

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (“ICSID”)**

**CASE NO. ARB/19/19**

in the arbitration

**IC Power Ltd and Kenon Holdings Ltd.**

– Claimants –

v.

**Republic of Peru**

– Respondent –

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**Decision on the Requests for Rectification and Clarification**

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***Members of the Tribunal***

Professor Luca G. Radicati di Brozolo, President

Mr. David R. Haigh KC, Arbitrator

Mr. Eduardo Siqueiros T., Arbitrator

***Assistant to the Tribunal***

Mr. Fabio Giuseppe Santacroce

***Secretary of the Tribunal***

Mr. Marco Tulio Montañés-Rumayor

May 3, 2024

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## I. INTRODUCTION

1. In this decision, the Tribunal decides on:

- (i) Claimants' request of November 10, 2023 ("**C-Request**") for rectification and/or supplementary decision in relation to the Tribunal's award dated October 3, 2023 (the "**Award**"), and
- (ii) Respondent's request of November 17, 2023 for rectification of the Award ("**R-Rectification Request**") and its request of December 6, 2023 for clarification of the Award ("**R-Clarification Request**").

2. Capitalized terms not otherwise defined have the same meaning as in the Award.

## II. PROCEDURAL BACKGROUND

3. On October 3, 2023, the Tribunal rendered the Award, ruling as follows:

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

- (i) **Declares** that the Tribunal has jurisdiction over the SFR Service Claim and the New Methodology Claim;
- (ii) **Declares** that Respondent breached Article 10.5 of the Treaty by issuing Resolution No. 141;
- (iii) **Declares** that Respondent has not breached Article 10.5 of the Treaty by issuing Resolution No. 164;
- (iv) **Orders** that Respondent pay Claimants US\$ 110.7 million as compensation for the damages caused by the issuance of Resolution No. 141 in breach of the Treaty, plus pre-award interest at a rate equal to Peru's CoD from the Valuation Date to the date of this Award;
- (v) **Orders** that Respondent pay Claimants post-award interest at a rate equal to Peru's CoD at the date of this Award from the date of the Award to the date of payment;
- (vi) **Decides** that Peru shall bear its own arbitration costs and pay to Claimants US\$ 4,931,993.58 in respect of Claimants' arbitration costs and US\$ 640,684.23 in respect of the costs of the Tribunal and of ICSID;
- (vii) **Rejects** all the Parties' other claims and defenses.

4. On November 10, 2023, Claimants submitted the C-Request under Article 49(2) of the ICSID Convention and ICSID Rule 49, seeking a rectification and/or supplementary decision in connection with the Tribunal's decision on the pre- and post-award interest payable on the amount of damages awarded by the Tribunal set forth in points (iv) and (v) of the dispositive of the Award, as well as an order that Respondent pay all costs and expenses of the proceedings concerning the C-Request.

5. On November 17, 2023, Respondent submitted the R-Rectification Request under Article 49(2) of the ICSID Convention and ICSID Rule 49, seeking a rectification of the Tribunal's decision on the Tribunal's and ICSID's fees and costs, as well as an order that Claimants pay Respondent's costs and fees with respect to the R-Rectification Request.
6. On December 6, 2023, Respondent submitted its observations on the C-Request ("**R-Observations**"), requesting the Tribunal to (i) reject the C-Request, (ii) "*clarify*" ¶¶ 606 and 624(v) of the Award (the "**R-Clarification Request**"), and (iii) order that Claimants pay all Respondent's costs and fees relating to the C-Request.
7. By a letter of December 7, 2023, Claimants informed the Tribunal that they do not object to the R-Rectification Request, except with respect to the request that Claimants reimburse Respondent's fees and costs. Claimants also sought leave to respond to the R-Observations, which the Tribunal granted.
8. On December 13, 2023, Claimants submitted their reply to the R-Observations ("**C-Reply**"), reiterating their requests and objecting to the R-Clarification Request.
9. On December 13, 2023, Respondent sought leave to respond to the C-Reply, which the Tribunal granted.
10. Respondent submitted its response ("**R-Response**") on December 20, 2023.
11. On February 5, 2024, the Parties filed their submissions on costs ("**C-Statement of Costs**" and "**R-Statement of Costs**").
12. On February 11, 2024, Respondent requested that the Tribunal: (i) strike from the record the portion of C-Statement of Costs containing arguments on the allocation of costs; or, alternatively, (ii) allow Respondent to submit its own arguments ("**R-Cost Statements Requests**"). On February 19, 2024, Claimants replied that the Tribunal should reject R-Cost Statements Requests and award them additional US\$ 4,000.00 for the legal fees incurred in preparing their reply. On February 28, 2024, Respondent reiterated the requests filed with R-Cost Statements Requests.
13. On March 5, 2024, the Tribunal granted Respondent leave to file an updated submission on costs with arguments on the allocation of costs, which Respondent submitted on March 8, 2024 ("**R-Updated Statement of Costs**").
14. On March 14, 2024, the Tribunal declared the proceedings closed.

