

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

IC Power Ltd and Kenon Holdings Ltd

v.

Republic of Peru

(ICSID Case No. ARB/19/19)

PROCEDURAL ORDER No. 3

Members of the Tribunal

Prof. Luca G. Radicati di Brozolo, President of the Tribunal
Mr. David R. Haigh, Arbitrator
Mr. Eduardo Siqueiros, Arbitrator

Secretary of the Tribunal

Mr. Marco Tulio Montañés-Rumayor

October 25, 2021

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I. INTRODUCTION

1. This Procedural Order decides on three requests by Claimants relating to two expert reports (jointly the “**Reports**”) filed by Respondent with its Rejoinder on the Merits and Reply on Jurisdiction (“**Rejoinder**”), and specifically:
 - (i) the report titled “*Dispatch assessments in the Peruvian power system*” (“**PSR Report**”) prepared by a consultant to Respondent’s quantum expert, attached as Exhibit RCBM-63 to the second expert report on damages by Ms. Ciupagea and Dr. Moselle from Compass Lexecon (“**CLEX Second Report**”); and
 - (ii) the expert report of Dr. Richard Tabors (“**Tabors Report**”).

II. BACKGROUND

2. Together with their Memorial on the Merits of June 5, 2020 (“**Memorial**”), Claimants submitted an expert report on damages by Berkley Research Group (“**BRG First Report**”). That Report relied on simulations modeling the functioning of the Peruvian electricity market prepared by *SIDEC – Sociedad Integrada de Consultoría* (“**SIDEC Simulations**”) for the purposes of calculating the cash flows that would have been generated by Claimant’s investments in the absence of the measures introduced by Peru that are challenged in the arbitration.
3. On January 22, 2021, Respondent sought and was granted a two-week extension until February 12, 2021 to file the Counter-Memorial on the Merits and Memorial on Jurisdiction (“**Counter-Memorial**”).¹ In the report on damages by Compass Lexecon attached to the Counter-Memorial (“**CLEX First Report**”), Respondent’s experts indicated that they were “*unable to replicate or verify the simulated data used by SIDEC and BRG because BRG have not provided all of the inputs that were used in the simulations*”² and submitted a list of the data and information that they would have needed to be able to reply to the BRG First Report and the SIDEC Simulations.³
4. In the Reply Memorial and Counter-Memorial on Jurisdiction (“**Reply**”), Claimants pointed out that, after receiving the Memorial, Respondent never requested the additional information underlying the SIDEC Simulations. They added that, in any case, that information “*was always available*” to Respondent’s experts, since (i) the data used by SIDEC to feed the model could be downloaded from the website of the Peruvian regulated entity operating the electricity system and

¹ Respondent’s and Claimants’ emails to ICISD of January 22, 2021 and Tribunal’s email of January 23, 2021.

² CLEX First Report, ¶ 6.6.

³ CLEX First Report, Appendix D.

(ii) the minor adjustments to those data made by SIDEC “were adequately explained” in the BRG First Report and accompanying exhibits.⁴

5. In the Reply, Claimants also indicated their concern that Respondent’s declaration in the Counter-Memorial was “an attempt pre-emptively to justify a belated submission of a novel dispatch simulation model” to be filed with the Rejoinder and said that “CLEX could and, if it thought necessary, should have produced with its first report any different dispatch simulation appropriate for its computation of damages”. Claimants therefore reserved their rights to object “to any novel dispatch simulations that Peru or CLEX present (if any) with the forthcoming Rejoinder, as the Claimants and BRG would have been improperly deprived of the opportunity to address any such novel simulations in connection with the written pleadings of the arbitration”.⁵
6. On July 1, 2021, Respondent requested Claimants to produce the data relating to the SIDEC Simulations. Those data were provided by Claimants the following week and were used to prepare the PSR Report.
7. On September 21, 2021, after receiving the Rejoinder, Claimants asked Respondent to produce the data and calculations underlying the PSR Report (“**Requested Documents**”), to be able to rebut to the latter.

III. CLAIMANT’S REQUESTS REGARDING THE REPORTS

8. With respect to the situation described above, Claimant submitted three requests to the Tribunal (together “**Requests**”).
9. On September 27, 2021, the Tribunal received the following two requests from Claimant:⁶
 - (a) That the Tribunal strike from the record the Reports as well as all passages of the Rejoinder referring to either of the Reports (“**Primary Request**”);⁷ and
 - (b) In the alternative, that Claimants be granted the option, to be exercised at their sole discretion, of addressing the Reports by filing a written submission including a further expert report (if deemed necessary) and/or submitting documents, by November 30, 2021; and/or instructing their experts to address and/or provide an analysis of the Reports as part of their presentation to the Tribunal at the hearing for which they should be granted supplementary time (“**Alternative Request**”).⁸

⁴ Reply, ¶¶ 476-479.

⁵ Reply, ¶ 480. See also Claimants’ letter to ICSID of September 24, 2021, p. 3.

⁶ Claimants’ letter to ICSID of September 30, 2021, p. 3.

⁷ Claimants’ letter to ICSID of September 24, 2021, p. 6.

⁸ *Ibid.*, p. 6-7.

