

# CPC v. KOC

## Tribunal's Ruling – 19/04/2011

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1. By letters of 25 March and 5 April 2011, Claimant submitted an application and request for further relief in respect of the Tribunal's jurisdiction *ratione personae* over EDC. Claimant, *inter alia*, sought an order for specific performance of an alleged obligation on KOC's part to designate EDC to the Centre. Respondent objected by its letters of 31 March and 6 April 2011.
2. On 13 April 2010, the Parties attended a conference call ("Conference Call") with the Tribunal.
3. The Tribunal notes that Claimant had already requested the relief for which it now applies in its counter-memorial dated 12 November 2010 when it asked the Tribunal to:

*"order KOC to fulfill its undertaking to designate EDC to the Centre and/or to notify the Centre of its previous designation of EDC, and declare that EDC has been designated to the Centre by the Kingdom of Cambodia" (Prayer for relief (7), p.152).*

4. However, on 7 December 2010, at the Hong Kong jurisdictional hearing ("Hearing"), Claimant withdrew its request. (D2/p71/l.17-24). When it did so, Claimant sought to reserve its rights in the following terms:

*"[w]e would reserve the right to the extent we have a right. I'm not asserting the Claimant does or doesn't at the moment, to do procedurally whatever we might be able to do to address that matter ... we might add that as an additional claim against the government under article 46 and rule 40(2) and seek provisional measures under article 47 and rule 39. I don't know if that relief is available. I'm just saying it's a hypothetical" (D2/p70/l.18 to p71/l.3).*

5. Even if Claimant formally reserved its rights, it is also clear from the record that Claimant was not sure whether it had any right to make such a request. Further, Claimant could not identify which provision of the ICSID Convention (“Convention”) or ICSID Arbitration Rules (“Rules”) might form the basis of its request.
6. Claimant’s reservation of its rights is enforceable so long as Claimant has a right susceptible to be reserved. This means that there must be a legal mechanism to make such application at this stage of the proceedings.
7. In the abovementioned letters, Claimant set out several grounds for its request. However, during the Conference Call, Claimant made it clear that it no longer based its request on Articles 47, 49(2), 50 or 51 of the Convention.
8. The only ground for Claimant’s request remained Article 46 of the Convention, which provides:

*“the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of consent of the parties and are otherwise within the jurisdiction of the Centre.”*

9. Claimant contends that its claims against KOC for specific performance (1) arise directly out of the subject-matter of the dispute, (2) are within the scope of consent of the parties, and (3) are otherwise within the jurisdiction of the Centre. Claimant further submits that neither the Convention nor the Rules provide a procedural time limit within which Claimant may raise such a claim.
10. The Tribunal finds that Claimant’s request fulfills the requirements of Article 46. During the Conference Call, Respondent recognised that Claimant’s request was an ancillary claim to Claimant’s other claims.
11. Further, the Tribunal acknowledges that no time limit is formally expressed in the Convention with regard to new claims under Article 46. However, according to Rule 40(2):

*“An incidental or additional claim shall be presented not later than in the reply and a counter-claim no later than in the counter-memorial, unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding.”*

12. It is clear that Rule 40(2) leaves the opportunity to Claimant to introduce an additional claim so long as any such claim is presented before the Reply.
13. According to the new timetable agreed by the Parties, Claimant’s Reply is now due on 21 October 2011. Given the fact that Claimant has already presented its request and that its Reply has not been submitted yet, the Tribunal finds that Claimant’s request is timely.
14. The only remaining issue regarding the admissibility of Claimant’s request is the “*abuse of process*” objection raised by Respondent in its letter dated 31 March 2011. Respondent reiterated this argument during the Conference Call.
15. The question whether Claimant’s withdrawal and re-introduction of its request represent an abuse of process is a procedural issue, which, pursuant to Article 44 of the Convention, the Tribunal has discretionary power to decide. Article 44 of the Convention provides:

*“[i]f any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.”*
16. The Tribunal proposes to consider whether Claimant’s request is an abuse of process in light of the circumstances of the case, and more particularly with regard to Claimant’s reasons in bringing this claim at this stage of the proceedings.
17. As the Tribunal understands it, Claimant submits two main reasons as to why Claimant is now seeking the same order in respect of which it had withdrawn its previous application.
18. First, Claimant contends that at the time of the Hearing it felt that “*Tribunal already had a complex set of interrelated and contingent issues to decide ... and [that the Tribunal]*

*preferred Claimant not press for a decision on this specific issue” (Letter 25 March 2011, p.5).*

19. There is no basis for Claimant’s assumption that the Tribunal preferred not to hear Claimant’s request at the Hearing. On the contrary, the Tribunal would have been ready to hear this issue if the Claimant had requested it to do so.

20. However, the Tribunal is ready to accept Claimant’s second argument by which Claimant asserts that the withdrawal of its request was due to the fact that:

*“the parties had not fully briefed the issue in their submissions and the circumstances giving rise to such a claim and the relief sought had not been established” (id.).*

21. Such reason was clearly articulated at the Hearing when Claimant said:

*“I think in fairness to the tribunal, and in fairness to both of the parties, it’s not procedurally ripe, in the sense that we haven’t – neither side has researched or briefed themselves or the tribunal on that issue.” (D2/p.70/l.3-7)*

22. It is correct that Claimant had an opportunity to articulate, as an alternative claim in its submissions on jurisdiction, a claim against Respondent for specific performance to designate EDC to the Centre. Claimant did not submit such alternative claim. However, Claimant’s choice to reserve its right to present this claim at a later stage does not appear to be prejudicial to Respondent.

