

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Mainstream Renewable Power Ltd and others

v.

Federal Republic of Germany

(ICSID Case No. ARB/21/26)

PROCEDURAL ORDER NO. 4

Members of the Tribunal

Ms. Wendy Miles KC, President of the Tribunal

Mr. Antolín Fernández Antuña, Arbitrator

Dr. Charles Poncet, M.C.L., Arbitrator

Secretary of the Tribunal

Ms. Martina Polasek

9 January 2023

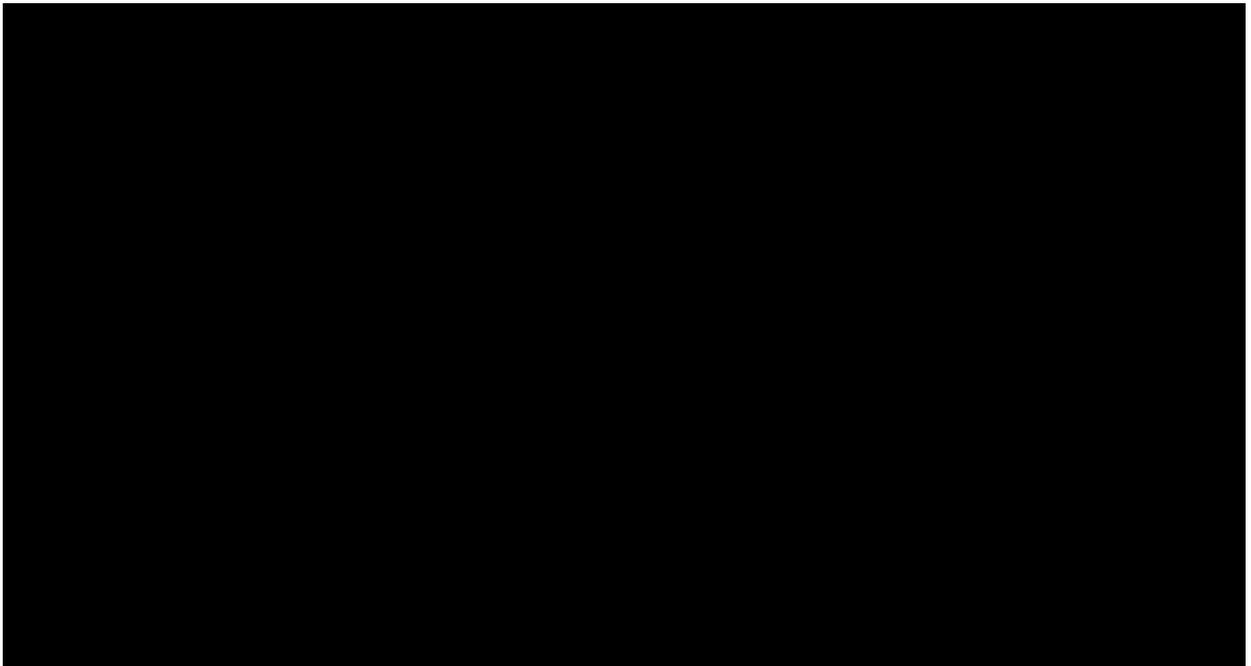
I. INTRODUCTION

1. On 2 December 2022, in accordance with the procedural calendar adopted in Procedural Order No. 1, Annex B, as subsequently amended, the Parties submitted their completed *Stern Schedules* containing document production requests, the responses and replies thereto.
2. This Procedural Order addresses the Parties' document production requests.

