INTERNATIONAL CENTRE FOR SETTLEMENT OF

INVESTMENT DISPUTES

IC POWER LIMITED

&

KENON HOLDINGS LIMITED

Claimants

-v-

THE REPUBLIC OF PERU

Respondent

REQUEST FOR ARBITRATION

12 JUNE 2019

Freshfields Bruckhaus Deringer US LLP

700 13th Street, NW
10th Floor
Washington, DC 20005-3960
United States of America

Philippi Prietocarrizosa Ferrero DU &Uría

Av Santa Cruz 888, Miraflores
Lima, Peru

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I. INTRODUCTION AND EXECUTIVE SUMMARY

1. Kenon Holdings Ltd (***Kenon***) and IC Power Ltd (***IC Power***) (together, the ***Claimants***), each a corporation constituted under the laws of the Republic of Singapore (***Singapore***), hereby request the institution of arbitration proceedings against the Republic of Peru (***Peru*** or the ***Respondent***) in accordance with Article 36 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ***ICSID Convention***).

2. This Request for Arbitration (the ***Request***) is submitted pursuant to Article 10.17.3(a) of the Free Trade Agreement between Singapore and Peru, signed on 29 May 2008 and entered into force on 1 August 2009 (the ***Treaty***).[1]

3. Claimants have taken all the necessary internal actions to authorize the submission of this Request to ICSID and have duly authorized the undersigned to institute and pursue arbitration proceedings on their behalf against Peru pursuant to the ICSID Convention and the Treaty.[2]

4. This dispute relates to two sets of Peruvian State measures that adversely affected Claimants' investments in the power generation sector in Peru, namely: (a) Peru's reversal of the commitments made in relation to the tender of the firm base provision of the Secondary Frequency Regulation service to Kallpa Generación S.A. (Peru) (***Kallpa GSA***); and (b) Peru's arbitrary and discriminatory modification of the methodology for apportioning the costs of certain electricity transmission lines among generators.

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[1] Free Trade Agreement between Singapore and Peru, signed on 29 May 2008 (***Treaty***), **C-1.** The Treaty entered into force on 1 August 2009. *See* Supreme Decree No 14, 1 August 2009, **C-2**. All exhibits referred to herein consist of true copies of original documents. Where exhibits consist of excerpts of documents, these excerpts constitute true and complete excerpts of the relevant parts of said documents.

[2] *See* Certified Extract of IC Power Directors' Resolution, 22 April 2019, **C-11**; Certified Extract of Minutes of the Meeting of the Board of Directors of Kenon, 22 April 2019, **C-5**; Power of Attorney granted by IC Power to attorneys of Freshfields Bruckhaus Deringer, 27 November 2018, **C-6**; and Power of Attorney granted by Kenon to attorneys of Freshfields Bruckhaus Deringer, 27 November 2018, **C-4**.

5. Secondary Frequency Regulation (***SFR***) is a service that is crucial for maintaining the reliability of the supply of electricity, by guaranteeing the equilibrium between the supply and demand of electricity. Prior to 2014, Peru had an inadequate regulatory framework for SFR which provided no incentives for generators to provide the service. Frequency regulation was adjusted manually and was not sufficiently adaptable to meet the challenges posed by the incorporation of renewable energy resources into Peru's electricity grid.

6. Peru therefore sought to reform the SFR framework in order to address those challenges and to introduce an automatic generation control system (as opposed to a manual system). The reform process lasted several years, during which the regulator submitted several drafts of a proposal to regulate SFR that were discussed with all relevant stakeholders. This consultation process led to the enactment of Technical Procedure No 22 (***PR-22***) for the provision of SFR.

7. Peru purposely favored a system whereby the base provision of the SFR service would be secured through long-term commitments tendered through a competitive bidding process. PR-22 established that the power generator that won the bid would be called to provide SFR with priority over other generators. This meant that the SFR provider would necessarily be called upon to dispatch energy every day, so as to be able to provide SFR, regardless of whether it would have been called upon to dispatch based on existing dispatch rules (namely, based on its declared costs). Since power plants cannot operate below a certain minimum level, the SFR provider would be guaranteed to dispatch, at the very least, the minimum amount of energy required for its power plant to operate. This guarantee provided a strong incentive to provide the SFR service, because the unit that won the bid would not need to compete with other generators to be included in the dispatch on the basis of its costs.

8. In light of these incentives, Kallpa GSA put forward a competitive bid for the Firm Base Provision of the SFR service – a bid of zero Soles per MW/h – on the understanding that it would be mandatorily dispatched every day, and would

therefore recover the cost of providing the SFR service through the compensation it would receive for the energy it supplied to the grid.

9. However, shortly after Kallpa GSA won the bid, Peru enacted a Resolution purporting to "interpret" the terms of PR-22, but that effectively reversed the commitments that Kallpa GSA had relied on when putting forward its bid. This Resolution provided that Kallpa GSA would not be mandatorily dispatched, and would only provide the SFR service when it was called upon to dispatch based on its costs. Kallpa GSA was consequently deprived of its priority for dispatching electricity to the system, and its right to compensation for such dispatched electricity. These changes to PR-22 were applied retroactively to Kallpa GSA, which remained bound to provide the SFR service for free (per its bid price). Forced to compete with other generators in order to be dispatched while providing SFR for free, Kallpa GSA had no choice but to declare costs that were lower than its actual total costs in order to mitigate its losses.

10. In sum, Kenon and IC Power, through their subsidiary Kallpa GSA, relied on Peru's commitments when submitting a bid for the provision of SFR. Peru materially altered those commitments after Kallpa GSA had won the bid, adversely affecting its rights under the tender and causing it to incur significant losses.

11. Kenon and IC Power's second claim relates to Peru's arbitrary and discriminatory changes to the regulations apportioning the cost generators pay for the use of certain transmission lines (called secondary and complementary lines).

12. The cost of using secondary and complementary transmission lines is apportioned amongst generators applying either the "use" or "benefit" criterion. In 2008, Peru established the method for apportioning costs amongst generators for lines that apply the "use" criterion. Specifically, it provided that generators would only pay for those lines that were "relevant" to them, based on the amount of electricity

transmitted and the distance over which it was transmitted (*ie* the "Energy / Distance" method).

13. In February 2016, however, Peru proposed a new methodology, removing the concept of "relevance" such that generators would need to pay for all lines, not just those lines that were relevant to them. This new methodology was adopted notwithstanding significant criticism by private generators.

14. As a result of this arbitrary change to the regulatory framework, Claimants' subsidiaries, Kallpa GSA and Samay I S.A. (Peru) (***Samay***) (as well as other private sector power generators) were forced to make significant additional and unforeseen payments in relation to secondary and complementary transmission lines that were not relevant to them. Conversely, State-owned power generation companies, particularly Electroperú, directly benefited from this change and saw their payments materially reduced. In practice, eliminating the "relevance" requirement functioned as a cross subsidy for State-owned enterprises like Electroperú who exclusively used (and consequently exclusively paid for) certain costly lines under the previous methodology. The regulation discriminated against private generators in order to favor State-owned generators giving them an unjustified advantage with respect to other competitors.

15. In this Request, Claimants will establish the jurisdictional and substantive bases of their arbitral claim. Specifically, Claimants will:

(a) describe their investments in the Peruvian electricity sector (**Section II** below);

(b) show that Peru has taken measures that adversely affected those investments (**Section III** below);

(c) show that Peru's measures have breached Peru's obligations under the Treaty (**Section IV** below);

(d) establish that Claimants are protected investors under the Treaty with a dispute arising out of qualifying investments (**Section V(A) & (B)** below); and

(e) establish that Claimants are entitled to initiate these arbitration proceedings because both Peru and Claimants have consented to ICSID arbitration and because they have fulfilled all of the conditions to access ICSID arbitration under the ICSID Convention and the Treaty (**Section V(C)** below).

16. In **Section VI** below, Claimants propose that a three-member Tribunal adjudicate this dispute. The names and addresses of the parties are set out in **Section VII**. Claimants set out the relief they request in **Section VIII**.