10. On October 1, 2021, following Respondent’s refusal to provide the Requested Documents to Claimant voluntarily,⁹ the Tribunal received from Claimant the additional request (“**Additional Request**”) that:
 - (c) Respondent be ordered to provide the Requested Documents to Claimant.
11. In their application for the Primary and Alternative Requests Claimants:
 - (i) illustrated the reasons underlying those Requests;
 - (ii) indicated that Claimants and their experts were not in a position to address the observations and conclusions set out in the PSR Report and those of the CLEX Second Report that relied on the PSR Report, because the latter was not accompanied by the Requested Documents, that they had thus sought from Respondent;
 - (iii) clarified that, accordingly, as to the PSR Report, the Alternative Request was predicated upon “*the assumption that Peru promptly produce[d], during the week of 27 September 2021 the [Requested Documents]*”; and
 - (iv) reserved the right to seek further procedural relief from the Tribunal “*in the event that Peru [was] not forthcoming in providing the [Requested Documents]*”.¹⁰
12. On October 6, 2021, the Tribunal received Respondent’s comments on the Requests (“**Respondent’s Response**”) and granted the Parties the possibility to file a second round of short briefs.¹¹
13. On October 7, 2021, Claimants filed their comments on the Respondent’s Response (the “**Claimants’ Response**”).
14. The following day, Claimants informed the Tribunal of “*a recent development that relates to – but should have no bearing on the outcome of – [the Primary Request]*”.¹² They said that, while conducting inquiries with SIDEC in connection with the PSR Report’s observations, they discovered that SIDEC had provided to Claimants incorrect files to be produced to Respondent in response to the latter’s disclosure request of July 1, 2021 and that thus, Claimants had produced files that do not reflect the SIDEC Simulations relied upon by Claimants’ experts in the BGR First Report (“**Claimants’ Notice of Incorrect Data Production**”). Claimants also indicated that the correct files had been produced to Respondent earlier that day. Claimants explained that neither their counsel nor their expert could have averted the error, since the files can only be viewed and interpreted using proprietary software. Claimants assert that the disclosure of the incorrect files

⁹ Respondent’s email to Claimant of September 28, 2021, Annex B to Claimants’ letter to ICSID of September 30, 2021.

¹⁰ Claimants’ letter to ICSID of September 24, 2021, p. 7.

¹¹ Tribunal’s communication to Parties of October 6, 2021.

¹² Claimants’ letter to ICSID of October 8, 2021, p. 1.

“*should have no bearing*” on the Primary Request which they therefore maintain, while also requesting the Tribunal to direct the Parties to attempt to seek agreement on the further procedural implications, in case the Alternative Request is granted.

15. On October 13, 2021 Respondent submitted its observations on Claimants’ Response, as well as on Claimants’ Notice of Incorrect Data Production (“**Respondent’s Rebuttal**”)¹³.

IV. THE PARTIES’ POSITIONS

A. Claimants

16. By the Primary Request, Claimants ask that the Reports and all passages of the Rejoinder referring to them be struck from the record.¹⁴ By the Alternative Request, they request leave to respond to the Reports in writing by November 30, 2021 and/or by having their experts address the Reports at the hearing.¹⁵
17. For Claimants, the removal of the Reports and of the relevant passages of the Rejoinder is “*the only fair outcome*”, since the relief sought through the Alternative Request “*would create substantial work for Claimants at a time when they are focused on preparing the Rejoinder on Jurisdiction and on their preparations for the [...] hearing*”.¹⁶
18. Both the Primary and the Alternative Requests are grounded on Section 17.1 of Procedural Order No. 1 (“**PO1**”), which requires the Parties to submit with their first substantive submission the evidence on which they wish to rely and prohibits the submission of further evidence, including expert reports, with the second substantive submission, unless “*the relevance of such additional evidence has arisen as a result of the adverse party’s preceding submission*”.¹⁷
19. According to Claimants, the submission of the Reports with the Rejoinder was belated and thus in breach of Section 17.1 of PO1, since the Reports “*contain[] a novel rebuttal not of submissions that*

¹³ Respondent’s letter to ICSID of October 12, 2021.

¹⁴ A list of the references to the PSR Report and the Tabors Report made throughout the Rejoinder and the CLEX Second Report is provided in Annex C to Claimants’ letter to ICSID of September 24, 2021.

¹⁵ Claimant’s letter to ICSID Secretariat of September 24, 2021, p. 7.

¹⁶ *Ibid.*, p. 6.