II. DOCUMENT PRODUCTION REQUESTS

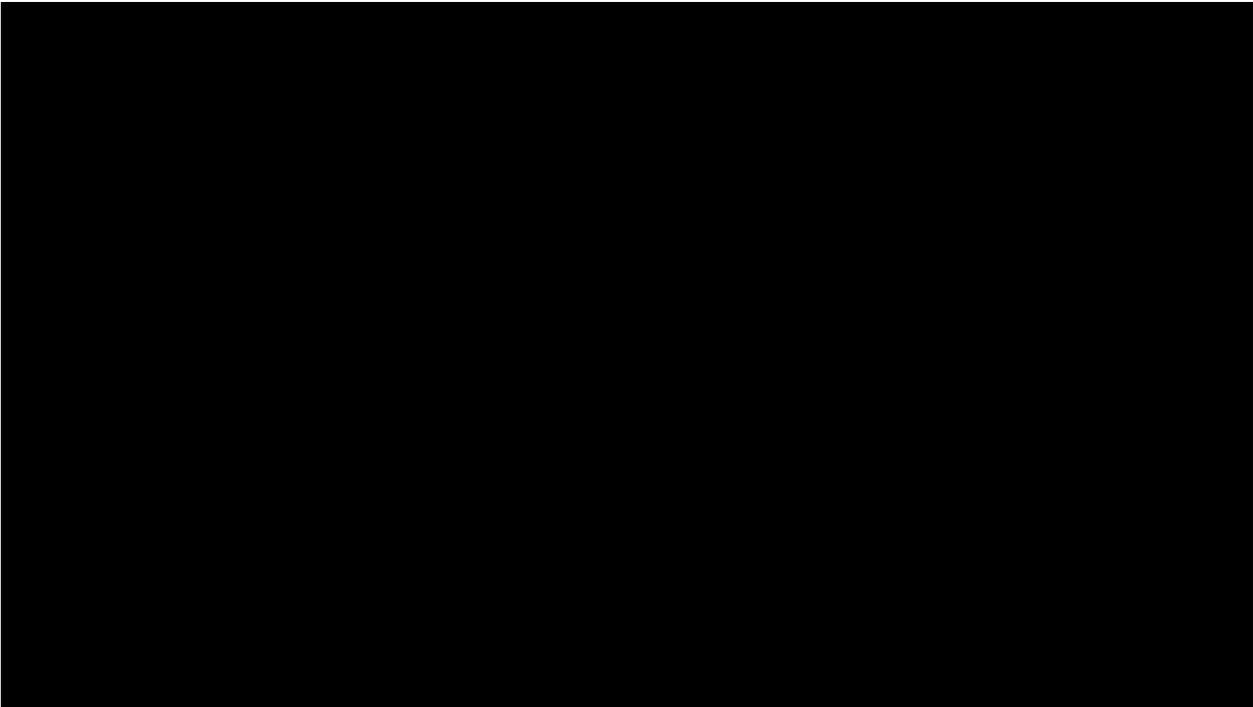
A. THE PARTIES' POSITIONS

3. Each Party's position on the documents requested by the opposing Party and submitted on 2 December 2022 are contained in the *Stern Schedules* at Annex A (the "**Claimants' Request for Documents**") and B (the "**Respondent's Request for Documents**"), attached hereto. These positions do not form part of the Tribunal's orders herein.
4. The Claimants' 23 relatively restrained and modest requests to produce generally fall into six categories including:





5. The Respondent objected to the production of documents in response to all of the requests. However, in respect of 10 of the 23 requests, the Respondent represented that it had conducted a search and that no responsive documents exist. The remaining objections were made on various grounds such that the requests were overly broad, on the grounds of relevance and materiality, and on the basis of political sensitivity, commercial sensitivity and/or privilege.
6. The Respondent's 95 "*extensive*" requests to produce are broad and far reaching. They fall into six categories (and several subcategories, as follows:



7. The Claimants agreed to search for and produce documents in respect of 28 of the Respondent's requests, namely Requests No. 7, 15, 16, 17, 18, 20, 22, 23, 24, 25, 26, 27, 31, 32, 33, 34, 36, 45, 46, 47, 48, 74, 75, 80, 84, 85, 94 and 95. For the remaining requests, the Claimants objected on the grounds of these being overly broad, not sufficiently relevant or material, already in the custody, possession or control of the Respondent or commercially sensitive and/or privileged.

B. ANALYSIS

8. Having carefully considered the Parties' respective submissions within the *Stern Schedules*, the Tribunal's orders and reasons are set out below and in attached Annexes A and B.

The Claimants' Request to Produce

9. The Claimants' requests to produce are less voluminous than those of the Respondent, covering just 23 requests. The Tribunal has granted many, but not all, of the remaining requests.
10. No order is granted for 10 of a total of 23 requests, eight in full (Request Nos. 1, 6, 7, 9, 11, 15, 18 and 19) and two in part (Request Nos. 13 and 22), on the basis of the Respondent's representation that it has conducted a search and no responsive documents exist.
11. One request is denied, namely Request No. 23 requesting correspondence between the Respondent and the European Commission regarding the Application to Intervene is denied on the grounds of relevance and materiality.
12. The remaining 14 requests are partially granted, subject to reduced scope and no order to produce politically sensitive documents, although with a requirement to specify the basis for such assertion in respect of each responsive document.