17. Claimants reserve their right to specify, supplement or amend the factual or legal claims and arguments herein.

II. CLAIMANTS' INVESTMENTS IN THE PERUVIAN ELECTRICITY SECTOR

18. This dispute relates to investments in the Peruvian electricity sector that Kenon and IC Power held through their wholly-owned subsidiary Inkia Energy Limited (Bermuda) (***Inkia***). The history of these investments is described below.

19. In June 2007, Inkia purchased Globeleq Americas Limited (Bermuda) (***Globeleq***), later renamed Inkia Americas Limited (***Inkia Americas***)[3] which held a number of companies throughout Latin America, including in Peru. Inkia thus acquired an indirect 74.9% stake in Kallpa GSA,[4] among other interests and assets. Through

[3] *See* Certificate of Incorporation of Globeleq Americas Limited, 19 May 2003, **C-17**. *See also* Memorandum of Association of Inkia Americas, **C-32**; Register of Members of Inkia Americas, 9 June 2017, **C-19**, showing Inkia's 100% ownership of Inkia Americas Limited (***Inkia Americas,*** formerly Globeleq), which has not changed since June 2007. Globeleq changed its name to Inkia Americas Limited on 2 November 2007. *See* Certificate of Incorporation on Change of Name of Inkia Americas, 7 November 2007, **C-18**.

[4] Kallpa GSA was previously named Globeleq Peru S.A. Inkia indirectly held 99.9% of the shares in Kallpa GSA, but in November 2009 it reduced its stake to 74.9%. *See* Notarial testimony of the amendments of the by-laws of Globeleq Peru S.A., 17 July 2007, **C-24**. *See also* Share register of Kallpa GSA, various dates, **C-23**.

Kallpa GSA, Inkia developed the Kallpa thermal power plant (***Kallpa***) located in Chilca, Department of Lima, in four different phases that included the construction and commissioning of the following turbines:

(a) Kallpa I, a natural gas-fueled turbine with an installed capacity of 186 MW, which began commercial operations in July 2007;

(b) Kallpa II, a natural gas-fueled turbine with an installed capacity of 195 MW, which began commercial operations in June 2009;

(c) Kallpa III, a natural gas-fueled turbine with an installed capacity of 197 MW, which began commercial operations in March 2010; and

(d) Kallpa IV, a steam turbine with an installed capacity of 292 MW which began commercial operations in August 2012. This turbine was installed to transform Kallpa from a simple cycle plant into a combined cycle plant.

20. Hence, Kallpa began its operations as a combined cycle power plant in August 2012 with a total installed capacity of 870 MW.

21. Cerro del Águila S.A. (Peru) (***CDA***) and Samay were constituted in July 2010.[5] Inkia indirectly held[6] 74.9% of their shares from August 2012[7] and June 2014,[8] respectively.

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[5] CDA was previously named Samay II S.A. *See* Certificate of Incorporation of Samay II S.A., 14 July 2010, **C-26**; Amendment of the by-laws of CDA, 7 February 2011, **C-27**; Certificate of Incorporation of Samay, 14 July 2010, **C-29**.

[6] Inkia indirectly held its interest in CDA and Samay through Inkia Americas (formerly Globeleq), Inkia Americas Holdings Limited (***Inkia Americas Holdings***) and IC Power Holdings (Kallpa) Limited (***IC Power Holdings (Kallpa)***). *See* chart in para 24 below. *See also* Secretary's Certificate of Inkia Americas Holdings, 30 August 2017, **C-20**; Secretary's Certificate of IC Power Holdings (Kallpa), 30 August 2017, **C-22**. IC Power Holdings (Kallpa) Limited was previously named Inkia Holdings (Kallpa) Limited. *See* Certificate of Incorporation on Change of Name of Inkia Holdings (Kallpa), 7 November 2007, **C-21**; Secretary's Certificate of IC Power Holdings (Kallpa), 30 August 2017, **C-22**, pp 2-3.

[7] Share register of CDA, various dates, **C-28**.

[8] Share register of Samay, various dates, **C-30**.

22. In the years that followed, Kallpa GSA, CDA and Samay invested in three power plants:

(a) In October 2010, the Ministry of Energy and Mining (the ***Ministry of Energy***) entered into a concession agreement with Kallpa GSA, granting Kallpa GSA the right to construct and operate a hydroelectric plant on the Mantaro River, in the Department of Huancavelica in central Peru, that would be known as Cerro del Águila (***Cerro del Águila***).[9] In June 2011, Kallpa GSA transferred this agreement to CDA, which began developing the Cerro del Águila hydroelectric plant.[10]

(b) In November 2013, Samay won a public bid conducted by the Government[11] to build an open cycle dual-fueled (diesel and natural gas) thermoelectric plant known as Puerto Bravo (***Puerto Bravo***) in Mollendo, in the Department of Arequipa.[12]

(c) In April 2014, Kallpa GSA acquired the Las Flores thermal power plant (***Las Flores***) – a simple cycle gas turbine – located in Chilca, in the Department of Lima.[13]

23. In January 2015, Kenon became the sole indirect shareholder of Inkia.[14] On 4 May 2015, Kenon incorporated IC Power (Singapore)[15] and later transferred its indirect interest in Inkia to its 100% subsidiary, IC Power.[16]

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9 *See* Ministry of Energy Resolution No 64, 23 October 2010, **C-46**, Arts 1-2.

10 *See* Ministry of Energy Resolution No 59, 23 June 2011, **C-47**, Arts 1-3.

11 Through the Agency for the Promotion of Private Investment (in Spanish, *Agencia de Promoción de la Inversión Privada*).

12 IC Power SEC Form F-1, 23 January 2017, **C-13**, p 3.

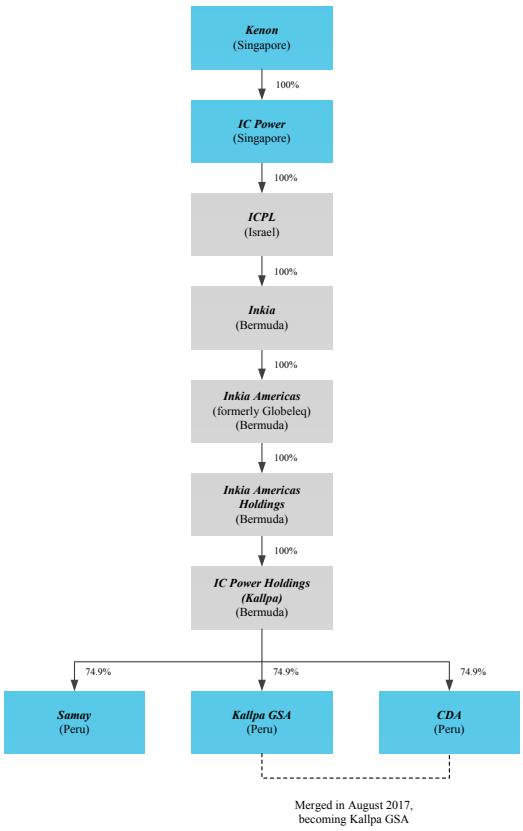
13 *See* Ministry of Energy Resolution No 160, 26 March 2014, **C-55**, Arts 1-2.

14 Kenon became the sole shareholder of IC Power Ltd (Israel) (***ICPL***), which held 100% of Inkia's shares. *See* IC Power SEC Form F-1, 23 January 2017, **C-13**, p 2; Register of Members of Inkia, 6 February 2018, **C-16**; Kenon SEC Form 20-F, 1 January 2017, **C-14**. On 28 March 2016, ICPL was renamed IC Power Asia Development Ltd. (Israel). *See* Registration Certificate of ICPL (English translation), 10 November 2016, **C-12**.

15 *See* Certificate of Good Standing of IC Power, 1 March 2019, **C-9**; Business Profile of IC Power issued by the Singaporean Accounting and Corporate Regulatory Authority, 19 February 2019, **C-8**, p 3; Register of Members of IC Power, 3 April 2019, **C-10**. IC Power Pte Ltd was renamed

24. Therefore, Kenon held an indirect 74.9% shareholding interest in the Peruvian companies Kallpa GSA, CDA and Samay from January 2015, and it held that interest through IC Power from March 2016 onwards.[17] Thus, at the time of the Peruvian State measures that gave rise to the present dispute, the corporate structure of Kenon and IC Power was as follows:

Investment structure: March 2016 - December 2017



IC Power Ltd on 20 January 2017. *See* Certificate of Conversion of Private Company to Public Company of IC Power , 20 January 2019, **C-7**.