### III. THE C-REQUEST AND THE R-CLARIFICATION REQUEST

15. By the C-Request, Claimants request that the Tribunal modify ¶ 624, points (iv) and (v), pursuant to Article 49(2) of the ICSID Convention by including the wording indicated in italics between brackets:

(iv) **Orders** that Respondent pay Claimants US\$110.7 million as compensation for the damages caused by the issuance of Resolution No. 141 in breach of the Treaty, plus pre-award interest at a rate equal to Peru's CoD [*"at the date of this Award"*] [*"based upon the sum of the one-month average yield of US Treasury bonds with a five-year maturity and the country risk premium for Peru determined by Professor Damodaran most recently published as of the date of this Award,"*] from the Valuation Date to the date of this Award [*" , compounded annually"*];

(v) **Orders** that Respondent pay Claimants post-award interest at a rate equal to Peru's CoD at the date of this Award [*"based upon the sum of the one-month average yield of US Treasury bonds with a five-year maturity and the country risk premium for Peru determined by Professor Damodaran most recently published as of the date of this Award,"*] from the date of the Award to the date of payment [*" , compounded annually"*].

16. Respondent objects to the C-Request and, by the R-Clarification Request, requests that the Tribunal delete the words "*at the date of this Award*" in ¶¶ 606 and 624(v) as follows:

606. In conclusion, the Tribunal finds that Claimants are entitled to pre and post award interest on their damages at a rate equal to Peru's CoD ~~at the date of this Award~~.

624. For the reasons set out above, the Tribunal: [...] (v) Orders that Respondent pay Claimants post-award interest at a rate equal to Peru's CoD ~~at the date of this Award~~ from the date of the Award to the date of payment.

17. In the following analysis of the Parties' requests, the Tribunal will treat Claimant's request to add "*at the date of this Award*" to ¶ 624(iv) ("**C-Request 1**") and Respondent's R-Clarification Request together, as they both turn on the interpretation of the Tribunal's decision on the relevant date for calculating the applicable interest rate, i.e. Peru's cost of debt ("**CoD**").

#### III.A The request to add "*at the date of this Award*" to ¶ 624(iv) (C-Request 1)

##### III.A.1 Claimants' position

18. Claimants submit that the Tribunal made a clerical error within the meaning of Article 49(2) of the ICSID Convention by omitting to specify in the dispositive part of the Award the relevant date for calculating Peru's CoD for the purpose of determining pre-award interest. Accordingly, they request that the Tribunal rectify that error by adding "*at the date of this Award*" after the word "*CoD*" at ¶ 624(iv) of the Award.<sup>1</sup>

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<sup>1</sup> C-Request, ¶¶ 14-17; C-Reply, ¶¶ 5-7.

19. Claimants argue that there can be no doubt that the Tribunal decided that Peru's CoD must be calculated at the date of the Award. In support of that proposition, they emphasize that ¶ 606 of the Award states unambiguously that "*Claimants are entitled to pre and post award interest on their damages at a rate equal to Peru's CoD **at the date of this Award***" (emphasis added). They add that, in light of the Tribunal's decision that "*the same interest rate applicable to pre-award interest should also apply to post-award interest*"<sup>2</sup> and that Respondent "*pay Claimants post-award interest at a rate equal to Peru's CoD at the date of this Award*",<sup>3</sup> it is obvious that Peru's CoD must be calculated at the date of the Award also for the purposes of ¶ 624(v).
20. Claimants deny that there is an inconsistency between ¶¶ 606 and 624(v) and ¶¶ 603, 605 and 624(iv) of the Award. In particular, they maintain that it would be no inconsistency if the Award endorsed Respondent's experts' methodology for the calculation of interest (which referred to the Valuation Date as the relevant date for calculating Peru's CoD) while at the same time requiring that Peru's CoD be calculated at the date of the Award. According to Claimants, while the Tribunal agreed with Respondent's experts that the relevant interest rate is Peru's CoD (as opposed to Kallpa's WACC), it deliberately departed from Respondent's experts' approach when it came to determining the relevant date for calculating such interest. Thus, according to Claimants, Respondent is attempting "*to manufacture an inconsistency in the Tribunal's findings that does not exist*".<sup>4</sup>
21. Claimants also contest Respondent's assertion that using Peru's CoD at the date of the Award as the applicable interest rate would be contrary to the purpose of interest (i.e. "*to compensate Claimants for the fact that they did not receive a return on their investment as of the date of the breach on November 30, 2017 (as found by the Tribunal)*").<sup>5</sup> They note that the Tribunal did not anchor interest to the date of the breach, which would in any case be June 13, 2016 (when Resolution No. 141 was issued) rather than the Valuation Date.<sup>6</sup> According to Claimants, with its award on interest, the Tribunal compensated Claimants for the opportunity cost of the foregone cashflows. Since the Tribunal implicitly endorsed the "*forced loan*" theory, it logically adopted the rate in force when it became clear that there had been a loan, i.e. the date of the Award declaring Peru's breach and its obligation to pay damages. By contrast, using Peru's CoD at the Valuation Date would undercompensate Claimants for the credit risk to which they were and continue to be exposed.<sup>7</sup>

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<sup>2</sup> Award, ¶ 605.

<sup>3</sup> Award, ¶ 624(v).

