionally, the express choice of English law itself has the effect of including (rather than displacing) at least a body of customary international law, since customary international law (i.e. general practices of states followed by them from a sense of legal obligation) constitutes part of the Common law by a well established doctrine of incorporation. When customary international law changes, the Common law also incorporates these changes, save to the extent that such changes conflict with domestic law.
334. Customary international law is inevitably relevant in the context of foreign investment (and ICSID arbitration), given that it comprises a body of norms that establish minimum standards of protection in this field. It is simply unrealistic to assume that the parties to a foreign investment contract such as those in question here would have intended to exclude such inherent protection by simply choosing an applicable national law.
335. Equally, parties can always consent to exclude customary international law from the scope of their dispute resolution clause. However, one would expect this to be done expressly and unequivocally. In the present case, the PPA, IA, DOG do not indicate that the Parties expressly excluded customary international law from the scope of their consent.
336. The Tribunal is also satisfied that the wording of each arbitration clause is itself wide enough to cover claims based on customary international law. The IA arbitration clause, for example, provides:

*“[i]f any dispute or difference arises out of or in connection with this Agreement ... the provisions of this Section 12 shall apply.”*

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337. This broad form of arbitration clause (which appears, albeit with slightly different wording, in each of the agreements) would allow the Parties to articulate claims on the basis of any remedies available in law or equity, including customary international law (as long as these are claims that could be said to arise out of or be in connection with each agreement). The Tribunal is satisfied that the Claimant is entitled to bring these claims in this case under each arbitration clause.
338. Whether or not any of the Claimant's claims under customary international law are actually sustainable as a matter of law or fact under each agreement is, of course, a separate matter for determination at a later stage.

**IX. OPERATIVE ORDER**

339. Accordingly, having carefully considered all the submissions presented to the Tribunal, and having heard Counsel, the Tribunal **DECIDES**, **ORDERS**, **DIRECTS** and **DECLARES**:
- (1) that the Tribunal does not have jurisdiction to consider any claims against EDC on the ground that KOC did not designate EDC as an agency or subdivision of KOC within the meaning of Article 25 of the ICSID Convention;
  - (2) that the Tribunal does have jurisdiction to hear the claims against KOC based on customary international law;
  - (3) that the Tribunal does have jurisdiction to hear the claims against KOC under the IA, PPA (if any) and the DOG;
  - (4) that the Tribunal makes the necessary Order for the continuation of the proceedings pursuant to Arbitration Rule 41(4); and
  - (5) that the Tribunal reserves all questions concerning costs for subsequent determination.

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[signed]

Signed .....

John Beechey  
*Co-Arbitrator*

[signed]

Signed .....

Toby Landau QC  
*Co-Arbitrator*

[signed]

Signed .....

Neil Kaplan CBE QC SBS  
*Presiding Arbitrator*