16 Kenon transferred ICPL (then renamed IC Power Asia Development Ltd) to IC Power. IC Power thus became the indirect shareholder of 100% of Inkia's shares. In turn, as the sole shareholder of IC Power, Kenon also remained as an indirect shareholder of 100% of Inkia's shares. *See* Registration Certificate of ICPL (English translation), 10 November 2016, **C-12**, p 2; Register of Members of Inkia, 6 February 2018, **C-16**. The sequence of Kenon and IC Power's acquisition of Inkia is portrayed in **C-31**.

17 *See* footnote 16 above.

25. On 16 August 2017, CDA merged with Kallpa GSA.[18]

26. In late 2017, after the measures giving rise to this dispute were taken, Kenon and IC Power sold their assets in Latin America, including their Peruvian subsidiaries Kallpa GSA and Samay, expressly retaining the right to submit the present dispute to arbitration under the Treaty.[19]

III. PERU'S MEASURES IN BREACH OF ITS OBLIGATIONS UNDER THE TREATY

27. This dispute relates to two sets of Peruvian State measures that violated Peru's obligation to accord fair and equitable treatment to Claimants' investments in the power generation sector in Peru, namely: (a) Peru's reversal of the commitments it made in relation to the tender of the firm base provision of the SFR service to Kallpa GSA; and (b) Peru's arbitrary and discriminatory modification of the procedure for apportioning the costs of certain electricity transmission infrastructure among generators in order to benefit State-owned generators, in particular Electroperú. We describe each of these claims below.

A. SECONDARY FREQUENCY REGULATION CLAIM

28. The Frequency Regulation service guarantees the equilibrium between supply (the amount of power generated) and demand, increasing the output of electricity when there is an under-frequency event (*ie* when there is more demand than supply), or decreasing the output of electricity when there is an over-frequency event (*ie* when there is more supply than demand). Since electricity cannot be stored, this service is crucial in order to maintain the quality and reliability of the electricity supply, as well as the safe operation of the system.

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18 *See* Certificate of Inscription of the capital increase and amendment of by-laws of Kallpa GSA, 19 September 2017, **C-25**.

19 *See* Share Purchase Agreement executed by Inkia and others, 24 November 2017, **C-15**, p 3.

29. The Committee for the Economic Operation of the National Interconnected System (*Comité de Operación Económica del Sistema Interconectado Nacional,* ***COES***) is the dispatch administrator for Peru's National Interconnected Electric System (*Sistema Eléctrico Interconectado Nacional*, ***SEIN***). Every day, COES analyzes the projected demand and the availability of power generation units. Generation units are ranked from the lowest to the highest cost per unit of electricity,[20] in what is known as the "merit order" or "economic dispatch".[21] The cost of each generation unit is established based on its variable costs (*ie* fuel and maintenance costs per unit of electricity generated). These costs are audited, with the exception of natural gas-fueled generators which declare their variable fuel costs annually (in June of each year). Gas-fueled generators secure the supply, transportation and distribution of natural gas through take-or-pay contracts, under which a considerable portion of the price is paid on a fixed basis. This makes the estimation of variable costs particularly complex, and generators may need to ensure dispatch to consume their take-or-pay obligations. Due to these complexities, the regulator allows gas-fueled generators to declare their variable costs for the purpose of determining their ranking in the merit order, so long as those declared costs do not exceed the sum of their gas supply, transport and distribution costs.

30. On the basis of that ranking, COES determines the Daily Operation Program (***DOP***) for the following day, which establishes which units will be called upon to dispatch electricity in each specific time slot of the day. Therefore, in some circumstances, generators have an incentive to compete by strategically declaring costs.

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[20] There are several exceptions to this minimal cost principle. In some cases COES may decide to force the dispatch of a more expensive unit for safety or other operational reasons (*eg* machinery requirements such as technical minimums or transmission congestion).

[21] Merit order is the ranking of generators, ordered from the least expensive to the most expensive on the basis of their costs. Economic dispatch means the dispatch of electricity in accordance with the merit order.

31. If, however, actual demand does not match projected demand (as will usually be the case), the dispatch administrator must adjust the output of electricity in the system in order to meet demand and maintain the balance of the system. These adjustments are made through the Frequency Regulation service. Primary Frequency Regulation kicks in first, within five seconds of a disequilibrium. In Peru, all power generation plants with an installed capacity greater than 10 MW are obliged to provide this service.[22] When the Primary Frequency Regulation is exhausted, within 20 seconds of a disequilibrium in the system, the SFR is activated.

32. The regulatory framework for SFR in Peru had historically been inadequate as it provided no incentives for generators to offer the service. The framework for SFR was established in 2001 through a number of technical procedures elaborated by COES and approved by the Ministry of Energy.[23] The technical procedure relating to Frequency Regulation — Technical Procedure No 22 (the ***Original PR-22***) — established that generators connected to the SEIN with the technical capability to provide SFR were obliged to provide the service for free in order to maintain the stability of the system.[24]

33. In the late 2000s, Peru sought to reform the SFR framework in order to adapt the provision of SFR to new technologies (introducing an automatic generation control (***AGC***) system) and to improve the reliability of the service. This was especially important given that Peru was beginning to incorporate generation units fueled by renewable energy resources that, given the nature of the resources they rely on, are less stable and predictable than other generation units (wind and solar generation, for example, can abruptly change according to climatic conditions).

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22 Power generation plants that use renewable energy resources, and whose primary energy source is wind, solar or tidal energy, are exempted from this obligation.

23 *See* Ministry of Energy Resolution No 232 (***Original PR-22***), 29 May 2001, **C-37**.

24 *See* Original PR-22, 29 May 2001, **C-37**, paras 7.2-7.4.

34. In August 2011, the *Dirección General de Electricidad* (***DGE***), a technical body within the Ministry of Energy in charge of proposing policies to regulate the power sector, issued a resolution (***DGE 2011 Resolution***) establishing that SFR services would henceforth be voluntary and remunerated.[25] The Resolution tasked the regulator for the energy sector, known as the Supervisory Organ for Investment in Energy and Mining (*Organismo Supervisor de la Inversión en Energía y Minería*, ***OSINERGMIN***), with approving the technical procedure to be proposed by COES setting out the methodology, criteria and conditions for the provision of SFR.[26]

35. This process took three years and involved the participation of multiple stakeholders, including power generators. After rejecting COES's first proposal as inadequate,[27] OSINERGMIN sent COES its own revised draft of Technical Procedure No 22 on "Rotating Reserve for SFR" (the ***Draft PR-22***) in November 2013.[28] This Draft was based on a report commissioned by the Ministry of Economy of Peru and elaborated by Spanish consulting firm Indra, as part of a consulting project sponsored by the Inter-American Development Bank entitled "Problems Associated with the Incorporation of Non-Conventional renewable energy resources: Generation in the SEIN and Technical Proposal for a Solution" (the ***Indra Report***). Recognizing that the SFR service provision in Peru was not yet developed, Draft PR-22, as well as the Indra Report, recommended the use of a mixed scheme of bilateral contracts (to ensure the long-term provision of the SFR service over a period of several years) coupled with a daily balancing market, to cover additional short term needs.

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25 Ministry of Energy Resolution No 14, 3 March 2005, as amended by DGE 2011 Resolution, 18 August 2011, **C-48**, Art 6.2.3. Until then, the SFR service was provided mandatorily and without additional compensation by all power generators capable of providing it, as part of their obligation to guarantee the quality of the service. *See* Ministry of Energy Resolution No 14 (*Norma Técnica para la Coordinación de la Operación en Tiempo Real de los Sistemas Interconectados*), 3 March 2005, **C-38**, Arts 6.1 and 6.2.

26 Ministry of Energy Resolution No 14, 3 March 2005, as amended by DGE 2011 Resolution, 18 August 2011, **C-48**, Art 6.2.4.