<sup>4</sup> C-Reply, ¶¶ 11-13.

<sup>5</sup> R-Observations, ¶ 21.

<sup>6</sup> C-Reply, ¶ 14.

<sup>7</sup> C-Reply, ¶ 15.

22. For the same reasons, Claimants object to Respondent's request that ¶¶ 606 and 624(v) be amended by the deletion of "at the date of this Award".<sup>8</sup> In their view, the requested amendment amounts to an impermissible material change to the substance of the Tribunal's decision<sup>9</sup> and would result in there being no guidance in the Award as to the date on which Peru's CoD should be calculated.<sup>10</sup> Moreover, according to Claimants, the R-Clarification Request is belated, as it was only submitted with the R-Observations, thus after the 45-day deadline from the Award contemplated by Article 49(2) of the ICSID Convention for the submission of rectification requests.<sup>11</sup>

### III.A.2 Respondent's position

23. Respondent objects to C-Request 1 arguing that the Tribunal did not make a clerical error in omitting to specify at ¶ 624(iv) of the Award that Peru's CoD must be calculated at the date of the Award.

24. According to Respondent, the C-Request 1 and the "Tribunal's statements in paragraphs ¶¶ 606 and 624(v)" on which Claimants rely are inconsistent with: (i) ¶ 603 of the Award,<sup>12</sup> which implicitly held that Peru's CoD must be calculated at the Valuation Date by endorsing Respondent's experts' approach to calculating pre-award interest<sup>13</sup> and by finding that damages crystallized on that Date;<sup>14</sup> (ii) ¶ 605 of the Award, which held that the pre-award interest rate must apply also to post-award interest, and not *vice versa*;<sup>15</sup> and (iii) ¶ 624(iv) of the Award, which awarded pre-award interest "at a rate equal to Peru's CoD from the Valuation Date to the date of this Award".<sup>16</sup>

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<sup>8</sup> R-Observations, ¶ 20.

<sup>9</sup> C-Reply, ¶¶ 8, 10.

<sup>10</sup> C-Reply, ¶ 9.

<sup>11</sup> C-Reply, ¶¶ 17-18 and Annex A.

<sup>12</sup> R-Observations, ¶¶ 14-19; R-Response, ¶¶ 7, 19.

<sup>13</sup> RER-CLEX I, ¶ 11.10; RER-CLEX II, ¶ 8.1.

<sup>14</sup> "The Tribunal finds Compass Lexecon's recourse to Peru's CoD to calculate pre-award interest more reasonable than BRG's use of Kallpa's WACC. [...] the Tribunal is of the view that the most appropriate rate to calculate pre-award interest is Peru's CoD, because it reflects the risks that Claimants— as investors and creditors of Respondent — bore during the time they have been deprived of the US\$ 110.7 million of damages owed to them by Respondent for its Treaty breach. In other words, during that period, between the Valuation Date (when damages crystallized) and the date of the Award, Claimants were exposed only to the risk of not obtaining the damages they are entitled to pursuant to the SFR Service Claim due to Peru's default, a risk reflected in Peru's CoD. By contrast, the use of Kallpa GSA's WACC advocated by Claimants is unconvincing, because it does not reflect the risks faced by Claimants for having to wait to obtain the cash flows of which they were deprived. [...]"

<sup>15</sup> According to Respondent, by reading that paragraph as to state that the same approach for post-award interest should apply to pre-award interest (C-Reply, ¶ 6), Claimants distort its meaning in an attempt to obtain a windfall profit which the Tribunal never granted (R-Response, ¶¶ 13-14).

<sup>16</sup> R-Observations, ¶ 20; R-Response, ¶¶ 11-14.

25. In response to Claimants' argument that the Tribunal did not endorse Respondent's experts' approach as to the relevant date for calculating Peru's CoD, Respondent notes that, since the Tribunal's endorsement of the experts' approach was unqualified, it is reasonable to infer that the Tribunal adopted Respondent's experts' entire methodology in relation to the calculation of interest. Further, Claimants' argument is contradicted by (i) the order on pre-award interest in ¶ 624(iv) of the Award, and (ii) the Tribunal's determination that damages crystallized on the Valuation Date.<sup>17</sup>
26. Respondent also maintains that applying the interest rate as of the date of the Award would unjustly inflate the amount Respondent is to pay to Claimants, due to the significant rise in interest rates between 2017 (the Valuation Date) and 2023 (the date of the Award). This would be contrary to the purpose of the award of interest, which is to compensate Claimants for not having received a return on their investment as from the date of breach on November 30, 2017.<sup>18</sup>
27. In light of the inconsistency between ¶¶ 606 and 624(v) of the Award, on the one hand, and ¶¶ 603, 605 and 624(iv) of the Award, on the other, by its R-Clarification Request,<sup>19</sup> Respondent requests that the Tribunal delete the words "*at the date of this Award*" from ¶¶ 606 and 624(v).
28. Respondent rejects Claimants' submission that the R-Clarification Request entails an impermissible change of substantive findings by the Tribunal, as it would merely eliminate an inconsistency in the Tribunal's statements. Instead, upholding C-Request 1 would lead to the application of a pre- and post-award interest calculation methodology at odds with that expressly endorsed by the Tribunal.<sup>20</sup>
29. Respondent likewise denies Claimants' allegation that upholding the R-Clarification Request would leave open the question of the date at which Peru's CoD should be assessed. In fact, since the Tribunal expressly endorsed the calculation methodology of Respondent's experts, upholding the R-Clarification Request would lead to the interest rate being calculated based on Peru's CoD at the Valuation Date, i.e. November 30, 2017.<sup>21</sup>

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<sup>17</sup> R-Response, ¶¶ 16-19.