¹⁷ Procedural Order No. 1 of February 27, 2020, Section 17.1, which reads as follows: “*The Memorial and Counter-Memorial shall be accompanied by the documentary evidence relied upon by the parties, including exhibits and legal authorities. Further documentary evidence relied upon by the parties in rebuttal shall be submitted with the Reply and Rejoinder. These additional documents, including witness statements and expert reports, may be submitted only insofar as the relevance of such additional evidence has arisen as a result of the adverse party’s preceding submission [...]*”

Claimants made in their immediate-prior submission (the Reply) but rather to submissions that Claimants made in their Memorial".¹⁸

20. Claimants maintain that the PSR Report does what PO1 prohibits, since it “*reflects novel dispatch simulations and contains substantial amount of discussion and analysis of [SIDECE Simulations]*”. It thus responds to submissions made by Claimants in the Memorial and not in the Reply.¹⁹
21. Claimants contend that the reason for Respondent’s failure to submit novel dispatch simulations and comments on the SIDECE Simulations with the CLEX First Report is that its expert did not have time to engage a third party to carry out such simulations “*given the compressed time it had to carry out its analysis*”,²⁰ as emerges from Respondent’s correspondence informing them that its experts began working on the case on December 23, 2020, i.e., five weeks before the deadline for the Counter-Memorial.²¹
22. In Claimants’ view, the assertion that Respondent’s experts had insufficient information to comment on the SIDECE Simulations and provide alternative ones, is a “*transparent excuse*”²² since their expert provided “*adequate explanations in its first report to enable the replication of [SIDECE Simulations]*”,²³ by exhibiting “*the output of the dispatch modeling exercise[] carried out by SIDECE [...] together with a detailed description of the inputs to the dispatch model*”.²⁴ In any case, they contend that, if it considered the information provided by Claimant’s expert to be insufficient, Respondent could have asked for the native files underlying the SIDECE Simulations in the eight-month period between the filing of the Memorial and the deadline for the Counter-Memorial.²⁵ Claimants highlight that Respondent provided no explanation for its failure to make that request²⁶ and that, if requested, they would have spontaneously provided the additional information on the SIDECE Simulations, as they did in July 2021, in response to Respondent’s request for voluntary production.²⁷
23. Claimants further contend that they cannot be faulted for not exhibiting the native files of the SIDECE Simulations with the Memorial, “*when Peru itself did not exhibit any of the native files*

¹⁸ Claimants’ letter to ICSID of September 24, 2021, p. 4.

¹⁹ *Ibid.*

²⁰ *Ibid.*, p. 3.

²¹ *Ibid.*, p. 2, fn. 4, referring to the attachment to Respondent’s letter to Claimants of March 9, 2021.

²² Claimants’ letter to ICSID of September 24, 2021, p. 3.

²³ *Ibid.* In particular, Claimants indicate that their first expert report: (i) included as exhibits the output results from the SIDECE Simulations; (ii) explained that the SIDECE Simulations relied on files downloadable from the system operator’s website; and (iii) summarized the assumptions and modifications that were made in building the Simulations.

²⁴ Claimants’ Response, p. 2.

²⁵ Claimants’ letter to ICSID of September 24, 2021, p. 3; see also Claimants’ Response, p. 3.

²⁶ Claimants’ Response, p. 3.

²⁷ Claimants’ letter to ICSID of September 24, 2021, p. 4; see also Claimants’ Response, p. 3.

associated with PSR's dispatch model".²⁸ Claimants disagree that CLEX fully supported its conclusions relying on the PSR Report and argue that Respondent's assertion that it is ready to provide the Requested Documents "*is an admission of its failure*" to provide those Documents earlier.²⁹ Claimants further contend that their failure to submit the native files of the SIDEC Simulations with the Memorial and the Reply is justified because "[e]lectricity dispatch models comprise hundreds of files containing voluminous data that can only be viewed and simulated using proprietary software".³⁰

24. Claimants contest that in the Counter-Memorial Respondent informed them of the flaws of the SIDEC Simulations and of the damages calculations based thereon.³¹ For them, neither the Counter-Memorial nor the CLEX First Report identify any flaws in the SIDEC Simulations, but merely indicate that CLEX was unable to replicate or verify the data used by SIDEC and Claimants' experts.³²
25. As to the Tabors Report, Claimants contend that it too was produced belatedly, since it responds not to novel issues arising out of the Reply but rather "*to Claimants' case as presented in its Memorial*" and thus, should have been submitted with the Counter-Memorial.³³
26. According to Claimants, by that Report Respondent attempts to respond to Claimants' discrediting in the Reply the expert report of Dr. Leyva submitted with the Counter-Memorial. In the Reply, Claimants submitted that Dr. Leyva's firm had prepared another report – contemporaneous to that submitted in this arbitration – which supports Claimants' interpretation of one of the key regulations at issue in these proceedings, thus undermining Dr. Leyva's analysis in this arbitration.³⁴
27. Claimants maintain that the Tabors Report's "*broad scope*" is "*evident on its face*", considering its structure and content³⁵ and highlight that Dr. Tabors refers only "*occasionally*" to the Reply and that in any case those references "*are to statements that were also made in Claimants' Memorial*".³⁶
28. For Claimants, this is apparent from their chart comparing the arguments addressed by Dr. Tabors in his Report with the passages of the Reply cited to by Dr. Tabors and those of the Memorial ("**Appendix 1**")³⁷ and argue that in the Reply Claimants "*summarize[d] [...] arguments made in*

²⁸ Claimants' Response, p. 3, emphasis in the original.

²⁹ *Ibid.*, p. 4.

³⁰ *Ibid.*, p. 3.

³¹ *Ibid.*

³² *Ibid.*

³³ Claimants' letter to ICSID of September 24, 2021, p. 5; see Claimants' Response, p. 1.