27 OSINERGMIN Resolution No 195, 4 October 2013, **C-50.**

28 OSINERGMIN Report No 513 (***Draft PR-22***), 28 November 2013, **C-51**.

36. After receiving COES's comments, in January 2014, OSINERGMIN published a report that clarified and provided further detail regarding the Draft PR-22 (the ***Pre-publication Report***)[29] and also included the revised proposed text of PR-22 (the ***Second Draft PR-22***).[30] It provided that SFR services would be secured by:

(a) long-term commitments to provide specified reserve quantities on a firm basis (***Firm Base Provision***);[31]

(b) long-term commitments to provide certain amounts on a variable basis (***Variable Base Provision***);[32] and

(c) additional short-term needs would be covered daily in the balancing market (***Balancing Market***).[33]

37. The Firm Base Provision would have priority over the Balancing Market and Variable Base Provision (*ie* only when the Firm Base Provision capacity was exhausted would the Balancing Market or Variable Base Provision kick in to cover for shortages).[34]

38. Further, the Firm Base Provider would be called upon to dispatch a minimum level of electricity with priority over other power generators. This was crucial for several technical reasons:

(a) First, in order to provide SFR services, a power generator must be operating and dispatching electricity to the system. This is because the amount of time required to turn on a power plant makes it impossible to respond quickly enough to supply the SFR service. Conversely, generators that are operating/dispatching at a

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29 OSINERGMIN Report No 27 (***Pre-publication Report***), January 2014, **C-52**.

30 OSINERGMIN Resolution No 5 (***Second Draft PR-22***), 16 January 2014, **C-53**.

31 *See* Second Draft PR-22, 16 January 2014, **C-53**, para 9.4.3(a).

32 *See* Second Draft PR-22, 16 January 2014, **C-53**, para 9.4.3(b).

33 *See* Second Draft PR-22, 16 January 2014, **C-53**, para 9.5.

34 *See* Second Draft PR-22, 16 January 2014, **C-53**, para 9.5.1. The Variable Base Provision would compete with the Balancing Market and would only be assigned where it offered a better price.

specific time can immediately increase or decrease the electricity dispatch in the event of a sudden change in demand (up or down or ***Rotating Reserve***). Therefore, for a unit to provide SFR, it must be included in that day's DOP.

(b) Second, for a power generation unit to operate, it must produce a minimum amount of power below which it cannot operate, either for technical or environmental reasons, without having to shut down. The minimum amount of power that, by design, a power plant has to generate when operating, is known as that plant's ***Technical Minimum***. Therefore, when included in any day's DOP, a unit must be allowed to dispatch at least its Technical Minimum, otherwise it cannot operate.

(c) Finally, in order to provide SFR, a power generation unit must be able to adjust its power generation level up or down. To be able to adjust upwards (*ie* increase its electricity output), a generator must retain power generation capacity in reserve (*ie* it cannot generate at full capacity) so that it has capacity to increase its output. To be able to adjust downwards (*ie* decrease its output), a generator has to be dispatching more power than its Technical Minimum; otherwise, it would not be able to decrease its output without shutting down. Therefore, to be able to provide SFR, a unit must: (i) be included in the DOP for a specific day, (ii) be dispatching power below its full capacity, to be able to adjust upwards, and (iii) be dispatching power above its Technical Minimum in order to have capacity to adjust downwards.

39. In sum, in order for a unit to provide the Firm Base SFR service, that unit must be included in each day's DOP and programmed to generate sufficiently above its Technical Minimum in order to be able to adjust downwards. This, in turn, means that the Firm Base Provider of the SFR service must be included in the DOP regardless of its costs (*ie* even if that unit would not have been dispatched according to the economic merit order). Where a unit that is not in the merit order is called upon to dispatch it is known as forced dispatch (***Forced Dispatch***). Forced Dispatch is a common practice in the SEIN which is used for several

purposes, such as grid stability or for maintaining the operation of base load plants which cannot shut down every day. In these particular cases, as a consequence of Forced Dispatch: (i) the SFR provider would not have to compete with other generators to be included in the merit order; and (ii) the cost of the SFR service, borne by all the generators operating in the SEIN, could potentially increase given that the SFR service would not necessarily be provided by the lowest cost unit.

40. The regulator was aware that the assignment of the Firm Base Provision could lead to the Forced Dispatch of units with higher costs than the marginal cost of the system (*ie* the marginal cost of the most costly unit dispatched at a given time), and expressly acknowledged and rejected the concerns voiced by certain power generators regarding the potential for increased costs during the consultation period for the drafts of the SFR regulation.[35] OSINERGMIN issued a Response Report where it expressly stated that units providing SFR would be compensated based on their variable costs, even if they were Forced Dispatched.[36] OSINERGMIN similarly rejected the suggestions made by certain generators that lower costs units – such as combined cycle plants — be given priority to provide SFR over other higher cost units, such as simple cycle diesel plants. OSINERGMIN stated that as long as a plant was qualified and complied with the technical requirements, any plant, regardless of its technology, could participate in the bid to provide SFR.[37]

41. On 29 March 2014, OSINERGMIN published the final version of PR-22.[38] It provided that the Firm Base Provision of the SFR service would be secured by way of public tender (generators would bid to provide the service) for a period of

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35 *See* OSINERGMIN Report No 164 (***Response Report***), March 2014, **C-54**, paras 2.1.6, 2.1.11, pp 17-18, 29-30.

36 *See* Response Report, **C-54**, para 2.1.11, pp 30.

37 *See* Response Report, **C-54**, para 2.6.9, pp 70-71.

38 *See* OSINERGMIN Resolution No 58 approving Technical Procedure No 22 (***PR-22***), issued on 26 March 2014, published on 29 March 2014, **C-56**.

three years. The remuneration for the Firm Base Provision of the SFR service would include the following components:

(a) the cost related to providing the SFR service (in Spanish, *costo de asignación del servicio*), *ie* the bid price offered by the winning generator for the provision of the SFR service;[39]

(b) the opportunity cost for reducing production levels to allow for the Rotating Reserve needed in order to provide the assigned SFR service (*ie* holding back capacity in order to be able to adjust electricity output upwards when required);[40]

(c) compensation for the operational costs of the electricity supplied.[41] The level of compensation depends on whether the unit providing SFR is dispatched within the merit order or is Forced Dispatched.

(i) If the unit providing SFR is dispatched within the merit order, the electricity the unit dispatches into the system is remunerated at the spot price (*ie* the marginal cost of the most costly unit dispatched at a given time).

(ii) If the unit providing SFR is Forced Dispatched, the unit must be compensated for the difference between the spot price and the unit's variable costs.[42] The unit would thus be compensated based on its variable costs not only for the electricity supplied to provide the SFR service, but also for the electricity supplied in order for the

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39 PR-22, 29 March 2014, **C-56**, para 11.4.2 and Annex IV, para 2.2.

40 PR-22, 29 March 2014, **C-56**, para 11.4.1 and Annex IV, para 2.1.

41 PR-22, 29 March 2014, **C-56**, para 11.8.

42 *See* OSINERGMIN Resolution No 245 approving Technical Procedure No 33 (***PR-33***), 26 November 2014, **C-57**, para 7.1.4.

power plant to operate at its Technical Minimum (and beyond in order to have the capacity to adjust downwards).[43]

42. On 1 October 2015, COES issued its "Technical Note for the Implementation of the Secondary Frequency Regulation Service through the Automatic Generation Control – AGC" (***Technical Note 1***).[44] The Technical Note explicitly stated that COES had to include the Firm Base Provider of the SFR service in the daily DOP, even if its costs were higher than those of other generators within the merit order.

43. On 11 February 2016, OSINERGMIN approved the "Guidelines for the Award of the Base Provision for Secondary Frequency" (the ***Guidelines***).[45] According to the Guidelines, the cost of providing the Firm Base Provision of the SFR service offered by each bidder (*ie* bid price) would be the objective factor for determining the winner of the tender.[46] Each bidder would offer to provide the SFR service for a specified price per KW/month expressed in Peruvian Soles. The Firm Base Provision would be awarded to the bidder or bidders offering the most competitive bid price.

44. In February 2016, COES called generators to participate in the tender for the Firm Base Provision of the SFR service according to the terms of PR-22, the Guidelines and Technical Note 1.[47] Kallpa GSA offered to provide the Firm Base Provision of the SFR service through its thermal power plants, Kallpa and Las Flores, for a price of 0 S/kW-month. The bid submitted by Kallpa GSA (zero Soles) was in line with its understanding of PR-22 that the Firm Base Provider

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43 Kallpa's Technical Minimum is approximately 540 MW. According to PR-22 and COES's Technical Note 1 (as defined in footnote 44 below), if Kallpa were to provide the 240 MW reserve of the Firm Base Provision of the SFR, its Technical Minimum plus 120 additional MW would therefore need to be included in the DOP and dispatched into the system.

