

**BEFORE THE SUPREME COURT CHAMBER****EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 002/19-09-2007-ECCC-TC/SC ( ) **Party Filing:** The Defence for IENG Sary**Filed to:** The Supreme Court Chamber**Original language:** ENGLISH**Date of document:** 28 January 2013**CLASSIFICATION****Classification of the document  
suggested by the filing party:****PUBLIC****Classification by OCIJ  
or Chamber:****សាធារណៈ/Public****Classification Status:****Review of Interim Classification:****Records Officer Name:****Signature:**


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**IENG SARY'S REPLY TO THE CO-PROSECUTORS' RESPONSE TO HIS APPEAL  
AGAINST THE TRIAL CHAMBER'S DECISION ON DEFENCE REQUESTS  
CONCERNING IRREGULARITIES ALLEGED TO HAVE OCCURRED DURING  
THE JUDICIAL INVESTIGATION (E221, E223, E224, E224/2, E234, E234/2, E241  
AND E241/1)**

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Michael G. KARNAVAS**The Supreme Court Chamber Judges:**Judge KONG Srim  
Judge SOM Sereyvuth  
Judge Agnieszka KLONOWIECKA-MILART  
Judge MONG Monichariya  
Judge Chandra Nihal JAYASINGHE  
Judge YA Narin  
Judge Florence Ndepele Mwachande MUMBA**Co-Prosecutors:**CHEA Leang  
Andrew CAYLEY**All Defence Teams****All Civil Parties**

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), pursuant to Practice Direction 8.4 of the Practice Direction on Filing of Documents Before the ECCC, hereby replies to the Co-Prosecutors’ Response to IENG Sary’s Appeal Against the Trial Chamber’s Decision on Defence Requests Concerning Irregularities Alleged to Have Occurred During the Judicial Investigation (E221, E223, E224, E224/2, E234, E234/2, E241 and E241/1) (“Response”).<sup>1</sup> This Reply is made necessary to address inaccurate and unfounded submissions made by the OCP in the Response.

## I. REPLY

### *Introduction and Procedural History – Response paragraphs 1-2*

1. In paragraphs 1-2, the OCP accurately sets out the procedural history. The OCP limits its Response to admissibility only and asserts that its position on the merits of the Appeal is indicated in its Responses to the Defence’s underlying Requests. By so asserting, the OCP waives its right to file any further response to the substance of the Appeal and should not be permitted to file a new or supplemental Response.

### *Admissibility of the Appeal – Response paragraphs 3-11*

2. In paragraphs 3-5, the OCP asserts that the Appeal is inadmissible because: **a.** it is *prima facie* inadmissible under Rule 104(4)(d); **b.** whether a decision is “under” Rule 35, and therefore implicates Rule 104(4)(d), hinges on the moving party’s claims and/or the basis of the Trial Chamber’s decision, not the effect of the decision; and **c.** the underlying Request must be “characterized at least in part as a request for investigation pursuant to Rule 35”<sup>2</sup> and the Appeal must not present “allegations to which Internal Rule 35 is manifestly inapplicable.”<sup>3</sup> The OCP is incorrect in its application of Supreme Court Chamber jurisprudence. Although neither the Defence’s filings nor the Impugned Decision explicitly refer to Rule 35, the Defence’s submissions and the basis of the Impugned Decision *can* be characterized as relating to a request for investigation pursuant to Rule 35. By conducting unrecorded interviews with at least fifteen witnesses – which were *not* acknowledged in the written records of interview – prior to taking their

<sup>1</sup> Co-Prosecutors’ Response to IENG Sary’s Appeal Against the Trial Chamber’s Decision on Defence Requests Concerning Irregularities Alleged to Have Occurred During the Judicial Investigation (E221, E223, E224, E224/2, E234, E234/2, E241 and E241/1), 21 January 2013, E251/1/2.

<sup>2</sup> *Id.*, para. 4, quoting Decision on IENG Sary’s Appeal Against the Trial Chamber’s Decision on Motions for Disqualification of Judge Silvia Cartwright, 17 April 2012 (“Decision on Motions for Disqualification of Judge Cartwright”), E137/5/1/3, para. 11.