³⁴ Claimants' letter to ICSID of September 24, 2021, p. 5, citing the Reply, ¶¶ 149-151.

³⁵ *Ibid.*

³⁶ *Ibid.*; see also fn. 16.

³⁷ Appendix 1 to Claimants' Response.

[the] *first submission in order to put issues and other arguments in context*".³⁸

29. Claimants allege that in the Memorial they "*squarely made*" the argument that the cost apportionment methodology for the secondary and complementary transmission system introduced by Respondent in 2016 (the "**New Methodology**") was arbitrary because it follows a "benefit", rather than a "use", criterion. They therefore reject Respondent's assertion that it is one of the arguments raised for the first time in the Reply that are addressed by the Tabors Report.³⁹
30. Claimants further maintain that the belated submission of the Reports improperly deprived them of the opportunity to rebut them in writing and that the dismissal of the Primary and Alternative Requests would violate their due process rights.⁴⁰
31. Finally, Claimants contend that Respondent's refusal to provide the Requested Documents, upon the production of which the Alternative Request was predicated, "*compounds*" their prejudice,⁴¹ as it "*(i) continues to deprive Claimants and their experts of the ability to analyze and understand the conclusions of the PSR Report and the conclusions of the Second CLEX Report that rely upon it, and (ii) makes Claimants' [Alternative Request] significantly more impractical, in light of the current timetable and the impending hearing*".⁴²

B. Respondent

32. For Respondent, the Primary and Alternative Requests⁴³ are unfounded and defective,⁴⁴ since the submission of the Reports with the Rejoinder was "*timely and entirely appropriate*"⁴⁵ and does not prejudice Claimants. To the contrary, the relief sought by Claimants would seriously prejudice Respondent and violate its due process rights.⁴⁶
33. With respect to the PSR Report, Respondent maintains that its filing with the Rejoinder was due to Claimants' "*refusal*"⁴⁷ to supply the data and information underlying the SIMEC Simulations with the expert reports submitted with the Memorial and the Reply and that Claimants should not be allowed to "*benefit from their own dilatory conduct*".⁴⁸

³⁸ Claimants' Response, p. 2.

³⁹ *Ibid.*

⁴⁰ Claimants' letter to ICSID of September 24, 2021, p. 4. See also p. 6.

⁴¹ Claimants' letter to ICSID of September 30, 2021, p. 3.

⁴² *Ibid.*

⁴³ With respect to the Alternative Request relating to the PSR Report, Respondent considers it has become moot, in light of Claimants' Notice of Incorrect Data Production, see Respondent's Rebuttal, p. 1, 3 and 5.

⁴⁴ Respondent's Response, p. 3.

⁴⁵ *Ibid.*, p. 2.

⁴⁶ *Ibid.*, p. 1. See also Respondent's Rebuttal, p. 1.

⁴⁷ Respondent's Response, p. 6.

⁴⁸ *Ibid.*, p. 5.

34. According to Respondent, the BRG First Report provided the “*outputs*” of the SIDEC Simulations and a “*summary of the inputs*” but not “*the specifications and details of the inputs that could permit one to replicate and investigate*” those Simulations.⁴⁹
35. Respondent disagrees that the SIDEC Simulations and the BRG First Report “*summarized the assumptions and modifications that had been made in building the simulations*” and considers those summaries insufficient to replicate and evaluate the reasonableness of the SIDEC Simulations.⁵⁰ It asserts that, even if it had requested the missing data and documents after receiving the Memorial, “*there is no reason to believe [...] that Claimants would have timely provided the information*” since Claimants consistently resisted providing documents requested by Respondent.⁵¹
36. In addition, it alleges that it did, in fact, “*press*” Claimants to obtain the documents and information underlying the SIDEC Simulations in the Counter-Memorial, when it explicitly indicated that “*without such information, Respondent was unable to replicate and analyze the [SIDEC Simulations]*” and that Claimants failed to produce the requested documents in response to that “*explicit declaration*”.⁵²
37. In Respondent’s view, not even the expert report submitted with the Reply (“**BRG Second Report**”) included the information necessary to adequately comment and replicate the SIDEC Simulations.⁵³
38. Respondent disagrees that Claimants were unable to submit the documents and data underlying the SIDEC Simulations with the BRG First and Second Reports and claims that they could have provided information allowing its consultants to reproduce the SIDEC Simulations “*such as by identifying the precise version of the software that SIDEC used and supplying the details of the modifications that SIDEC had made*” to the publicly available files used by SIDEC.⁵⁴
39. It accordingly argues that the filing of the PSR Report with the Rejoinder was “*neither unusual nor prejudicial to Claimants*” and that, had the information underlying the SIDEC Simulations been included in the Memorial in accordance with Section 18.6 of PO 1, “*Respondent would have been able to include [the PSR Report] with its Counter-Memorial*”.⁵⁵
40. In any case, it contends, Claimants had an opportunity to address Respondent’s analysis and criticisms of the SIDEC Simulations in writing, since Respondent informed them of the “*likely and*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.* p. 5-6.

⁵¹ Respondent’s Rebuttal, p. 3.