44 Technical Note for the Implementation of the Secondary Frequency Regulation Service through the Automatic Generation Control – AGC (***Technical Note 1***), 1 October 2015, **C-59**.

45 OSINERGMIN Resolution No 26 approving the Guidelines for the Award of the Base Provision for Secondary Frequency (***Guidelines***), issued on 11 February 2016, published on 16 February 2016, **C-60**.

46 Guidelines, 16 February 2016, **C-60**, para 6.5.2.

47 COES Letter No 132, 29 February 2016, **C-62**, p 2.

would definitely be dispatched, and would therefore recover the cost of providing the SFR service by being compensated for the energy delivered while operating at least at its Technical Minimum.

45. Having offered the lowest bid, on 15 April 2016, COES awarded Kallpa GSA, and its Kallpa and Las Flores units, the exclusive right to provide the Firm Base Provision for a period of three years (August 2016 to July 2019).[48] Kallpa GSA and COES thus executed a commitment act incorporating the terms of the bid (***Commitment Act***). Pursuant to the Commitment Act, for the first quarter (August 2016 to November 2016) Kallpa would provide a Rotating Reserve of 240 MW for the Firm Base Provision (such that it could adjust its electricity output 120MW upwards or downwards). Such Reserve would increase on a quarterly basis up to 298 MW for the last six months of the term (from December 2018 until July 2019).[49]

46. However, shortly after the tender, certain generators again expressed concerns that the provision of the SFR service in accordance with PR-22 might generate additional costs. On 15 June 2016, natural gas-fueled generators were required to declare their variable costs for the following year (from July 2016 to June 2017).[50] Since Kallpa GSA had won the tender for SFR and was guaranteed to be included in the dispatch, there was no incentive for it to strategically declare its costs in order to compete with other generators to be ranked in the merit order. Foreseeing that it was rational for Kallpa GSA to declare its full costs, certain generators pressured the Government to rescind the terms promised to Kallpa GSA.[51]

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48 *See* Commitment Act, 15 April 2016, **C-63** pp 2, 9-15.

49 *See* Commitment Act, 15 April 2016, **C-63**, pp 14-15.

50 *See* OSINERGMIN Resolution No 246 approving Technical Procedure No 31 (***PR-31***), 27 November 2014, **C-58**, Annex 3, para 1.2.

51 Letter from Engie (Mr Cámac Gutiérrez and Ms Spallarossa Lecca) to OSINERGMIN (Mr Tamayo Pacheco) and COES (Mr Butrón), 8 June 2016, **C-64**; Letter from Termochilca (Ms Alegre Chalco) to OSINERGMIN (Mr Tamayo Pacheco), 10 June 2016, **C-65**.

47. On 13 June 2016, two days before the date on which cost declarations were due, OSINERGMIN issued a resolution (***Resolution 141***)[52] purporting to clarify the interpretation of PR-22. Resolution 141 provided that rather than being included in the DOP regardless of its ranking in the merit order, the units providing the SFR service (*ie* Kallpa and Las Flores to whom the Firm Base Provision of the SFR service had already been tendered) would be programmed based on economic dispatch; that is, taking into account the lowest marginal cost of service.[53] That meant that Kallpa GSA would only have "priority" to provide SFR if its marginal cost was lower than the marginal cost of other generators capable of providing the service, such that it was included in the daily DOP based on economic dispatch. Resolution 141 thus effectively deprived Kallpa GSA of its priority for dispatching electricity above the Technical Minimum of its units required to be able to provide the SFR service through Forced Dispatch as necessary, and the right to recover the costs of supplying the associated energy.

48. Rather than clarifying or interpreting aspects of PR-22, Resolution 141 fundamentally changed the rules that Kallpa GSA had relied on in submitting its bid. These changes to PR-22 were applied retroactively to Kallpa GSA as Firm Base Provider, thus frustrating the expectations generated by the terms of the bid and of the Commitment Act. Through Resolution 141, Peru withdrew its commitment to dispatch Kallpa GSA's units, regardless of their ranking in the merit order, while Kallpa GSA remained bound to provide the Firm Base SFR service for free (per its bid price).

49. As a consequence, Kallpa GSA was forced to make a strategic gas price declaration, declaring costs that were lower than its actual total costs in order to assure its dispatch in order to fulfil its take-or-pay obligations.

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52 OSINERGMIN Resolution No 141 (***Resolution 141***), issued on 13 June 2016, published on 14 June 2016, **C-66**.

53 Resolution 141, 14 June 2016, **C-66**, Art 1.

50. Kenon and IC Power, through their subsidiary Kallpa GSA, relied on the commitments made by Peru in submitting a bid for the provision of SFR. Resolution 141 was contrary to the explicit text of PR-22, as clearly interpreted in the clarifications provided by OSINERGMIN, the regulator, in response to comments by interested parties during its lengthy approval process. Rather than clarifying the terms of PR-22, Resolution 141 materially changed the regulatory framework Kallpa GSA had relied on when it made its bid, adversely affecting its rights under the tender and causing losses to Claimants.

B. SECONDARY AND COMPLEMENTARY TRANSMISSION CLAIM

51. Until 2006, electricity was transmitted in the Peruvian national grid (the SEIN) through the Primary Transmission System (***PTS***) and/or the Secondary Transmission System (***STS***), both regulated by Decree Law 25844, the Electricity Concessions Law (the ***Electricity Concessions Law***).[54]

52. The PTS consists of very high and high voltage transmission lines connecting all users, including generators, with busbars. Typically, PTS lines transport electricity in both directions, allowing generators to sell power and energy to any busbar connected to the system.[55]

53. The STS consists of high voltage and medium voltage transmission lines that transmit electricity from a generator to a busbar, or transmit electricity from a busbar to a distributor or large consumer.[56] STS lines may be used exclusively by a generator or demand user (*eg* a distributor or large industrial consumer, ***Demand User***). In these cases, it is possible to determine exactly which generator or Demand User uses the line. In other cases, STS lines may be shared by a group of generators, or by generators and Demand Users. When these lines are shared by

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54 Law Decree No 25844 (***Electricity Concessions Law***), 19 November 1992, **C-33**, Annex, paras 16-17.

55 *See* Electricity Concessions Law, 19 November 1992, **C-33**, Art 58 and Annex, paras 1, 16.

56 *See* Electricity Concessions Law, 19 November 1992, **C-33**, Annex, para 17.

generators and Demand Users, it becomes necessary: (a) to apportion the cost of the line as between generators and Demand Users; and then, (b) to apportion the cost amongst the members of each group, *ie* amongst generators and amongst Demand Users. This claim concerns the apportionment of the cost of transmission lines (whether of single or mixed use) between generators.

54. Different economic criteria may be applied to determine the apportionment of charges and costs among generators who use transmission lines. Peruvian law acknowledges the use of both the "use" criterion (based on a generator's use of any given line) and the "economic benefit" criterion (based on the benefits a generator derives from each line).[57] Once a criterion is selected by the regulator, a specific calculation methodology must be adopted to determine the way in which the costs will be apportioned among users. Different methodologies can be used to implement each criteria. Until 2006, the cost of using STS lines for which the "use" criterion was applicable, was apportioned amongst generators in accordance with the "topological distribution factors" methodology.[58] This is a flow-based cost allocation method that aims to identify the power injected by a generator in each of the network's transmission lines and allocates the cost of transmission lines proportionally to such injection.

55. On 23 July 2006, Peru adopted Law 28832, also known as the Law to Ensure the Efficient Development of Electricity Generation (***Law 28832***) which aimed to "perfect the rules established in the Electricity Concessions Law".[59] This Law established that, in addition to the PTS and STS, the SEIN would have two new electricity transmission systems: the Guaranteed Transmission System (***GTS***) and the Complementary Transmission System (***CTS***). In essence, GTS lines are equivalent to PTS lines in that they are very high and high voltage transmission lines connecting all users, including generators. The main difference is that GTS

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57 *See* Supreme Decree No 9 (***ECL Regulation***), 25 February 1993, as amended, **C-34**, Art 139.