23. At the time of the Hearing, neither Party had briefed or supported this issue, and neither was ready to do so. Claimant’s withdrawal of its request was thus appropriate. Claimant’s re-submission of its request at this stage of the proceedings is permitted by Article 46 of the Convention and 40(2) of the Rules. Although the Tribunal is concerned about the way in which this matter has evolved, on balance, the Tribunal does not consider that Claimant’s conduct amounts to an abuse of process.

24. An issue also arose as to the nature of the Claimant's request. Claimant introduced its request as a relief invoking Tribunal's jurisdiction *ratione personae* over EDC. Respondent contends that Claimant's request should be considered as an issue on the merits. Whether Claimant's request is a jurisdictional or a merits issue bears significant consequence, so far as the way forward in the proceedings is concerned. If it is a jurisdictional issue, there might be a basis to adjourn the proceedings on the merits until the Parties have fully addressed this issue and the Tribunal has rendered its decision. On the contrary, if Claimant's request is an issue on the merits, the Parties ought to address the matter in merits submissions without a further preliminary decision and further delay.
25. The Tribunal finds that Claimant is wrong in presenting its request as an issue relating to the Tribunal's jurisdiction. Claimant's request for specific performance might have a (future) impact on jurisdiction, beyond the scope of this particular proceeding, but it remains a remedy, along with the claim for damages, for an alleged breach of contract. A claim for breach of contract is an issue on the merits.
26. The Tribunal is satisfied that Claimant's request is a merits issue falling under Article 46 of the Convention. Therefore, it ought to be addressed as part of the merits stage of the proceedings, which need not be adjourned. In furtherance of such finding, the Tribunal requests Claimant to set out in details its case on the alleged breach of the alleged undertaking and to spell out the basis of its claim as well as all reliefs sought in a Pleading appended to its Memorial on Quantum due on 10 May 2011. Respondent shall reply in its Counter-Memorial due on 29 July 2011.
27. For the avoidance of doubt, the inclusion of this additional claim for alleged breach of contract does not mean that EDC is now brought back into this arbitration. The Tribunal has already finally decided that it has no jurisdiction over the claim against EDC and thus EDC is not and cannot be a party to this arbitration.
28. EDC could only be subject to ICSID jurisdiction if (a) the Claimant's additional claim succeeds; (b) an order for specific performance, directing the Respondent to designate EDC to the Centre is granted; (c) and such an order is complied with, and a designation effected. These are matters that will only be clear after the Tribunal has rendered its

Award in this case (and the result therefore cannot impact on this particular proceeding). The jurisdictional issue regarding EDC, therefore, is entirely different to other types of jurisdictional issue (e.g. the definition of “investment”) that might be joined to the merits of a dispute, with putative parties participating in the arbitration in the meantime.

29. The Tribunal is conscious that the Claimant would wish the jurisdictional question regarding EDC to be resolved earlier than the other merits in this case, but given the history of this matter as set out earlier, and the Tribunal’s previous decision on jurisdiction, the Tribunal sees no justification to further disrupt the procedure with a second preliminary issue and, as would necessarily follow from such a course, to lose the existing hearing dates in 2012.
30. The Tribunal must also address a timetable issue raised by the Parties. As the proceedings have been disrupted, the Parties negotiated a new timetable submitted to the Tribunal by Respondent on 1 April 2011. The Parties agreed on all points but one. The remaining issue concerns the date of filing of a request for production of documents by Respondent relating to the merits.
31. During the Conference Call, Respondent suggested that it file such request as soon as possible and that Claimant present its objections (if any) by 29 April 2011. The non-objected documents should then be produced by 13 May 2011. Claimant firmly objected to Respondent’s proposal on the ground that Respondent’s early request for production of documents would cause great practical difficulties in light of Claimant’s ongoing preparation of its Memorial on Quantum due on 10 May 2011.
32. On 15 April 2011, Respondent served on Claimant a 50-page request for production of documents. In its email dated 16 April 2011, Claimant reiterated its concern that addressing such considerable request would disrupt Claimant’s preparation of its Memorial on Quantum. Claimant’s last proposal is to produce un-objected documents and objections (if any) concurrently on 20 May 2011.
33. Timetable issues are always difficult to deal with and a perfect solution is rarely attained. The Tribunal understands Respondent’s argument that the stage of requesting documents

on the merits is to start as soon as possible; this was suitably done when Respondent served its request for production of documents on 15 April 2011. However, Claimant has a close deadline to finalise its Memorial on the Quantum as well as its Pleading on the alleged undertaking and alleged breach of contract. In the Tribunal's view, to require Claimant to address Respondent's request by 13 May 2011 could lead to serious practical difficulties for Claimant. This would most likely result in Claimant's non-compliance with the agreed timetable.

34. The Tribunal is satisfied that Claimant's proposal will best avoid unnecessary disruption of the proceedings without causing significant hardship to Respondent, which Counter-Memorial is now due on 29 July 2011. In order to keep the integrity of the schedule, the Tribunal orders Claimant to produce un-objected documents and to present any objection(s) to Respondent's request for production of documents by 20 May 2011.

35. In conclusion, the Tribunal finds that Claimant's request for further relief is an admissible request on the merits under Article 46 of the Convention. Accordingly, in the exercise of the Tribunal's discretion and in the light of all the matters set out above, the Tribunal thus allows Claimant fully to brief its additional claim in a Pleading appended to its Memorial on Quantum which shall be served by 10 May 2011. The Tribunal further admits the new timetable submitted by the Parties and orders Claimant to respond to Respondent's request for production of documents by 20 May 2011.

Neil Kaplan

For and on behalf of the Tribunal