⁵² *Ibid.*

⁵³ Respondent’s Response, p. 5-6.

⁵⁴ Respondent’s Rebuttal, p. 3.

⁵⁵ Respondent’s Response, p. 7.

apparent flaws” in the SIDEC Simulations and in the BRG First Report already in the Counter-Memorial, so that Claimants could have addressed those criticisms in the Reply, both by “*providing the necessary underlying data*” and “*preemptively correcting*” the SIDEC Simulations in the areas that Respondent criticized.⁵⁶

41. In support of the rejection of the Primary and Alternative Requests with respect to the PSR Report, Respondent also highlights that the sequence of the parties’ exchanges on the SIDEC Simulations “*is no different than it would have been if Respondent had obtained the information about [the SIDEC Simulations] from Claimants during a document production phase*”. In that situation, Claimants could not have submitted a supplemental expert report or testimonial rebuttal and would have been able to address Respondent’s submissions in the Rejoinder only at the hearing. Accordingly, Claimants are not prejudiced by the filing of the PSR Report with the Rejoinder.⁵⁷
42. With respect to the Tabors Report, Respondent maintains that it is responsive to allegations raised for the first time in the Reply, including arguments submitted in the report of Mr. Espinoza (“**Espinoza Report**”) filed by Claimants with the Reply,⁵⁸ and that thus the filing of the Tabors Report with the Rejoinder is consistent with Section 17.1 of PO1.⁵⁹
43. In Respondent’s view this is evidenced by the fact that “*nearly all*” references in the Tabors Report to Claimants’ arguments are to the Reply. It is not true that even if Dr. Tabors almost exclusively cited to Claimants’ Reply, the arguments to which he responds were already in the Memorial. Even if some statements of the Reply referred to in the Tabors Report “*may echo*” statements of the Memorial, “*other statements [...] were made only for the first time in [the Reply]*”.⁶⁰
44. As an example, Respondent refers to the argument that the New Methodology was arbitrary, because it follows a “benefit” criterion rather than a “use” criterion. Although in the Memorial, Claimants did allege that the New Methodology unfairly burdened them with payment for transmission lines that they did not use and that thus was inconsistent with the “use” criterion, in Respondent’s view, they “*did not go so far*” as to argue that the New Methodology follows a “benefit” criterion as opposed to a “use” criterion, as they did in the Reply.⁶¹

⁵⁶ *Ibid.* See also Respondent’s Rebuttal, p. 4, where Respondent specifies that in the Counter-Memorial it identified the “*flawed assumptions*” in the SIDEC Simulations, even if it could not provide the “*mechanical calculations showing the effect*” of those flaws (emphasis added). In light of Claimants’ Notice of Incorrect Data Production, Respondent considers that this question has become moot.

⁵⁷ Respondent’s Response, p. 7-8.

⁵⁸ *Ibid.*, p. 3.

⁵⁹ *Ibid.* See also Respondent’s Rebuttal, p. 1-2, where Respondent, based on the fact that in their Response, Claimants did not mention the Espinoza Report, concludes that not even Claimants deny the fact that the Tabors Report responds to arguments raised for the first time in the Reply and namely in the Espinoza Report.

⁶⁰ Respondent’s Response, p. 3, emphasis in the original.

⁶¹ *Ibid.*, p. 4 and fn. 12.

45. For Respondent, it is not true that the “benefit” criterion was discussed at § 154 of the Memorial,⁶² since that paragraph consists of a quotation from the witness statement of Mr. Burgos, with no reference to the “benefit” criterion or a related concept.⁶³
46. In Respondent’s view, Claimants allegations are not supported by Appendix 1 which actually confirms that the Tabors Report replies to arguments raised for the first time in the Reply.⁶⁴ It alleges that “*at least 7 of the 26 rows in Claimants’ Appendix refer to passages from [the Reply] that rely on and cite to documents that Claimants submitted for the first time with their Reply, such as the Espinoza Report and the witness statement of Jaime Guerra*”.⁶⁵ Respondent considers Appendix 1 “*misleading*”, since it “*makes it appear as though the passages from the Reply cite to passages in the adjacent column from the Memorial*”, but most of the passages from the Reply do not cite to the Memorial.⁶⁶
47. Respondent further alleges that the arguments of the Reply “*materially expand upon or modify*” those of the Memorial, “*such that Respondent was required to rebut the arguments anew and with additional expert support in its Rejoinder*”.⁶⁷
48. Respondent alleges that the Requests are “*extremely prejudicial*” to it, since, if granted, they would either prevent it from fully presenting its defense to Claimants’ claims, or deprive it of the last word on Claimants’ merits and damages claims, in violation of its due process rights.⁶⁸
49. The Requests are moreover “*abusive*”, since Claimants themselves belatedly submitted a new witness statement (that of Mr. Guerra) as well as a new expert report (the Espinoza Report) with the Reply that are not responsive to the Counter-Memorial. Accordingly, Respondent indicates that insofar as the Tribunal grants the Primary Request, it “*reserves the right to make an application that the Espinoza Report and the Guerra Statement also be stricken from the record*”.⁶⁹
50. Respondent maintains that Claimants’ Note of Incorrect Data Production impacts significantly on the Requests and on the fairness of the proceedings.⁷⁰ As to the Alternative Request, Respondent considers that Claimants’ Note of Incorrect Data Production rendered that Request moot.⁷¹ As to

⁶² Respondent’s Rebuttal, p. 2.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*, p. 2 and fn. 3.