58 *See eg*, OSINERGMIN Report No 11A, 11 April 2005, **C-41**, p 3; OSINERGMIN Report No 15A, 11 April 2005, **C-39**, p 16; OSINERGMIN Report No 18A, 11 April 2005, **C-40**, p 18.

59 Law No 28832 (***Law 28832***), 23 July 2006, **C-42**, Art 2.

lines "[entered] into commercial operation after the enactment" of Law 28832, *ie* after 23 July 2006.[60] Likewise, CTS are equivalent to STS lines, in that they are high voltage and medium voltage transmission lines that transmit electricity from a generator to a busbar, or from a busbar to a distributor or large consumer, that entered into operation after 23 July 2006.

56. One of the main objectives of Law 28832 was to provide a clear framework for compensation payments for transmission infrastructure. Under the previous law, the criterion for apportionment of compensation payments could vary for a given transmission line. Law 28832 stabilized the criteria for apportioning compensation payments for PTS and STS lines[61] – that is, lines in operation before 23 July 2006. Thus, the "use" criterion applicable to existing STS lines was stabilized.[62]

57. Following the enactment of Law 28832, the regulation of the Electricity Concessions Law (the ***ECL Regulation***) was adapted to include specific provisions regarding the CTS. The ECL Regulation established that: the apportionment of the cost of CTS lines between generators and Demand Users would be established once and kept constant afterwards;[63] and the same criteria used for STS lines (*ie* the "use" criteria) would be applied for the apportionment of payments for CTS lines amongst generators.[64]

58. On 30 May 2008, OSINERGMIN published Resolution No 383 (***Resolution 383***), which took effect on 1 May 2009,[65] formally approving the "Procedure for the

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60 Law 28832, 23 July 2006, **C-42**, Art 20.2 (emphasis added).

61 As per Law 28832, previous categories were fixed (installations could not be reclassified). Law 28832 also stabilized the apportionment of compensation payments between Generators and Demand Users.

62 Law 28832, 23 July 2006, **C-42**, Sixth Final Complementary Provision.

63 ECL Regulation, 25 February 1993, **C-34**, Art 139(e)(VI). The ECL Regulation was amended by Supreme Decree No 27 on 17 May 2007.

64 ECL Regulation, 25 February 1993, **C-34**, Art 139(e)(IV).

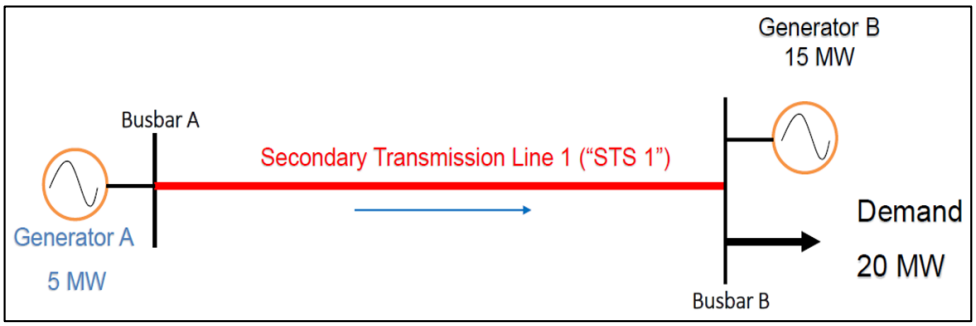
65 OSINERGMIN Resolution No 383 (***Resolution 383***), issued on 29 March 2008, published on 30 May 2008, **C-44**.

Apportionment of Responsibility for the STS and CTS" (the ***Apportionment Procedure***).[66] The Apportionment Procedure followed the suggestions and conclusions of a report prepared by Quantum S.A., a consultant, on the "Methodology and Procedure for the Apportionment of Transmission Charges" (the ***Quantum Report***).[67] Among other aspects, the Apportionment Procedure established how to allocate among generators the payment of charges for STS lines and CTS lines.

59. The Apportionment Procedure changed the methodology to be used when applying the "use" criterion to apportion the cost of STS and CTS lines among generators. Going forward, the "topological distribution factors" methodology would be replaced with the "Energy / Distance" methodology, combined with the concept of "Relevant Generator".

60. Only generators considered to be "relevant" for each line would be responsible for paying the costs associated with using a specific line (or ***Element***).[68] A generator would be considered relevant for a line "if at least one electrical pathway of a particular generator to any demand busbar passes through an Element".[69] In the graph below, for example, Generator A would be considered relevant for the STS 1 line, whereas Generator B would not.

Figure A



66 Resolution 383, 30 May 2008, **C-44**, Art 1.

67 Quantum Final Report, 22 May 2008, **C-43**.

68 Resolution 383, 30 May 2008, **C-44**, Annex, Art 11.1.

69 Resolution 383, 30 May 2008, **C-44**, Annex, Art 4.20.

61. Once OSINERGMIN determined which generators were "relevant" for each Element of the transmission system,[70] COES would apportion the total monthly payments amongst the "relevant" generators for that Element (or line) using the Energy/Distance methodology.[71] Essentially, the Energy/Distance methodology allocates transmission costs for each Element based on the distance from the generator to the Element, and the magnitude of the power generated by the generator. The closer a generator is to an Element and the more electricity it generates, the larger its allocated payment for that Element.

62. This methodology made sense given the structure of Peru's electricity grid. Whereas PTS and GTS transmission lines form the core of the country's transmission grid, such that the payment for the cost of those lines was borne by all users, STS and CTS lines are more peripheral and serve specific generators or Demand Users, such that the payment for the cost of those lines was assigned to their specific beneficiaries.

63. For example, two of the power plants operated by Claimants' Peruvian subsidiaries were located at close proximity to most of their Demand Users in Lima, and, therefore, they only paid for the few lines that were relevant to them in order to transmit electricity to consumers. This can be seen in the map below which shows that Kallpa and Las Flores were located much closer to their Demand Users in Lima than, for instance, State-owned power generators. In making investment decisions for all of their plants, Claimants relied on the fact that they would only have to pay for transmission lines for which they were actually relevant.

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70 *See* Resolution 383, 30 May 2008, **C-44**, Art 11.

71 *See* Resolution 383, 30 May 2008, **C-44**, Art 12.

64. In accordance with the Apportionment Procedure, on 14 October 2009, OSINERGMIN issued Resolution No 184 (***Resolution 184***) setting out the compensation payable for the use of transmission lines, including STS and CTS lines, for the period from 2009-2013.[72] OSINERGMIN used the "Energy / Distance" methodology combined with the concept of "Relevant Generator" as established in the Apportionment Procedure. It used the "Topographical Distribution Factors" method to identify the Relevant Generators for each line.[73]

65. OSINERGMIN implemented the same methodology for the following four year period, from 2013-2017, pursuant to Resolution No 54 (***Resolution 54***).[74]

66. In February 2016, however, OSINERGMIN published Resolution No 24 which attached the draft text of a resolution setting out a new apportionment procedure to replace the Apportionment Procedure previously approved under Resolution

72 OSINERGMIN Resolution No 184 (***Resolution 184***), 15 October 2009, **C-45**, Art 8.

73 Resolution 184, 15 October 2009, **C-45**, Annex 8, Tables 8.28 to 8.39.

74 OSINERGMIN Resolution No 54, 15 April 2013, **C-49**.

383 of 2008 (the ***New Apportionment Procedure***).[75] Among other things, the draft sought to remove the concept of Relevant Generator, so that the payment for the use of the STS and CTS would now be shared between all generators instead of only by those considered relevant for each specific line.

67. Notwithstanding that generators heavily criticized the New Apportionment Procedure,[76] OSINERGMIN approved it shortly thereafter, on 30 June 2016, through Resolution No 164 (***Resolution 164***).[77] This Resolution was issued in an irregular manner that was not consistent with the principles of motivation, neutrality and cost-benefit analysis required for the issuance of electricity regulations.[78]

68. Resolution 164 maintained the Energy / Distance methodology, but eliminated the relevance requirement, thus materially altering the manner in which payments for the use of STS and CTS infrastructure were apportioned. By removing the requirement that only Relevant Generators pay compensation, *all* generators became liable to pay for *all* STS and CTS lines, regardless of whether they used them (*ie* in Figure A above, Generator B would also have to pay for the STS 1 line).