<sup>3</sup> *Id.*, para. 5, quoting Decision on Motions for Disqualification of Judge Cartwright, para. 12.

recorded statements, and by staging at least one interview, the OCIJ investigators engaged in subterfuge and misled the Trial Chamber and the parties as to the accuracy and reliability of the witnesses' evidence.<sup>4</sup> In essence, OCIJ investigators tampered with evidence. This conduct is prohibited under Rule 35(1)(c).<sup>5</sup> The Appeal is not manifestly inadmissible at this stage.

3. In paragraphs 6 and 8, the OCP asserts that the Appeal is inadmissible because "neither an error of fact or law nor an abuse of discretion on the part of the Trial Chamber can, by itself, constitute a knowing and willful interference with the administration of justice."<sup>6</sup> The OCP mischaracterizes the Supreme Court Chamber's ruling as it applies to the Appeal. The Impugned Decision is not limited to a discrete event. The Impugned Decision, in conjunction with the Trial Chamber's 6 September 2012 oral decision restricting the parties' ability to question witnesses on the circumstances of their OCIJ interviews,<sup>7</sup> indicates a pattern of ignoring submissions that raise well-founded concerns about the reliability of OCIJ written records of interview and the witnesses' in-court testimony. By prohibiting any investigation into the OCIJ investigators' practices regarding gathering evidence in Case 002, the Trial Chamber has interfered with the administration of justice within the meaning of Rule 35. This interference is appealable under Rule 104(4)(d).
4. In paragraph 7 and 9, the OCP asserts that, although the Supreme Court Chamber has "refused to apply Rule 35 to the act of rendering a judicial opinion,"<sup>8</sup> the Defence claims that judicial holdings have constituted an interference with the administration of justice

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<sup>4</sup> See, e.g., IENG Sary's Request that the Trial Chamber Seek Clarification From the OCIJ as to the Existence of any Record Relating to the Questioning of Witness Oeun Tan on 8 October 2008, 29 August 2012, E224, paras. 6-7; IENG Sary's Request to Hear Evidence From the Interpreter Concerning Witness Phy Phuon's Second OCIJ Interview Whereby Irregularities Occurred Amounting to Subterfuge, 23 August 2012, E221, para. 15; IENG Sary's Request that the Trial Chamber Seek Clarification From the OCIJ as to the Questioning of Witness Norng Sophang on 17 February 2009 and Summon the OCIJ Investigators to Give Evidence Regarding this Interview, 27 September 2012, E234, paras. 6-7, 10; IENG Sary's Request for the Trial Chamber to Hold a Public Hearing and Take Evidence Concerning the OCIJ's Widespread and Systematic Practice of Conducting Unrecorded Interviews with Witnesses, 2 November 2012, E241, para. 12.

<sup>5</sup> Rule 35(1) states in relevant part: "The ECCC may sanction or refer to the appropriate authorities, any person who knowingly and willfully interferes with the administration of justice, including any person who: ... c) destroys or *otherwise tampers in any way with* any documents, exhibits or other evidence in a case before the ECCC" (emphasis added).

<sup>6</sup> Response, para. 6, *quoting* Decision on Ieng Sary's Appeal Against Trial Chamber's Order Requiring his Presence in Court, 13 January 2012, E130/4/3, p. 2.

<sup>7</sup> See, e.g., Transcript, E1/123.1, 6 September 2012, p. 34-35, 42-44.

<sup>8</sup> Response, para. 7, *quoting* Decision on Motions for Disqualification of Judge Cartwright, para. 14.

under Rule 104(4)(d). The OCP misleads the Supreme Court Chamber by selectively quoting from the Supreme Court Chamber's decision. The remainder of the paragraph from the decision, which addressed a request for investigation into improper *ex parte* conduct by a Trial Chamber Judge, is instructive. The Supreme Court Chamber held that Rule 35 applies to "any person" and that judges are "at least in principle within the jurisdiction of Internal Rule 35, provided that [the] alleged conduct rises to the level of an interference with the administration of justice within the meaning of that Rule."<sup>9</sup> As stated *supra* in paragraph 3, the Impugned Decision, in conjunction with the Trial Chamber's 6 September 2012 oral decision, interferes with the administration of justice. Thus, the Trial Chamber Judges as a whole are within Rule 35's jurisdiction.