<sup>18</sup> R-Observations, ¶ 21; R-Response, ¶¶ 7, 20.

<sup>19</sup> R-Observations, ¶ 20.

<sup>20</sup> R-Response, ¶ 12.

<sup>21</sup> R-Response, ¶ 15.

30. Finally, as to Claimants' submission that the R-Clarification Request is belated, Respondent argues that such Request should not be considered a request for rectification of the Award under Article 49 of the ICSID Convention, but rather a suggestion for a "way forward for the benefit of clarity"<sup>22</sup> or, alternatively, a request for interpretation under Article 50 of the ICSID Convention, for which there is no time limit.<sup>23</sup>

### III.A.3 *The Tribunal's decision*

31. Both the C-Request 1 and the R-Clarification Request concern the interpretation of the Tribunal's decision on the date for the determination of Peru's CoD on the basis of which to establish the applicable pre- and post-award interest rate (Award, ¶¶ 602-606 and 624, points (iv) and (v)).

32. Relying on ¶¶ 606<sup>24</sup> and 624(v)<sup>25</sup> of the Award, Claimants argue that the Tribunal intended to award pre- and post- award interest at a rate corresponding to Peru's CoD calculated at the time of the Award.<sup>26</sup> By contrast, Respondent relies on ¶¶ 603,<sup>27</sup> 624(iv)<sup>28</sup> and 605 of the Award<sup>29</sup> to argue that Peru's CoD should be calculated at the Valuation Date.

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<sup>22</sup> R-Response, ¶ 22, relying on *Antin v. Spain*, ICSID Case No. ARB/13/31, Decision on Rectification of the Award, January 29, 2019, ¶¶ 18, 32.

<sup>23</sup> R-Response, ¶¶ 23-24, relying on S. W. Schill et al. (eds.), *Schreuer's Commentary on the ICSID Convention*, 2022, p. 1187-5, 1193-28.

<sup>24</sup> "In conclusion, the Tribunal finds that Claimants are entitled to pre and post award interest on their damages at a rate equal to Peru's CoD at the date of this Award".

<sup>25</sup> "Orders that Respondent pay Claimants post-award interest at a rate equal to Peru's CoD at the date of this Award from the date of the Award to the date of payment".

<sup>26</sup> C-Reply, ¶ 8.

<sup>27</sup> "The Tribunal finds Compass Lexecon's recourse to Peru's CoD to calculate pre-award interest more reasonable than BRG's use of Kallpa's WACC. Indeed, [...] the Tribunal is of the view that the most appropriate rate to calculate pre-award interest is Peru's CoD, because it reflects the risks that Claimants – as investors and creditors of Respondent – bore during the time they have been deprived of the US\$ 110.7 million of damages owed to them by Respondent for its Treaty breach. In other words, during that period, between the Valuation Date (when damages crystallized) and the date of the Award, Claimants were exposed only to the risk of not obtaining the damages they are entitled to pursuant to the SFR Service Claim due to Peru's default, a risk reflected in Peru's CoD [...]".

<sup>28</sup> "Orders that Respondent pay Claimants US\$ 110.7 million as compensation for the damages caused by the issuance of Resolution No. 141 in breach of the Treaty, plus pre-award interest at a rate equal to Peru's CoD from the Valuation Date to the date of this Award".

<sup>29</sup> "The Tribunal [...] considers that in the present case the application of the same interest rate as for pre-award interest is justified".

33. The Tribunal finds that it is clear from its reasoning at ¶¶ 602-606 of the Award that the relevant date for calculating Peru's CoD is the date of the Award. Indeed, ¶ 606 of the Award, containing the Tribunal's conclusion on interest, expressly states that:
- In conclusion**, the Tribunal finds that Claimants are entitled to **pre and post award interest** on their damages at a rate equal to Peru's CoD **at the date of this Award** (emphasis added).
34. Consistent with that finding, at ¶ 624(v) of the Award the Tribunal expressly ordered that Respondent pay Claimants post-award interest at a rate equal to Peru's CoD **at the date of this Award** from the date of the Award to the date of payment (emphasis added).
35. The Tribunal cannot countenance Respondent's argument that ¶ 603 of the Award endorses "*Respondent's experts' complete methodology in relation to the calculation of interest*", including with respect to the date for calculating Peru's CoD,<sup>30</sup> which is the basis for Respondent's further argument that there is an inconsistency between that paragraph, ¶ 603 and ¶ 624(iv) of the Award, on the one hand, and ¶¶ 606 and 624(v) of the Award, on the other. As is clear from ¶ 603, far from subscribing to Respondent's experts' entire methodology for calculating interest, the Tribunal agreed with Respondent's experts on the narrower point that Peru's CoD was a "*more appropriate*" interest rate than Kallpa's WACC for awarding interest on the Award.<sup>31</sup> In that paragraph, the Tribunal said nothing about the date at which such interest rate should be calculated, an issue it then discussed at ¶ 606. This is dispositive of Respondent's argument.
36. In the Tribunal's view, Respondent's argument that calculating Peru's CoD at the date of the Award would unjustly inflate the amount of interest and be inappropriate is both irrelevant and wrong. It is irrelevant because, even assuming Respondent were correct, it would be plainly outside the Tribunal's authority to revisit its substantive findings on the grounds that they are unjust or inappropriate.<sup>32</sup> That argument is in any case wrong because it was in fact entirely appropriate, and fully consistent with the "*forced loan*" theory underlying the Tribunal's decision on interest, for the Tribunal to anchor Peru's CoD to the date of the Award, since only on that date did it become clear that Respondent owed money to Claimants because of a breach of its international obligations.