69. Given the configuration of the STS and CTS transmission lines, as a result of this unpredictable and arbitrary change to the regulatory framework, from 1 May 2017, Claimants' subsidiaries, Kallpa GSA and Samay (as well as other private sector power generators), were forced to make significant additional and

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75 OSINERGMIN Resolution No 24 approving the New Apportionment Procedure (***New Apportionment Procedure***), 16 February 2016, **C-61**.

76 *See* OSINERGMIN Resolution No 164 (***Resolution 164***), issued on 30 June 2016, published on 2 July 2016, **C-67**, p 2, para 7.

77 Resolution 164, 2 July 2016, **C-67**.

78 *See* Law No 27444, 11 April 2001, **C-35**, Art 3.4; Supreme Decree No 54 (***OSINERGMIN General Regulation***), 9 May 2001, **C-36**, Arts 5, 7.

unforeseen payments in relation to STS and CTS lines that were not relevant to them.[79]

70. Conversely, State-owned power generation companies, particularly Electroperú, directly benefited from Resolution 164 and saw their STS and CTS payments materially reduced.[80] In practice, eliminating the "Relevance" requirement functioned as a cross subsidy for State-owned enterprises like Electroperú who exclusively used (and consequently had to exclusively pay for) certain costly lines under the previous system. Resolution 164 discriminated against private generators, causing losses to Claimants, in order to favor State-owned generators giving them an unjustified advantage with respect to other competitors.

IV. PERU'S VIOLATIONS OF THE TREATY

71. Article 10.5 of the Treaty provides that:

> Each Party shall accord to investments of investors of the other Party treatment in accordance with customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security […].[81]

72. Peru has breached its obligation under Article 10.5 of the Treaty through its measures in relation to the provision of the SFR service and the allocation of the costs of electricity transmission lines, as described in Section III above, which adversely affected Claimants' investments. In particular, but without limitation, Peru breached its Treaty obligation by acting in an arbitrary, discriminatory, unfair and inequitable manner, and by frustrating Claimants' legitimate expectations.

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79 *See* OSINERGMIN Resolution No 129, 22 June 2017, **C-70**.

80 *See* Electroperu 2017 Annual Report, 8 March 2018, **C-71**, pp 2, 4-5.

81 Treaty, 1 August 2009, **C-1**, Art 10.5.1.

V. THE TRIBUNAL HAS JURISDICTION TO DECIDE THE DISPUTE

A. CLAIMANTS ARE PROTECTED INVESTORS UNDER THE TREATY

73. Article 10.1.7 defines an "investor of a Party" as follows:

> (a) an enterprise of a Party; or
>
> (b) a natural person who resides in the territory of a Party or elsewhere and who under the law of that Party:
>
> > (i) is a citizen of that Party; provided, however, that a natural person who is a dual citizen shall be deemed to be exclusively a citizen of the State of his or her dominant and effective citizenship; or
> >
> > (ii) has the right of permanent residence in that Party;
> >
> > that has made, is in the process of making, or is seeking to make an investment in the territory of the other Party.[82]

74. Article 10.1.2 of the Treaty defines "enterprise of a Party" as follows:

> an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party.[83]

75. IC Power and Kenon are incorporated in Singapore.[84] Claimants are therefore enterprises of a Party to the Treaty and thus investors qualifying for protection under the Treaty.

B. THE DISPUTE ARISES OUT OF INVESTMENTS PROTECTED UNDER THE TREATY

76. Article 10.2.1 of the Treaty provides as follows:

> This Chapter applies to measures adopted or maintained by a Party relating to:

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82 Treaty, 1 August 2009, **C-1**, Art 10.1.7 (emphasis added).

83 Treaty, 1 August 2009, **C-1**, Art 10.1.2.

84 Certificate of Good Standing of IC Power, 1 March 2019, **C-9**; Certificate of Good Standing of Kenon, 17 December 2012, **C-3**.

> (a) investors of the other Party;
>
> (b) investments of investors of the other Party, made, in the process of being made, or sought to be made, in the territory of the former Party;
>
> (c) with respect to Article 10.7 (Performance Requirements), all the investments in the territory of the Party.[85]

77. Article 10.1.6 defines an "investment" as:

> every kind of asset, owned or controlled, directly or indirectly, by an investor, that includes characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk, including but not limited to the following:
>
> (a) an enterprise;
>
> (b) shares, stock, and other forms of equity participation in an enterprise, including rights derived therefrom;
>
> (c) bonds, debentures, and loans and other debt instruments including rights derived therefrom;
>
> (d) futures, options, and other derivatives;
>
> (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
>
> (f) claims to money or to any contractual performance related to a business and having an economic value;
>
> (g) intellectual property rights and goodwill;
>
> (h) licenses, authorizations, permits, and similar rights conferred pursuant to applicable domestic law, including any concession to search for, cultivate, extract or exploit natural resources; and
>
> (i) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.[86]

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85 Treaty, 1 August 2009, **C-1**, Art 10.2.1 (emphasis added).

86 Treaty, 1 August 2009, **C-1**, Art 10.1.6 (original footnote reference omitted).

78. At the time of the measures complained of in this Request for Arbitration, Claimants held protected investments, including, but not limited to: (i) their indirect shareholdings in Kallpa GSA and Samay, which are enterprises for the purposes of the Treaty; (ii) property in the form of the Kallpa, Las Flores, Cerro del Aguila and Puerto Bravo power plants; (iii) rights and administrative authorizations granted to Kallpa GSA and Samay in relation to the operation of those same power plants; and (iv) the right to provide the Firm Base Provision of the SFR service, in accordance with the Commitment Act executed by Kallpa GSA following the tender of the service to Kallpa and Las Flores. Each of these enterprises, assets, rights and authorizations qualifies as an investment under sub-paragraph (a), (b), (h) or (i) of the definition of investment set out in the Treaty.

79. Consequently, the present dispute concerns alleged breaches of the Treaty by Peru which have caused loss or damage to protected investors (Claimants) and their qualifying investments (as described above), as required under Article 10.17.1 of the Treaty. Kenon and IC Power expressly retained the right to submit the present dispute to arbitration under the Treaty when they sold their assets in Latin America, including their Peruvian subsidiaries, in late 2017, following the enactment of the measures.[87]

C. THE PARTIES' CONSENT TO ARBITRATION UNDER THE TREATY AND THE ICSID CONVENTION

80. Claimants have fulfilled all the requirements for access to arbitration under the ICSID Convention and the Treaty, as explained below.

[87] *See* Share Purchase Agreement executed by Inkia and others, 24 November 2017, **C-15**. International tribunals have consistently held that the voluntary disposition of an investment does not affect jurisdiction insofar as the right to pursue the claim is retained. *See, eg, National Grid plc v The Argentine Republic* (UNCITRAL) Decision on Jurisdiction, 20 June 2006, paras 120-122; and *El Paso Energy International Company v The Argentine Republic* (ICSID Case No ARB/03/15) Decision on Jurisdiction, 27 April 2006, para 135.

1. The requirements under the Treaty have been fulfilled

81. Disputes between investors and Parties to the Treaty are governed by Article 10.17 of the Treaty which applies "to disputes between a Party and an investor of the other Party concerning an alleged breach of an obligation of the former under this [investment] Chapter which causes loss or damage to the investor or its investment."[88]

82. Article 10.17.2 of the Treaty provides that "[t]he parties to the dispute shall initially seek to resolve the dispute by consultations and negotiations."[89]

83. Peru's consent to submit investment disputes with investors to ICSID arbitration is provided in the Treaty under Article 10.17.3 of the Treaty:

> Where the dispute cannot be resolved as provided for under paragraph 2 within six (6) months from the date of a request for consultations and negotiations, then, unless the disputing investor and the disputing Party agree otherwise, or if the investor concerned has already submitted the dispute for resolution before the courts or administrative tribunals of the disputing Party, or if the dispute is already otherwise subject to other binding dispute settlement proceedings (excluding proceedings for interim measures of protection referred to in paragraph 5 below), the investor concerned may submit the dispute for settlement to
>
> (a) ICSID for conciliation or arbitration pursuant to Articles 28 or 36 of the ICSID Convention, if both Parties are parties to the ICSID Convention;
>
> (b) arbitration under the UNCITRAL Arbitration Rules; or
>
> (c) any other arbitration institution or under any other arbitration rules, if the disputing investor and the disputing Party agree.[90]

84. Article 10.17.4 of the Treaty provides for the fulfilment of certain procedural requirements prior to the submission of a claim to arbitration and reads as follows:

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88 Treaty, 1 August 2009, **C-1**, Art 10.17.1.