5. In paragraph 10, the OCP asserts that the Defence's Rule 21 argument is irrelevant because Rule 21 cannot be utilized to interpret Rule 104(4)(d) contrary to its plain meaning and the Supreme Court Chamber's jurisprudence. The OCP misstates the Defence's position. Rule 104(4)(d) is not being interpreted in a manner contrary to its plain meaning or the Supreme Court Chamber's jurisprudence. As stated *supra* in paragraph 2, the conduct at issue in the underlying Requests and in the Appeal falls within the parameters of Rule 35. The OCP itself has argued against a strict interpretation of Rule 104.<sup>10</sup> Rule 21 should not be construed so narrowly as to sanction the violation of Mr. IENG Sary's fair trial rights.
6. In paragraph 11, the OCP asserts that there is no plausible legal basis to construe the Impugned Decision as a decision on interference with the administration of justice under Rule 35(6). The OCP is incorrect. The Supreme Court Chamber has held that an appeal is admissible under Rule 104(4)(d) when the underlying Request can be characterized at least in part as a request for investigation under Rule 35.<sup>11</sup> Thus, there is no requirement that the Defence explicitly reference Rule 35 in its Requests. Similarly, there is no requirement that the Impugned Decision explicitly reference Rule 35.<sup>12</sup> The Defence sought investigations into and hearings on conduct by OCIJ investigators that falls under Rule 35(1)(c). The Appeal is not manifestly inadmissible.

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<sup>9</sup> Decision on Motions for Disqualification of Judge Cartwright, para. 14.

<sup>10</sup> See Appeal, para. 31.

<sup>11</sup> Decision on Motions for Disqualification of Judge Cartwright, para. 11.

<sup>12</sup> Decision on IENG Sary's Appeal Against the Trial Chamber's Decision on its Senior Legal Officer's Ex Parte Communications, 25 April 2012, E154/1/1/4, para. 13.



*Request for a Rule 38 Warning – Response paragraphs 12-16*

7. In paragraph 12, the OCP asserts that, despite the Supreme Court Chamber's clear and dispositive jurisprudence as to admissibility, the Defence has made the same erroneous interpretation of Rule 104(4)(d) as in past Defence appeals, which is disrespectful to the Supreme Court Chamber's authority and causes an unnecessary expenditure of judicial resources. The OCP's assertion is misplaced. The Appeal concerns conduct that falls under Rule 35, and therefore under Rule 104(4)(d). It is neither disrespectful of the Supreme Court Chamber's authority nor an unnecessary expenditure of judicial resources to file an immediate appeal in this matter. The Defence has a due diligence obligation to represent Mr. IENG Sary's legal interests. The fair trial rights violations raised in the Appeal are exactly the sorts of violations that could be rectified at other international criminal tribunals through immediate appeal.<sup>13</sup>
8. In paragraphs 13 and 14, the OCP asserts that the Defence – on the verge of bad faith – attempts to circumvent the Supreme Court Chamber's prior rulings with "fatuous semantics" by arguing that the submission is not limited to one discrete event, but concerns two events, the Impugned Decision and an in-court ruling, which indicate a pattern of interference. The OCP's assertions are unfounded and inappropriate. The Impugned Decision relates to four separate requests by the Defence<sup>14</sup> and four submissions by the other Defence teams<sup>15</sup> concerning irregularities that occurred during

<sup>13</sup> See Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, Rules 72(B), 73(B); Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, Rules 72(B), 73(B); Statute of the International Criminal Court, Art. 82(1)(d); Rules of Procedure and Evidence for the Special Court for Sierra Leone, Rule 73(B); Rules of Procedure and Evidence for the Special Tribunal for Lebanon, Rules 92(B)(ii), 126(C).