13. Two of those 14 partially granted orders (Request Nos. 2 and 22) are also subject to confidentiality terms for production of any commercially or technically sensitive documents.
14. Where the Tribunal considers the Claimants' requests to relate to a specific document or to a narrow and specific category of documents that are relevant to the case and material to the outcome, it has ordered production in accordance with the request. Where the Tribunal does not consider a request to be sufficiently narrow and specific, but nevertheless relating to documents that are relevant to the case or material to its outcome, it has sought to narrow the category of documents ordered for production.
15. The Tribunal's orders do not require production of privileged documents, although if the Claimants are to claim privilege they are to do so specifically and by reference to the legal and factual basis for that assertion, in the form of a privilege log.
16. The Tribunal's orders do require production of potentially commercially sensitive materials and the Tribunal invites the Parties to seek to agree terms for production to protect confidentiality, *e.g.*, on a "for counsel eyes only" and/or "expert eyes" basis.
17. As noted above, for 28 of the 95 requests, the Claimants have agreed to search for and produce documents, namely Request Nos. 7, 15, 16, 17, 18, 20, 22, 23, 24, 25, 26, 27, 31, 32, 33, 34, 36, 45, 46, 47, 48, 74, 75, 80, 84, 85, 94 and 95. No orders are made in respect of those requests (including in relation to privilege logs).
18. Similarly, no order to produce is granted for a further five of the remaining 67 requests, on the grounds of duplicity in requests, namely Request Nos. 4, 6, 10, 11 and 12.
19. Almost half of the remaining 62 requests are denied, namely Request Nos. 14, 19, 28, 29, 30, 41, 50, 52, 54, 56, 57, 58, 60, 62, 64, 65, 67, 68, 70, 72, 73, 76, 78, 79, 81, 82, 83, 88 and 92 on various grounds of relevance and materiality, overly broad or privilege. This reflects what the Tribunal considers to have been an overly "*extensive*" approach by the Respondent to the document production exercise. The Tribunal may have granted orders

of narrower scope in respect of some of these, but the broad and often repetitive approach to the requests made this too difficult in many cases.

20. However, the remaining 33 requests are largely partially granted, all subject to reduced scope and (where relevant) no order to produce privileged documents, although with a requirement for a privilege log for seven of the requests (Request Nos. 39, 69, 71, 87, 89, 90 and 93).
21. Six of those 33 partially granted requests (Request Nos. 69, 87, 89, 90, 91 and 93) are also subject to confidentiality terms for production of any commercially or technically sensitive documents.

The Respondents' Request to Produce

22. The Respondent's requests to produce are comparatively more voluminous and indeed "*extensive*", covering 93 requests for specific documents or categories of documents. The Tribunal has granted some, but not all of those requests. Some are phrased too broadly to be possible of narrowing and others are in the form of a request that does not sufficiently explain the relevance or materiality of the entire category of responsive documents sought.
23. Where the Tribunal considers the Respondent's request to relate to a specific document or to a narrow and specific category of documents that are relevant to the case and material to the outcome, it has ordered production in accordance with the request. Where the Tribunal does not consider a request to be sufficiently narrow and specific, but nevertheless relating to documents that are relevant to the case or material to its outcome, where possible (and it was not always possible) it has sought to narrow the category of documents ordered for production.
24. The Tribunal's orders do not require production of documents that are subject to particular political or police sensitivity, although if the Respondent is to claim such privilege or sensitivity it is to do so specifically and by reference to the legal and factual basis for that assertion.

25. For both sides, as to proportionality of process, the IBA Rules require a reasonable search and a process that is efficient and economical. The Tribunal does not propose to make orders to produce in respect of either Party that are beyond what is reasonably economical.
26. Accordingly, the requests that are granted are subject to limitations as follow:
- a. the Parties are required to make a reasonable search only for documents within their possession, custody or control (which includes its agencies, officers, employees and agents); and
 - b. neither Party is required to procure any search for or production documents outside its possession, custody or control.
27. If either Party seeks to assert privilege in respect of any documents that are responsive to the Tribunal's orders, that Party shall produce a privilege log.
28. Finally, in order to ensure that the document production process is efficient, economic and fair, both Parties are required to conduct reasonable and proportionate searches in the implementation of the Tribunal's orders and are to provide a brief summary of the scope and nature of its searches at the same time as production of any additional responsive documents.
29. At this stage of the proceeding, the Tribunal is only in a position to assess the *prima facie* relevance and materiality of the documents requested, having regard to the factual allegations the Parties have made to date. This *prima facie* assessment does not preclude a different assessment at a later point of the arbitration, with the benefit of the entire evidentiary record.

III. ORDER

30. For the reasons set out above and further and specifically in the *Stern Schedules* set forth as Annexes A and B, attached, the Tribunal directs and orders as follows:

Procedural Order No. 4

- a. the Tribunal's decisions on the Claimants' document production requests are set out herein and in the *Stern Schedule* attached hereto as Annex A;
- b. the Tribunal's decisions on the Respondents' document production requests are set out herein and in the *Stern Schedule* attached hereto as Annex B;
- c. in accordance with the timeline set out in Annex B of Procedural Order No. 1, as subsequently amended, each Party shall produce the documents of which production is ordered to the requesting Party **by 27 January 2023**; and
- d. in addition, each Party shall produce any privilege logs and responses in relation to sensitivity alongside their respective summaries as to the nature and scope of the reasonable search process conducted also **by 27 January 2023**.

On behalf of the Tribunal,

[signed]

Ms. Wendy Miles KC
President of the Tribunal
Date: 9 January 2023