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<sup>30</sup> R-Response, ¶ 17, emphasis added.

<sup>31</sup> Award, ¶ 599.

<sup>32</sup> As recently confirmed by the tribunal's decision on a rectification request in the ICSID case *Infracapital v. Spain*, the rectification remedy contemplated by the ICSID Convention and ICSID Rule 49 "*is limited in scope. [...] [It] generally involves straightforward, clerical or arithmetical errors or correcting obvious omissions, so the real intentions of the tribunal are given effect in the award. The remedy therefore cannot be used to re-consider and/or re-evaluate the positions and evidence submitted in the case*" (*Infracapital F1 S.à.r.l. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18, *Decision on the Request for Rectification*, September 26, 2023, ¶¶ 56, 61).

37. Since it is already clear from the reasoning of the Award that pre- and post-award interest must be calculated at a rate corresponding to Peru's CoD at the date of the Award, the Tribunal would be tempted to conclude that the rectification requested by Claimants is superfluous. This said, so as to avoid further disputes between the Parties and for the sake of clarity, the Tribunal grants C-Request 1 and rectifies ¶ 624 (iv) of the Award by specifying that Peru's CoD is to be assessed at the date of the Award. Accordingly, R-Clarification Request is rejected.

### **III.B The request to rectify ¶ 624, points (iv) and (v), to specify the components of the pre-and post-award interest rate ("C-Request 2")**

#### *III.B.1 Claimants' position*

38. Claimants submit that the Tribunal committed a clerical error within the meaning of Article 49 of the ICSID Convention in omitting to specify at ¶ 624, points (iv) and (v), of the Award how Peru's CoD is to be calculated.

39. Claimants argue that, to rectify such omission, the Tribunal should specify in those paragraphs that Peru's CoD must be calculated in accordance with the methodology proposed by Peru's experts, which the Tribunal endorsed (except for the relevant date for calculating Peru's CoD). Thus, the Tribunal should specify that Peru's CoD corresponds to the sum of two components: (a) the one-month average yield of US Treasury bonds with a five-year maturity; and (b) the country risk premium for Peru determined by Professor Damodaran in his most recently published estimate as of the date of the Award.<sup>33</sup>

40. Claimants assert that Respondent agrees with their description of its experts' methodology for calculating Peru's CoD and Respondent's objection to C-Request 2 turns on the wrong assumption that Peru's CoD must be calculated as at the Valuation Date.<sup>34</sup>

#### *III.B.2 Respondent's position*

41. Respondent objects to C-Request 2 alleging that it seeks to alter the Tribunal's ruling, which accepted Respondent's methodology for the calculation of interest. In particular, it alleges that Claimants' requested amendments to ¶ 624, points (iv) and (v), of the Award do not reflect that methodology, which calculated Peru's CoD as the sum of: (a) the yield on US bonds with a maturity close to the time lapse between the Valuation Date and the assumed date of the Award (i.e. five years) and (b) the value of 1.38%, which is Professor Damodaran's estimate for

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<sup>33</sup> C-Request, ¶¶ 24-25.

<sup>34</sup> C-Reply, ¶¶ 20-21.

Peru's country risk premium in 2017.<sup>35</sup> Respondent denies having agreed with Claimants' description of how its experts calculated Peru's CoD.<sup>36</sup>

### *III.B.3 The Tribunal's decision*

42. The Parties seem to impliedly agree that ¶ 624, points (iv) and (v) of the Award should specify how Peru's CoD must be calculated, since Respondent does not contest that those paragraphs contain an inadvertent omission regarding that issue. They also agree that, by accepting Respondent's experts' methodology, the Tribunal impliedly decided that Peru's CoD is equal to the sum of: (a) a risk-free rate equal to the one-month average yield of US Treasury bonds with a five-year maturity; and (b) a country risk premium equal to the country risk premium for Peru estimated by Professor Damodaran.
43. They however disagree on the relevant date for assessing component (b). Claimants contend that one should look at Professor Damodaran's most recently published estimate as at the date of the Award, whereas Respondent argues that one should instead rely on Professor Damodaran's 2017 estimate, which was the one used by its experts.
44. The Tribunal agrees with Claimants' approach. While it is true that Respondent's experts' methodology endorsed by the Tribunal refers to Professor Damodaran's estimate of Peru's country risk premium in 2017, the Tribunal's ruling that Peru's CoD must be calculated as of the date of the Award necessarily entails that its two components, as identified by Respondent's experts, should be assessed at such date. Thus, to calculate component (b) of Peru's CoD, one should look at Professor Damodaran's latest estimate of Peru's country risk as of the date of the Award.<sup>37</sup>
45. In light of the above, the Tribunal grants C-Request 2 and, accordingly, rectifies ¶ 624, points (iv) and (v), as proposed by Claimants.