<sup>14</sup> IENG Sary's Request to Hear Evidence from the Interpreter Concerning Witness Phy Phoun's Second OCIJ Interview Whereby Irregularities Occurred Amounting to Subterfuge, 23 August 2012, E221; IENG Sary's Request that the Trial Chamber Seek Clarification from the OCIJ as to the Existence of Any Record Relating to the Questioning of Witness Oeun Tan on 8 October 2008, 29 August 2012, E224; IENG Sary's Request that the Trial Chamber Seek Clarification from the OCIJ as to the Questioning of Witness Norng Sophang on 17 February 2009 and Summon the OCIJ Investigators to Give Evidence Regarding this Interview, 28 September 2012, E234; IENG Sary's Request for the Trial Chamber to Hold a Public Hearing and Take Evidence Concerning the OCIJ's Widespread and Systematic Practice of Conducting Unrecorded Interviews with Witnesses, 5 November 2012, E241.

<sup>15</sup> KHIEU Samphan's Submission in Support of Mr. IENG Sary's Request E221, and Request for the Trial Chamber to Order the Co-Prosecutors to Revise the List of Written Statements They are Seeking to Put Before the Chamber in Lieu of Oral Testimony, 29 August 2012, E223; KHIEU Samphan's Submission in Support of Mr. IENG Sary's Request that the Trial Chamber Seek Clarification from the OCIJ as to the Existence of Any Record Relating to the Questioning of Witness Oeun Tan on 8 October 2008, 10 September 2012, E224/2; NUON Chea's Notice of Joinder to IENG Sary's Request E234, 2 November 2012, E234/2; KHIEU Samphan's Soutien de la "Demande de IENG Sary Visant à ce que le Chamber de Première Instance Tienne une Audience

several OCIJ witness interviews.<sup>16</sup> The Trial Chamber's written and oral decisions indicate a continuing unwillingness to confront those irregularities and to examine the OCIJ investigators' practices. The Defence's interpretation of Rule 104(4)(d) is well-founded and made in good faith.

9. In paragraph 15, the OCP asserts that the Defence is leveling "clearly baseless and insulting accusations at the Trial Chamber" by submitting that the Trial Chamber knowingly and willfully interfered with the administration of justice, and that the Trial Chamber is "ignoring specific allegations," taking a "path of willful blindness" and attempting to "shield itself and give itself plausible deniability." The OCP misstates and misunderstands the Defence's submissions. "Willful blindness" is a legal term of art also referred to as deliberate or contrived ignorance.<sup>17</sup> A person becomes willfully blind when he "does not possess positive knowledge only because he consciously avoided it."<sup>18</sup> The motivations for becoming willfully blind are self-evident: to avoid having to exercise a duty, especially if prescribed by law and where the failure to act in a timely and appropriate manner carries consequences. The concept of willful blindness is well established before the international criminal tribunals, particularly with regard to superior

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Publique pour Examiner la Pratique Répandue et Systématique Suivie par le Bureau des Co-juges d'Instruction et Ayant Consisté a Mener des Entretiens avec des Témoins sans que Ceux-Ci Soient Enregistrés", 16 November 2012, E241/1.

<sup>16</sup> See *supra*, para. 2, indicating that, in at least fifteen instances, OCIJ investigators conducted unrecorded interviews prior to taking the witnesses' recorded written statements, and staged a recorded interview with one witness after conducting an unrecorded interview with him. See, e.g., IENG Sary's Request that the Trial Chamber Seek Clarification From the OCIJ as to the Existence of any Record Relating to the Questioning of Witness Oeun Tan on 8 October 2008, 29 August 2012, E224, paras. 6-7; IENG Sary's Request to Hear Evidence From the Interpreter Concerning Witness Phy Phoun's Second OCIJ Interview Whereby Irregularities Occurred Amounting to Subterfuge, 23 August 2012, E221, para. 15; IENG Sary's Request that the Trial Chamber Seek Clarification From the OCIJ as to the Questioning of Witness Norng Sophang on 17 February 2009 and Summon the OCIJ Investigators to Give Evidence Regarding this Interview, 27 September 2012, E234, paras. 6-7, 10; IENG Sary's Request for the Trial Chamber to Hold a Public Hearing and Take Evidence Concerning the OCIJ's Widespread and Systematic Practice of Conducting Unrecorded Interviews with Witnesses, 2 November 2012, E241, para. 12.