⁶⁶ *Ibid.*, p. 2.

⁶⁷ Respondent’s Response, p. 4.

⁶⁸ Respondent’s Rebuttal, p. 4. See also Respondent’s Response, p. 4 and 9.

⁶⁹ Respondent’s Rebuttal, p. 4.

⁷⁰ *Ibid.*, p. 5.

⁷¹ *Ibid.*, p. 1, 3 and 5.

the Primary Request, Respondent contends that it must be rejected because, “*given Claimants’ acknowledged error, Respondent has not yet had the opportunity to respond in full to Claimants’ damages claims*” and thus, the PSR Report must remain on the record and Respondent must be allowed to update its damage analysis, if necessary. According to Respondent, Claimants’ error will require an “*overhaul*” of the PSR Report, that will likely include new simulations, as well as a “*revision*” of the CLEX Second Report and of the Rejoinder, since Respondent “*will need to essentially redo the damages analysis*” it had presented, “*expending anew time and effort*”.⁷²

51. Accordingly, Respondent indicates that it agrees with Claimants that the Parties be directed to confer on the procedural consequences of Claimants’ mistake and reserves the right to seek “*appropriate relief*” from the Tribunal to remedy the consequences of Claimants’ error.⁷³

V. THE TRIBUNAL’S ANALYSIS

52. The Tribunal is called upon to decide whether the Reports were submitted belatedly with the Rejoinder in breach of Section 17.1 of PO1 and, if so, to determine the appropriate remedy to cure such breach.

53. In light of Claimants’ position that, were the Tribunal to consider the Reports belated, their removal would be “*the only fair outcome*”, while the relief requested by the Alternative Request would create substantial work for Claimants while they are preparing the hearing and that, thus, they request it “*reluctantly*” and only in the alternative,⁷⁴ the Tribunal will first address the Primary Request and will proceed to consider the Alternative Request only if it rejects the Primary Request.

54. As mentioned, in the first instance Claimants request the striking from the record of the Reports and all passages of the Rejoinder and the CLEX Second Report in which either of them is cited, on the grounds that those Reports were submitted belatedly with the Rejoinder in breach of Section 17.1 of PO1,⁷⁵ which provides as follows:

*“The Memorial and Counter-Memorial shall be accompanied by the documentary evidence relied upon by the parties, including exhibits and legal authorities. Further documentary evidence relied upon by the parties in rebuttal shall be submitted with the reply and Rejoinder. These additional documents, including witness statements and experts reports, may be submitted only insofar as the relevance of such additional evidence has arisen as a result of the adverse party’s preceding submission”.*⁷⁶

⁷² *Ibid.*, p. 5.

⁷³ *Ibid.*

⁷⁴ Claimants’ letter to ICSID of September 24, 2021, p. 6-7.

⁷⁵ Claimants’ letters to ICSID of September 24, 2021, p. 6 and of September 30, 2021, p. 3. See also Claimants’ Response, p. 4.

⁷⁶ PO1, Section 17.1.

55. According to Claimants, the Reports respond to arguments raised in the Memorial and thus should have been submitted by Respondent with the Counter-Memorial.
56. Respondent opposes the Primary Request, arguing that the submission of the Reports with the Rejoinder was timely and entirely appropriate, since, on the one hand, Respondent was unable to produce the PSR Report with the Counter-Memorial due to Claimants' failure to provide with the Memorial the information necessary to prepare that Report and, on the other hand, the Tabors Report is responsive to allegations raised by Claimants in the Reply. Respondent also submits that, if granted, the Primary Request will prejudice its due process rights to present a full defense to Claimants' claims.⁷⁷
57. The Tribunal will analyze the Primary Request with respect to the PSR Report and the Tabors Report separately in the following sections.

A. The PSR Report

58. The PSR Report presents electricity dispatch simulations alternative to the SIDEC Simulations on which Claimants and their experts based the damages calculations in the Memorial.
59. Respondent does not dispute this, nor the fact that pursuant to Section 17.1 of PO1 the PSR Report should have been filed with the Counter-Memorial. However, it contends that the delay in filing the Report is attributable exclusively to Claimants' and their experts' failure to provide the data and information underlying the SIDEC Simulations that Respondent and its experts deem essential to comment on those Simulations and prepare alternative ones.⁷⁸
60. This is disputed by Claimants, who maintain that their expert provided "*adequate explanations in its first report to enable the replication of [SIDEC Simulations]*",⁷⁹ by exhibiting "*the output of the dispatch modeling exercise[] carried out by SIDEC [...] together with a detailed description of the inputs to the dispatch model*".⁸⁰
61. In the Tribunal's view, there is no need to assess whether the data and information provided in the Memorial and in the BRG First Report were in fact sufficient to analyze, and respond to, the SIDEC

⁷⁷ Respondent's Response, p. 2. See Respondent's Rebuttal, p. 1, 3.