### **III.C The request to add “*compounded annually*” to ¶ 624, points (iv) and (v) (“C-Request 3”)**

#### *III.C.1 Claimants' position*

46. Claimants submit that the Tribunal inadvertently omitted to specify at ¶ 624, points (iv) and (v), of the Award that interest must be calculated on a compounded basis and accordingly

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<sup>35</sup> R-Observations, ¶ 23, relying on RER-CLEX I, ¶ 11.10; RER-CLEX II, ¶ 8.1. While in RER-CLEX I, ¶ 11.10, Compass Lexecon used the yield of a bond with a 3-year maturity, in RER-CLEX II, ¶ 8.1, it updated its calculations to account for the expected time lapse between the Valuation Date and the date of the Award going from 2.5 years to 3.5 years and thus used the yield of a 5-year bond.

<sup>36</sup> R-Response, ¶¶ 25-26.

<sup>37</sup> For the same reason, the relevant US Treasury bonds to calculate component (a) of Peru's CoD are those quoted in October 2023, when the Award was rendered.

request that the Tribunal rectify the omission pursuant to Article 49(2) of the ICSID Convention. In support of their request, Claimants argue that the annual compounding of interest was not disputed between the Parties and was impliedly accepted by the Tribunal.<sup>38</sup>

### *III.C.2 Respondent's position*

47. Respondent maintains that C-Request 3 is not justified under Article 49(2) of the ICSID Convention, which aims to rectify “an oversight on the part of the Tribunal” or an “inadvertent omission of an item in the calculation of damages”.<sup>39</sup> According to Respondent, the Tribunal committed no such oversight or inadvertent omission, as it clearly adopted Respondent’s experts’ calculation which assumed annual compounding of interest.<sup>40</sup>

### *III.C.3 The Tribunal's decision*

48. The Tribunal is of the view that C-Request 3 must be upheld. The Parties confirm that they agreed in the arbitration that any interest awarded by the Tribunal should be compounded annually<sup>41</sup> and that the Tribunal implicitly concurred with that.<sup>42</sup> Accordingly, the Award’s failure to specify that interest must be compounded annually is a clerical omission requiring rectification.

49. The Tribunal struggles to follow Respondent’s argument that Claimants’ request for rectification is not justified under Article 49(2) of the ICSID Convention. Article 49(2) of the ICSID Convention allows rectification of inadvertent omissions and minor technical errors which do not alter the merits of the Award. The omission to state in the dispositive part of the Award that pre- and post- award interest must be compounded annually is clearly such an inadvertent omission. As asserted by Claimants, that omission is sufficiently serious to justify a rectification, as it may cause uncertainties and problems in the event of enforcement of the Award. This is particularly so because, contrary to Respondent’s assertions,<sup>43</sup> the Tribunal partly departed from Respondent’s experts’ methodology on the calculation of interest,<sup>44</sup> so that it is necessary to clarify in the dispositive part of the Award that the Tribunal endorsed the annual compounding of interest.

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<sup>38</sup> C-Request, ¶¶ 26-27; C-Reply, ¶¶ 22-23.

<sup>39</sup> R-Response, ¶ 28.

<sup>40</sup> R-Observations, ¶ 24; R-Response, ¶ 27.

<sup>41</sup> Memorial, ¶ 299; RER-CLEX I, Appendix H, “CL Modifications” tab, cell G47; RER-CLEX II, Appendix E, “CL Modifications” tab, cell G47.

<sup>42</sup> C-Request, ¶¶ 26-27; C-Reply, ¶¶ 22-23; R-Observations, ¶ 24; R-Response, ¶ 27.

<sup>43</sup> R-Observations, ¶ 24; R-Response, ¶ 27.

<sup>44</sup> See Section III.A.3.

50. For these reasons, the Tribunal grants C-Request 3 and accordingly rectifies ¶ 624, points (iv) and (v) of the Award as proposed by Claimants.

#### **IV. THE R-RECTIFICATION REQUEST**

51. In the R-Rectification Request,<sup>45</sup> Respondent requests that the Tribunal rectify ¶ 623 of the Award as follows:

623. As for the costs of the Tribunal and of ICSID set forth in ¶ 611 above, i.e. **US\$ 915,263.19**, the Tribunal orders that Respondent shall bear 70% thereof, i.e. **US\$ 640,684.23** [**“183,052.64”**].