<sup>17</sup> See *U.S. v. Heredia*, 483 F.3d 913, 918 (9<sup>th</sup> Cir. 2007), addressing *mens rea* in the context of a criminal drug possession case and defining a "deliberate action" as one that is "[i]ntentional; pre-meditated; fully considered." *Heredia* further defines willful blindness as knowledge (*Id.* at 919, n. 6; 922, n. 13). In Canada, willful blindness is termed "contrived ignorance." See *Sansregret v. The Queen*, [1985] 1 S.C.R. 570, 584: "[W]ilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth." The United Kingdom also recognizes the concept of willful blindness. See *Hyam v. DPP* [1975] AC 55, in which Lord Hailsham stated: "in the field of guilty knowledge it has long been accepted both for the purposes of criminal and civil law that ... 'a man who deliberately shuts his eyes to the truth will not be heard to say that he did not know it.'"

<sup>18</sup> *U.S. v. Jewell*, 532 F.3d 697, 702-03 (9<sup>th</sup> Cir. 1976).

/ command responsibility.<sup>19</sup> The factual matrix in this instance manifests the correctness of the Defence submission that the Trial Chamber is engaged in tactics that constitute willful blindness. This is best appreciated by the Trial Chamber's refusal to investigate the circumstances of a staged interview. Despite an ECCC interpreter's confirmation that the interview was staged by OCIJ investigators after an unrecorded interview was held,<sup>20</sup> and despite acknowledging that such an interview was "puzzling,"<sup>21</sup> the Trial Chamber warned the Defence for engaging in an investigation in violation of Rule 55, rather than investigating the matter to its fullest (to avoid, at the very least, giving the impression that the Trial Chamber condones such conduct).<sup>22</sup> The Appeal does not contain baseless or insulting accusations. Rather, the Appeal points out facts that, when allowed to breathe openly, yield to the conclusion that the Trial Chamber is attempting to remain willfully blind. The Trial Chamber is ignoring information in its possession that compels a finding that the OCIJ investigators' irregular practices have impacted the reliability of the evidence before the Trial Chamber and, as argued repeatedly,<sup>23</sup> Mr. IENG Sary's right to a fair trial.

<sup>19</sup> See, e.g., *Prosecutor v. Halilović*, IT-01-48-T, Judgement, 16 November 2005, para. 69: "[A] commander is not permitted to remain 'wilfully blind' of the acts of his subordinates"; *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, 16 November 1998, para. 387: "Regarding the mental standard of 'had reason to know', the Trial Chamber takes as its point of departure the principle that a superior is not permitted to remain wilfully blind to the acts of his subordinates. There can be no doubt that a superior who simply ignores information within his actual possession compelling the conclusion that criminal offences are being committed, or are about to be committed, by his subordinates commits a most serious dereliction of duty for which he may be held criminally responsible under the doctrine of superior responsibility"; *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeals Judgement, 20 February 2001, para. 226: "The point here should not be that knowledge may be presumed if a person fails in his *duty* to obtain the relevant information of a crime, but that it may be presumed if he had the *means* to obtain the knowledge but deliberately refrained from doing so" (emphasis in original); *Prosecutor v. Blaškić*, IT-95-14-A, Appeals Judgement, 29 July 2004, para. 406: "The Appeals Chamber emphasizes that responsibility can be imposed for deliberately refraining from finding out but not for negligently failing to find out"; *Prosecutor v. Bagilishema*, ICTR-95-1A-A, Appeals Judgement, 3 July 2002, para. 35: "A military commander, or a civilian superior, may therefore be held responsible if he fails to discharge his duties as a superior either by deliberately failing to perform them or by culpably or wilfully disregarding them"; *Prosecutor v. Sesay et al.*, SCSL-04-15-A, Appeals Judgement, 26 October 2009, para. 855: "Where a commander receives information of the alleged commission of crimes by his subordinates, he may not remain wilfully blind to those reports."