⁷⁸ Respondent's Response, p. 5-7; Respondent's Rebuttal, p. 3-4.

⁷⁹ *Ibid.* In particular, Claimants indicate that their first expert report: (i) included as exhibits the output results from the SIDEC Simulations; (ii) explained that the SIDEC Simulations relied on files downloadable from the system operator's website; and (iii) summarized the assumptions and modifications that were made in building the Simulations.

⁸⁰ Claimants' Response, p. 2.

Simulations, as alleged by Claimants, or whether key information was missing, as lamented by Respondent.

62. The Tribunal considers that, irrespective of that, insofar as Respondent and its experts considered the information provided by Claimants and their experts insufficient, they should have requested the missing data immediately upon receipt of the Memorial to be able to respond to the SIDEC Simulations in the Counter-Memorial, as requested by Section 17.1 of PO1.
63. It follows that Respondent's emphasis on its and its experts' statements in the Counter-Memorial and CLEX First Report on the incompleteness of the data and information provided by Claimants and their experts in the Memorial⁸¹ is inapposite, since Respondent could and should have requested those data and information *in advance* of the Counter-Memorial. The Tribunal notes that it had eight months to do so.
64. By failing to do so and filing the PSR Report with the Rejoinder, Respondent deprived Claimants of their right to rebut to the PSR Report, in breach of the ordinary sequence of pleadings foreseen by Sections 15 and 17.1 of PO1.
65. Respondent has not provided any explanation for its omission. The Tribunal finds that Respondent's assertion that, had it requested the information earlier, Claimants would have not provided is not persuasive, also considering that, when Respondent requested the data in July 2021, Claimants produced it promptly. In any case, Respondent's contention is undemonstrated.
66. Based on the above, the Tribunal finds that the PSR Report was submitted belatedly with the Rejoinder in breach of Section 17.1 of PO1 and that accordingly it and all passages of the Rejoinder and the CLEX Second Report referring to it⁸² shall be stricken from the record.
67. In light of the above conclusion, the incorrectness of the data produced by Claimants in July 2021 becomes totally irrelevant for the purposes of the Tribunal's decision.
68. The Primary Request is therefore allowed and there is no need to address the Alternative Request with respect to the PSR Report.

B. The Tabors Report

69. Unlike the PSR Report, the Parties do not agree on the scope and content of the Tabors Report. According to Claimants, it "responds *generally to Claimants' case as presented in* [the]

⁸¹ Counter-Memorial, ¶ 328 and CLEX First Report, ¶ 6.6 and Appendix D.

⁸² The passages of the Rejoinder and the CLEX Second Report to be stricken from the record are listed in Annex A attached to this procedural order.

Memorial”;⁸³ conversely, in Respondent’s view, it is a response to arguments raised by Claimants in the Reply and, in particular, to those addressed in the Espinoza Report.⁸⁴

70. The Tribunal agrees with Claimants that almost the entirety of the arguments of the Tabors Report are responsive to those raised in the Memorial and that in the Reply Claimants simply summarized those arguments “*in order to put issues and other arguments in context*”.⁸⁵ In particular, the Tribunal finds that this is so for the arguments addressed in Sections II and III of the Report, discussing the economic principles governing electric power systems in general and the Peruvian system in particular, and the reasonability of the measures adopted by Peru in relation to the secondary frequency regulation service.
71. On the other hand, the Tribunal shares Respondent’s view that it was only in the Reply that Claimants put forward the argument that the New Methodology is arbitrary on the grounds that it is in line with the “benefit” criterion and not with the “use” criterion established by Peruvian law.⁸⁶
72. The Tribunal is not persuaded by Claimants’ allegation that the above argument “*was squarely made*” in the Memorial and finds that the passages thereof to which Claimants refer⁸⁷ do not support their position.
73. In the Tribunal’s view, in the Memorial, Claimants:
 - (a) explained that different economic criteria may be applied to determine the apportionment of costs among generators that use the transmission lines of the Peruvian electricity system (Memorial, ¶ 138);
 - (b) illustrated the difference between the “benefit” criterion and the “use” criterion, clarifying that the use of both criteria is permitted under Peruvian law (Memorial, ¶ 138);
 - (c) explained that various methodologies can be used to implement each criterion (Mem., ¶ 138);
 - (d) listed the methodologies that were adopted in the Peruvian systems before the New Methodology (Memorial, ¶¶ 139-150) and specified that those of 2006 and 2008 were in line with the “use” criterion that had been stabilized by Law 28832 of July 23, 2006 (Memorial, ¶ 141); and
 - (e) argued that the New Methodology is arbitrary since it establishes that all generators pay for all transmissions lines, regardless of whether they used them (Memorial, ¶ 153), with the result of benefitting State-owned generators to the detriment of private generators including Claimants’ investments (Memorial, ¶¶ 155-157).

⁸³ Claimants’ letter to ICSID of September 24, 2021, p. 5. See also Claimants’ Response, p. 1.

⁸⁴ Respondent’s Response, p. 3. See also Respondent’s Rebuttal, p. 1-2.

⁸⁵ Claimants’ Response, p. 2.