52. According to Respondent, the rectification is necessary to account for the fact that each Party has already paid US\$ 600,000 to ICSID in advance payments for the fees and costs of the Tribunal and ICSID (including US\$ 142,368.41 of overpayment). In light of the Tribunal’s ruling that Respondent bear 70% of the Tribunal’s and ICSID’s costs, and of the fact that Respondent already paid 50% of those costs to ICSID (i.e. 50% of US\$ 915,263.19, equal to US\$ 457,631.60), the rectification is necessary to ensure that Respondent only pays to Claimants the extra 20% not already paid (i.e. US\$ 183,052.64).<sup>46</sup>

53. Claimants do not object to R-Rectification Request.<sup>47</sup>

54. In light of the above, the Tribunal rectifies ¶ 623 of the Award as requested by Respondent.

#### **V. THE COSTS OF THE RECTIFICATION PROCEEDINGS**

##### **V.A Claimants’ position**

55. Claimants request that the Tribunal order Respondent to pay all costs and expenses associated with the rectification proceedings<sup>48</sup> totaling US\$ 226,979.35, broken down as follows:

- (i) lodging fee paid in relation to the C-Request for US\$ 10,000.00;
- (ii) fees and expenses of external legal counsel (Freshfields Bruckhaus Deringer US LLP) for US\$ 151,056.00;
- (iii) legal fees for the response to R-Cost Statements Requests;<sup>49</sup>

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<sup>45</sup> R-Rectification Request, ¶ 15.

<sup>46</sup> R-Rectification Request, ¶¶ 2, 9-13.

<sup>47</sup> Claimants’ letter of December 7, 2023.

<sup>48</sup> C-Request, ¶ 28(d); C-Statement of Costs, ¶¶ 5-6.

<sup>49</sup> See ¶ 12 above.

(iv) fees and expenses of Claimants' independent experts (Berkeley Research Group) for US\$ 30,075.00;

(v) travel costs and expenses of Claimants' representatives for US\$ 31,848.35.<sup>50</sup>

56. According to Claimants, the aforementioned costs should be borne by Respondent because the Tribunal upheld the SFR Service Claim and the costs-follow-the-event principle employed in the Award must extend to the rectification proceedings. Further, Claimants argue that the Tribunal should take into account the meritorious nature of the C-Request, and Peru's obstructive conduct (i.e. the untimely, inadmissible and unmeritorious R-Clarification Request, as well as Respondents' illogical and obstructive objection to C-Request 3), which increased the time and costs of the proceedings.<sup>51</sup>

57. Claimants object to Respondent's request that Claimants reimburse the fees and costs incurred by Respondent with respect not only to the C-Request, but also to the R-Rectification Request, since (i) Peru elected not to raise with Claimants the proposed rectification prior to filing the R-Rectification Request and (ii) Claimants have neither objected to, nor filed observations on, such request.<sup>52</sup>

#### **V.B Respondent's position**

58. Respondent requests that the Tribunal order Claimants to pay the costs and fees incurred in connection with its R-Rectification Request and with the C-Request,<sup>53</sup> totaling<sup>54</sup> US\$ 228,379.50 in counsel fees and expenses.<sup>55</sup>

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<sup>50</sup> C-Statement of Costs, ¶¶ 6-7.

<sup>51</sup> C-Statement of Costs, ¶ 5.

<sup>52</sup> Claimants' letter of December 7, 2023; C-Statement of Costs, ¶¶ 8-9.

<sup>53</sup> R-Rectification Request, ¶ 15; R-Observations, ¶ 25; R-Updated Statement of Costs, p. 1.

<sup>54</sup> In the R-Statement of Costs, Respondent states it incurred a total of US\$ 6,812,285.61 in the arbitration proceedings. For the purposes of this decision, the Tribunal will only take into account the costs incurred after the issuance of the Award (marked in the R-Statement of Costs with an asterisk).

<sup>55</sup> R-Statement of Costs, pp. 3-6; R-Updated Statement of Costs, p. 4. Of this amount:

- US\$ 2,500.00 relate to fees and expenses (including travel and translations) of Sidley Austin LLP, Washington, D.C.;
- US\$ 21,610.00 relate to fees and expenses (including travel) of Stanimir A. Alexandrov PLLC;
- US\$ 4,000.00 relate to fees and expenses (including travel) of Estudio Navarro & Pazos;
- US\$ 171,785.50 relate to professional services and expenses of Baker Botts LLP, Washington, D.C.;
- US\$ 28,484.00 relate to costs incurred following the issuance of C-Statement of Costs.

