

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**IC Power Ltd and Kenon Holdings Ltd**

**v.**

**Republic of Peru**

**(ICSID Case No. ARB/19/19)**

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**PROCEDURAL ORDER No. 4**

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***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

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November 15, 2021

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## I. INTRODUCTION

1. In this Procedural Order the Tribunal decides on:
  - (i) Respondent's motion of November 3, 2021 for reconsideration of Procedural Order No. 3 of October 25, 2021 ("PO3") ("**Motion for Reconsideration**")<sup>1</sup>; and
  - (ii) Claimants' application to deny Respondent's request to cross-examine SIDEC at the evidentiary hearing (the "**Hearing**") of November 9, 2021 ("**Application on SIDEC Cross-examination**")<sup>2</sup>.
2. Capitalized terms used in this Order and not otherwise defined have the same meanings as in PO3.

## II. THE MOTION FOR RECONSIDERATION

3. By PO3, the Tribunal excluded from the record the PSR Report and certain portions of the Tabors Report, as well as all passages of the Rejoinder and the CLEX Second Report referring thereto and ordered Respondent to submit an amended version of the Rejoinder and of the CLEX Second Report by November 1, 2021.<sup>3</sup>
4. Having carefully considered the Motion for Reconsideration and Claimants' comments thereon of November 7, 2021,<sup>4</sup> the Tribunal makes the following considerations.
5. At the outset, the Tribunal holds that the power to reconsider and amend procedural orders falls within the inherent discretionary powers foreseen by Article 44 of the ICSID Convention (*Churchill Mining PLC & Planet Mining Ltd v. Republic of Indonesia*, ICSID Case Nos. ARB/12/14 and 12/40, Procedural Order No. 13, November 18, 2014, ¶¶ 19-20).
6. As to the **PSR Report**, the Tribunal notes that Respondent disagrees with the Tribunal's decision of ¶ 81(a) PO 3, which it deems prejudicial and inappropriately severe,<sup>5</sup> but does not dispute the underlying reasoning and premises. In particular, it does not contest that the filing of the PSR Report with the Rejoinder was unjustifiably belated since (*i*) the Report is responsive to arguments raised in the Memorial and not in the Reply;<sup>6</sup> and

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<sup>1</sup> Respondent's letter to ICSID of November 3, 2021.

<sup>2</sup> Claimants' letter to ICSID of November 9, 2021.

<sup>3</sup> PO3, ¶ 81.

<sup>4</sup> Claimants' letter to ICSID of November 7, 2021.

<sup>5</sup> Motion for Reconsideration, p. 2.

<sup>6</sup> PO3, ¶¶ 58-59.

- (ii) Respondent did not justify its failure to promptly ask Claimants for the documents it needed to prepare the PSR Report to be able to submit it timely with the Counter-Memorial.<sup>7</sup>
7. In addition, the Tribunal finds that the alternative remedy proposed in the Motion for Reconsideration<sup>8</sup> implies unworkable amendments to the procedural calendar and risks jeopardizing the efficiency of the proceedings. Furthermore, that remedy does not effectively safeguard Claimants' due process rights since it provides for simultaneous submissions by the Parties' damages experts, thus failing to offer Claimants an effective opportunity to respond to Respondent's damages case based on the PSR Report.
  8. Accordingly, the Tribunal finds there is no basis to reconsider its decision on the PSR Report.
  9. As to the **Tabors Report**, the Tribunal is of the view that two of the three topics mentioned in the Motion for Reconsideration that Respondent says were addressed for the first time in the Reply and thus properly rebutted in the Rejoinder with the support of the Tabors Report (i.e. (i) the characterization of the economic dispatch principle as an operational criterion as opposed to a legal principle<sup>9</sup> and (ii) the reasonability of Claimants' reliance on Technical Note No. 1 to interpret PR-22<sup>10</sup>) were instead already discussed in the Memorial,<sup>11</sup> although in more general terms, as well as addressed in Respondent's Counter-Memorial.<sup>12</sup>
  10. By contrast, based on the explanations provided by Respondent in the Motion for Reconsideration,<sup>13</sup> the Tribunal finds that paragraph 15 of the Tabors Report, which explains the notion of "restriction" or "boundary condition" in a dispatch model, is responsive to arguments that were only developed explicitly in the Reply,<sup>14</sup> although they were probably implicit in the Memorial.<sup>15</sup> On this ground, the Tribunal reverses its decision of ¶ 81(b) PO3 and admits paragraph 15 of the Tabors Report to the record.