⁸⁶ Respondent’s Response, p. 3-4 and fn. 12; Respondent’s Rebuttal, p. 2-3.

⁸⁷ Claimants’ Response, p. 2. See also Appendix 1, lines 17, 18, 20, 24, 25 and 26.

74. Thus, the Tribunal shares Respondent’s position that, in the Memorial, Claimants did not go so far as to argue that the New Methodology is arbitrary since it follows a “benefit” criterion as opposed to the “use” criterion and it is hence in contrast with Law 28832, as they did in the Reply (Reply, ¶¶ 240-242).⁸⁸
75. In light of the above, the Tribunal considers that Section IV of the Tabors Report, discussing the reasonability of the New Methodology (“**Section IV**”), addresses arguments raised by Claimants for the first time in the Reply and was thus correctly submitted with the Rejoinder, in compliance with Section 17.1 of PO1.
76. With respect to Section IV of the Tabors Report, the Primary Request is thus denied. The same applies to Section I, ¶¶ 1-6 (describing Dr. Tabors’s professional experience) and Section V, ¶ 86 (illustrating Dr. Tabors’ conclusions on the reasonability of the New Methodology) (“**Admissible Sections**”).
77. Conversely, the Primary Request is granted with respect to the remaining sections of the Tabors Report (i.e., Section I, ¶ 7, Section II, Section III and Section V, ¶¶ 85 and 87), that shall be thus stricken from the record, together with all passages of the Rejoinder and of the CLEX Second Report referring to those Sections, as specified in Annex A attached to this procedural order.
78. Since the Tribunal has decided to grant the Primary Request partially with respect to the Tabors Report and considering that accordingly Section IV and the Admissible Sections remain on the record, the Tribunal shall consider the Alternative Request, *i.e.*, it shall determine whether Claimants are entitled to rebut, either in writing or benefitting of extra time at the hearing, to Section IV and to the Admissible Sections.
79. The Tribunal finds that since Section IV and the Admissible Sections present arguments responsive to those raised in the Reply, they were correctly submitted with the Rejoinder, in compliance with the sequence of written pleadings envisaged by Section 17.1 of PO1.
80. Therefore, the Tribunal agrees with Respondent that, in accordance with that provision, as well with Section 15 of PO1 and “*standard arbitration practice*”,⁸⁹ Respondent is entitled to the last written word in the Parties’ exchanges of briefs concerning Claimants’ merits and damages claims. The Alternative Request is thus denied with respect to Section IV and the Admissible Sections.

⁸⁸ Respondent’s Response, fn. 12.

⁸⁹ Respondent’s Response, p. 9.

VI. DECISION

81. For the reasons set out above, the Tribunal:

- a. **grants** the Primary Request with respect to the PSR Report and accordingly **strikes** from the record the PSR Report, and all passages of the Rejoinder and of the CLEX Second Report referring to it as indicated in Annex A hereto;
- b. **grants** the Primary Request with respect to Sections I, ¶ 7, II, III and V, ¶¶ 85, 87 of the Tabors Report and accordingly **strikes** from the record those Sections and all passages of the Rejoinder and of the CLEX Second Report referring to them as indicated in Annex A hereto;
- c. **denies** the Alternative Request with respect to Section IV of the Tabors Report and the Admissible Sections; and accordingly
- d. **orders** Respondent to submit an amended version of the Rejoinder and of the CLEX Second Report by **November 1, 2021**.

On behalf of the Tribunal

[signed]

Prof. Luca G. Radicati di Brozolo
President of the Tribunal

ANNEX A

**References to the Reports in the Rejoinder and in CLEX Second Report
to be stricken from the record**

PSR REPORT (Exhibit RCBM-63)	
Document	References
Rejoinder	¶¶ 584-586, 590, 592-593, 612-613
	Tables at ¶¶ 586, 590, 612
	Footnotes 968-976, 987
CLEX Second Report	¶¶ 2.24-2.29, 2.43, 2.45, 2.47, 2.52, 2.72, 2.75, 3.7, 3.64-3.78, 4.3, 4.8, 4.10, 4.12, 4.22, 4.24, 4.26, 4.30, 4.44, 5.3-5.7, 5.14, 5.19-5.20, 5.35, 5.43, 7.1-7.3, 7.5-7.13, 8.4-8.7
	Footnotes 19-21, 25, 35, 44, 109-113, 15, 117-118, 120, 131, 133, 139, 144, 149, 153, 163, 185-186, 194-195, 317
	Appendices D, F, G, I
	Figures 1, 4, 6-10, 19
	Tables 2, 3-5, 7, 8, 16, 18-21, 24-31
	Exhibit RCBM-76

TABORS REPORT	
Document	References
Rejoinder	¶¶ 3, 18, 44, 45, 53, 56, 64, 68, 124, 126, 130, 195, 196, 207, 220
	Footnotes 19, 20, 21, 35, 48, 49, 50, 64, 65, 67, 68, 69, 71, 72, 73, 74, 75, 76, 77, 78, 104, 105, 172, 198, 199, 200, 202, 203, 209, 321, 322, 333, 334, 351
CLEX Second Report	¶ 5.30
	Footnote 224