<sup>20</sup> IENG Sary's Request to Hear Evidence From the Interpreter Concerning Witness Phy Phoun's Second OCIJ Interview Whereby Irregularities Occurred Amounting to Subterfuge, 23 August 2012, E221.

<sup>21</sup> Impugned Decision, para. 33.

<sup>22</sup> *Id.*, para. 38.

<sup>23</sup> The four Requests for investigations were based upon Mr. IENG Sary's fundamental fair trial rights to examine the evidence and witnesses against him and to mount a defence. Enjoyment of these rights requires the ability to examine and challenge a witness's credibility and the weight, if any, to be afforded to his evidence. The Impugned Decision, however, deprives Mr. IENG Sary of his right to meaningfully challenge the authenticity, credibility and reliability of testimonial evidence.

10. In paragraph 16, the OCP asserts that the Defence's submission as to the Trial Chamber's interference with the administration of justice, without "a shred of evidence as to any impropriety or interference," abuses the process, tends to bring the proceedings into disrepute and is a "vexatious and contemptuous" claim that warrants a Rule 38 warning. The OCP again misstates and misunderstands the Defence's submissions. This Appeal is not an abuse of process. It is neither frivolous nor unfounded, and it most certainly is not intended to bring the proceedings into disrepute. The Trial Chamber has demonstrated a singular lack of concern for the irregularities in witness interviews and written records of interviews as a result of improper OCIJ investigative practices, and the impact these irregularities may have upon the evidence. The Impugned Decision, in conjunction with the Trial Chamber's 6 September 2012 oral decision limiting examination on OCIJ interviews,<sup>24</sup> is evidence of impropriety and interference. The Defence is duty bound to protect Mr. IENG Sary's fair trial rights by ensuring that the evidence ultimately considered by the Trial Chamber is reliable and accurate. The Defence has attempted to highlight the Trial Chamber's errors and abuse of discretion in misapplying the facts and misinterpreting the law and Rules to achieve a pre-determined result.
11. In sum, the Defence respectfully submits that the Supreme Court Chamber should exercise its preference for the rule of law based on intellectual integrity. The Supreme Court Chamber should ensure that the applicable law and Rules are correctly and faithfully applied by the Trial Chamber.<sup>25</sup> Indeed, the Supreme Court Chamber would be well-served were it to be guided by the sage admonition of the fourth Chief Justice of the United States Supreme Court, Chief Justice John Marshall:

Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the

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<sup>24</sup> See, e.g., Transcript, E1/123.1, 6 September 2012, p. 34-35, 42-44.

<sup>25</sup> The Pre-Trial Chamber International Judges have recognized the importance of strict respect for fair trial rights and the rule of law: "We cannot emphasise enough the importance for a judicial body, such as the Co-Investigating Judges, to strictly respect the right to a fair trial and the procedural rights of individuals involved in the proceedings, which hold a prominent place in any democratic society as a basic guarantee of the rule of law". Considerations of the Pre-Trial Chamber Regarding the Appeal Against Order on the Admissibility of Civil Party Applicant Robert Hamill, Opinion of Judges Lahuis and Downing, 24 October 2011, D11/2/4/4, para. 10. This decision was issued in regard to Case 003 and concerned the need for the OCIJ to provide parties with sufficient information and clarity about its procedures. Its language applies equally to Case 002/01 and the issues raised in the Appeal.




purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law.<sup>26</sup>

Respectfully submitted,

  
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ANG Udom



  
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Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this **28<sup>th</sup>** day of **January, 2013**

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<sup>26</sup> *Osborn v. Bank of the United States*, 22 U.S. 738, 866 (1824).