59. According to Respondent, those costs should be borne by Claimants because: (i) albeit agreeing with the issue raised in R-Rectification Request, they failed to raise the point in the C-Request, which would have saved Respondent time and expenses; (ii) Respondent's responses to the C-Request were meritorious and, contrary to Claimants' assertion, the R-Clarification Request was admissible; and (iii) Claimants' arguments were "*grossly misleading*", thus requiring Respondent to file two submissions to clarify and correct Claimants' assertions.<sup>56</sup>
60. Respondent also objects to Claimants' claim for costs related to the rectification proceedings, since "[i]t would be inappropriate to require Respondent to cover any costs or fees of a proceeding arising solely from errors by the Tribunal requiring rectification".<sup>57</sup>

#### **V.C The Tribunal's decision**

61. In accordance with ICSID Rule 47(1)(j), which is applicable to the Tribunal's decision on rectification of the Award by virtue of ICSID Rule 49(4),<sup>58</sup> the present decision must contain "*any decision of the Tribunal regarding the cost of the proceeding*".
62. Both Claimants and Respondent request that the Tribunal order the other party to reimburse all costs they respectively incurred in these rectification proceedings.
63. As noted in the Award,<sup>59</sup> the Tribunal enjoys discretion on how to allocate between the Parties the costs of the arbitration, including attorney's fees and other expenses as it deems appropriate.
64. The Tribunal has considered all the circumstances of the case, including in particular that: (i) both Parties submitted a request for rectification of the Award and objected to some or all the requests proposed by the other Party; (ii) both Parties produced submissions addressing the other Party's position; and (iii) none of the Parties behaved in bad faith or negligently, so that there is no reason to take their conduct into consideration for purposes of apportioning the costs.
65. Accordingly, the Tribunal determines that costs should lie where they fall and that accordingly each Party should bear its own costs and expenses associated with the rectification proceedings and share equally the costs of the rectification proceedings, including the fees and expenses of the Tribunal and the President's Assistant, ICSID's administrative fees and

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<sup>56</sup> R-Updated Statement of Costs, pp. 1-3.

<sup>57</sup> R-Updated Statement of Costs, pp. 3-4. See also R-Response, ¶ 30.

<sup>58</sup> "*Rules 46-48 shall apply, mutatis mutandis, to any decision of the Tribunal pursuant to this Rule*".

<sup>59</sup> Award, ¶ 616.

direct expenses. This is consistent with the practice of tribunals on the allocation of costs in rectification proceedings.<sup>60</sup>

66. The costs of this proceeding, including the fees and expenses of the Tribunal and the President's Assistant, ICSID's administrative fees and direct expenses, amount to (in US\$), broken down as follows:

Tribunal's fees and expenses	
Luca G. Radicati di Brozolo, President	\$ 15,000
Mr. David R. Haigh KC, Arbitrator	\$ 8,542.19
Mr. Eduardo Siqueiros T., Arbitrator	\$ 6,050
Assistant's fees and expenses	\$ 5,000
ICSID's administrative fees	\$ 0
Direct expenses	\$ 5,060
<b>Total</b>	<b>\$ 39,652.19</b>

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<sup>60</sup> *Conocophillips Petrozuata B.V., Conocophillips Hamaca B.V. and Conocophillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Rectification of the Award, August 29, 2019, ¶¶ 62-63; *Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain*, ICSID Case No. ARB/16/18, Decision on the Requests for Rectification, September 26, 2023, ¶ 87.

**VI. DECISION**

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

(i) **Rectifies** ¶ 623 of the Award as follows:

As for the costs of the Tribunal and of ICSID set forth in ¶ 611 above, i.e. **US\$ 915,263.19**, the Tribunal orders that Respondent shall bear 70% thereof, i.e. **US\$ 183,052.64**.

(ii) **Rectifies** ¶ 624(iv) of the Award as follows:

**Orders** that Respondent pay Claimants US\$ 110.7 million as compensation for the damages caused by the issuance of Resolution No. 141 in breach of the Treaty, plus pre-award interest at a rate equal to Peru's CoD *at the date of this Award based upon the sum of (a) a risk-free rate equal to the one-month average yield of US Treasury bonds with a five-year maturity and (b) the country risk premium for Peru determined by Professor Damodaran most recently published as of the date of this Award*, from the Valuation Date to the date of this Award, compounded annually;

(iii) **Rectifies** ¶ 624(v) of the Award as follows:

**Orders** that Respondent pay Claimants post-award interest at a rate equal to Peru's CoD at the date of this Award *based upon the sum of (a) a risk-free rate equal to the one-month average yield of US Treasury bonds with a five-year maturity quoted as of October 2023 and (b) the country risk premium for Peru determined by Professor Damodaran most recently published as of the date of this Award*, from the date of the Award to the date of payment, compounded annually;

(iv) **Decides** that each Party shall bear its own costs and expenses associated with these rectification proceedings and bear 50% of the costs of these rectification proceedings, including the fees and expenses of the Tribunal and the President's Assistant, ICSID's administrative fees and direct expenses.

(v) **Rejects** all the Parties' other requests and defenses.

[signed]

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Mr. David R. Haigh  
Arbitrator

Date: May 3, 2024

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Mr. Eduardo Siqueiros T.  
Arbitrator

Date:

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Professor Luca G. Radicati di Brozolo  
President of the Tribunal

Date:

[signed]

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Mr. David R. Haigh  
Arbitrator

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Mr. Eduardo Siqueiros T.  
Arbitrator

Date:

Date: May 3, 2024

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Professor Luca G. Radicati di Brozolo  
President of the Tribunal

Date:

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Mr. David R. Haigh  
Arbitrator

Date:

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Mr. Eduardo Siqueiros T.  
Arbitrator

Date:

[signed]

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Professor Luca G. Radicati di Brozolo  
President of the Tribunal

Date: May 3, 2024