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<sup>7</sup> PO3, ¶ 65.

<sup>8</sup> Motion for Reconsideration, pp. 2-3.

<sup>9</sup> Motion for Reconsideration, pp. 3-4.

<sup>10</sup> Motion for Reconsideration, pp. 3-4.

<sup>11</sup> Memorial ¶¶ 44-45, 51-52, 92 ff., 230-233.

<sup>12</sup> Counter-Memorial, ¶¶ 54-55, 106-108.

<sup>13</sup> Motion for Reconsideration, p. 3-4.

<sup>14</sup> Reply, ¶¶ 8, 46, 68-69.

<sup>15</sup> Memorial, ¶ 94.

11. The Tribunal emphasizes that its original decision in ¶ 81(b) PO3 was grounded, *inter alia*, on Respondent’s original responses to Claimants’ Primary Request. These failed to explain how paragraph 15 of the Tabors Report – which contained no reference to the Reply and only provided a generic description of the features and functioning of a dispatch model – was responsive to Claimants’ arguments raised in the Reply. Had that point been properly briefed in Respondent’s earlier submissions, paragraph 15 of the Tabors Report would not have been excluded from the record.
12. Finally, with respect to the request for striking from the record the Espinoza Report and the testimony of Claimants’ fact witness, Mr. Jaime Guerra (“CWS-Guerra”), the Tribunal considers that Respondent waived its right to object to the filing of those documents with the Reply by failing to exercise that right for more than five months after the Reply. Accordingly, the request is denied pursuant to ICSID Arbitration Rule 27.

### **III. THE APPLICATION ON THE SIDEC CROSS-EXAMINATION**

13. The Tribunal is conscious that the SIDEC Simulations were submitted neither as an expert report nor as a witness statement and that thus, technically, would not warrant the cross-examination of SIDEC at the Hearing. In its view, however, in certain circumstances the distinction between documents submitted as exhibits and documents submitted as witness statements or expert reports may be unduly formalistic (and potentially opportunistic) and risk depriving arbitrators of the opportunity to consider evidence that it may consider relevant.
14. In the case at hand, the Tribunal finds that, even if SIDEC’s role was to “*input the assumptions provided by BRG into the dispatch modelling software and to report on the output*”, as argued by Claimants,<sup>16</sup> in principle certain issues and questions material for the outcome of the case might be better addressed and answered with the benefit of SIDEC’s professional expertise. For this reason SIDEC’s cross-examination could be useful.
15. In light of the above, the Application on SIDEC Cross-examination is rejected and Respondent will be allowed to cross-examine SIDEC at the Hearing.

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<sup>16</sup> Application on SIDEC Cross-examination, p. 2.

#### IV. DECISION

16. For the reasons illustrated above, the Tribunal:

- (i) **rejects** the Motion for Reconsideration with respect to the PSR Report, thus confirming its decision of ¶ 81(a) PO3;
- (ii) **grants** the Motion for Reconsideration with respect to paragraph 15 of the Tabors Report, which is therefore admitted to the record; accordingly
- (iii) **orders** Respondent to submit an updated version of the Rejoinder and the CLEX Second Report, in accordance with PO3 and PO4, by **November, 19, 2021**; and
- (iv) **rejects** the Application on SIDEC Cross-examination and thus permits Respondent to cross-examine SIDEC at the Hearing.

On behalf of the Tribunal

[signed]

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