89 Treaty, 1 August 2009, **C-1**, Art 10.17.2.

90 Treaty, 1 August 2009, **C-1**, Art 10.17.3.

> Each Party hereby consents to the submission of a dispute to conciliation or arbitration under paragraphs 3(a) to 3(c) in accordance with the provisions of this Article, conditional upon:
>
> (a) the submission of the dispute to such conciliation or arbitration taking place within three (3) years of the time at which the disputing investor became aware, or should reasonably have become aware, of a breach of an obligation under this Chapter causing loss or damage to the disputing investor or its investment;
>
> (b) the disputing investor providing written notice ("notice of intent"), which shall be submitted at least thirty (30) days before the claim is submitted, to the disputing Party of its intent to submit the dispute to such conciliation or arbitration and which:
>
> (i) states the name and address of the disputing investor and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;
>
> (ii) nominates either paragraph 3(a), 3(b) or 3(c) of this Article as the forum for dispute settlement (and, in the case of ICSID, nominates whether conciliation or arbitration is being sought);
>
> (iii) waives its right to initiate any proceedings (excluding proceedings for interim measures of protection referred to in paragraph 5) before any of the other dispute settlement fora referred to in paragraph 3 in relation to the matter under dispute;
>
> (iv) for each claim, briefly summarises the alleged breach of the disputing Party under this Chapter, including the articles alleged to have been breached, and its legal and factual basis; and
>
> (v) states the approximate amount of loss or damage allegedly caused to the disputing investor or its investment.[91]

85. The requirements of the Treaty to submit the dispute to arbitration have been satisfied in this case:

(a) Claimants waited at least six months from the date on which they sent to Peru their requests for negotiations and consultations before submitting the present dispute to ICSID arbitration in accordance with Article 10.17.3 of the Treaty;[92]

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[91] Treaty, 1 August 2009, **C-1**, Art 10.17.4 (original footnote reference omitted).

(b) Claimants provided written notice to Peru of their intent to submit the present dispute to arbitration on 12 April 2019, more than thirty days before submitting the present dispute to ICSID arbitration (the ***Notice of Intent***). In said Notice of Intent Claimants: (i) stated their names, addresses and places of incorporation; (ii) nominated ICSID arbitration as the means of settling the dispute; (iii) waived their right to initiate any proceedings before any other dispute settlement fora; (iv) summarized Peru's breaches of the investment chapter of the Treaty; and (v) stated the approximate value of their losses resulting from Peru's breaches.[93]

(c) at the time of the filing of this Request for Arbitration, less than three years have elapsed since Claimants first acquired, or should have acquired, knowledge of Peru's breaches of the Treaty causing loss or damage, as Claimants first acquired that knowledge on the date of the measures, namely on 14 June and 2 July 2016; and

(d) Claimants have not submitted the dispute for resolution before Peru's courts or administrative tribunals, per Article 10.17.3 of the Treaty, and have waived their right to initiate proceedings in accordance with Article 10.17.4 of the Treaty.[94]

86. Claimants have therefore fulfilled all requirements to access ICSID arbitration under the Treaty.

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92 IC Power requested negotiations and consultations pursuant to Article 10.17.3 of the Treaty through its notice of dispute delivered on 4 October 2016, and its second notice of dispute delivered on 27 June 2017. *See* Letter from IC Power (Mr García Burgos) to the Ministry of Economy and Finance (***IC Power Notice of Dispute***), 3 October 2016, **C-68**; Letter from Claimants (Mr García Burgos) to the Ministry of Economy and Finance (***IC Power Second Notice of Dispute***), 21 June 2017, **C-69**. IC Power held meetings with the Special Commission (*Comisión Especial Ley No 28933*) in December 2016 and November 2017. Kenon requested negotiations and consultations pursuant to Article 10.17.3 of the Treaty through its notice of dispute of 12 November 2018 and held a meeting with the Special Commission in March 2019. *See* Letter from Kenon (Mr Rosen) to the Ministry of Economy and Finance (Mr Herrera Catalán) (***Kenon Notice of Dispute***), 12 November 2018, **C-72**. Despite this, no amicable settlement of the dispute was achieved.

93 Letter from Claimants (Mr Rosen) to the Ministry of Economy and Finance (Mr Herrera Catalán) and to the Special Commission - Law 28933 (Mr Ampuero Llerena) (***Notice of Intent***), 12 April 2019, **C-73**.

94 Notice of Intent, 12 April 2019, **C-73**.

2. The requirements under the ICSID Convention have been fulfilled

87. Articles 25(1) and (2) of the ICSID Convention set out the requirements to access ICSID arbitration:

> (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State […] and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.
>
> (2) 'National of another Contracting State' means: […]
>
> > (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

88. Article 25 provides that ICSID has jurisdiction over (a) legal disputes; (b) that arise directly out of an investment; (c) between an ICSID Contracting State and (i) a national of another Contracting State and/or (ii) a national of the Contracting State party to the dispute that, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of the ICSID Convention; and (d) which the parties to the dispute have consented to submit to ICSID arbitration.

89. All of these elements are satisfied in this case:

(a) there is a legal dispute arising from Peru's breach of its obligations under the Treaty, as set out in Section IV above;

(b) the dispute arises directly out of Claimants' investments in Peru, as described in Section III above, which are qualifying investments under the Treaty and the ICSID Convention;

(c) the dispute has arisen between Peru, an ICSID Contracting State[95] and Claimants, each an investor of Singapore, an ICSID Contracting State;[96] and

(d) Peru consented to submit this dispute to ICSID arbitration pursuant to Article 10.17 of the Treaty. Claimants consented to submit this dispute to ICSID arbitration through their Notice of Intent delivered to Peru in accordance with Article 10.17 of the Treaty.[97]

90. The Tribunal therefore has jurisdiction under the Treaty and under the ICSID Convention.

VI. CONSTITUTION OF THE TRIBUNAL, PLACE AND LANGUAGE OF THE ARBITRATION

91. The Tribunal shall be constituted in accordance with the procedure set out in Article 2(1)(a) of the ICSID Arbitration Rules. In accordance with Article 37(2)(b) of the ICSID Convention, Claimants propose that the Tribunal be composed of three arbitrators.

92. In accordance with Article 62 of the ICSID Convention, the arbitration proceedings shall be held at ICSID's headquarters in Washington, DC.

93. The Treaty is silent on the question of the language of the arbitration, and the parties have not reached an agreement on this issue in accordance with Article 22 of the ICSID Arbitration Rules. Claimants propose both English and Spanish as

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95 The ICSID Convention entered into force for Peru on 8 September 1993, following its signature of the Convention on 4 September 1991 and the deposit of its instrument of ratification on 9 August 1993.

96 The ICSID Convention entered into force for Singapore on 13 November 1968, following its signature of the Convention on 2 February 1968 and the deposit of its instrument of ratification on 14 October 1968.

97 Notice of Intent, 12 April 2019, **C-73**.

the languages of the arbitration. Claimants further propose that documents, exhibits and authorities in English or Spanish may be submitted by the parties in the course of the proceedings without translation into English or Spanish, and have adopted this practice in the present Request.

VII. NAMES AND ADDRESSES OF THE PARTIES

94. Kenon is a corporation organized under the laws of Singapore with its registered office at:

Kenon Holdings Limited
1 Temasek Avenue, #36-01, Millenia Tower
039192 Singapore

95. IC Power is a corporation organized under the laws of Singapore with its registered office at:

IC Power Limited
1 Temasek Avenue, #36-01, Millenia Tower
039192 Singapore

96. All correspondence and notices relating to this case should be addressed to:

Nigel Blackaby
Caroline Richard
María Julia Milesi
María Paz Lestido

Freshfields Bruckhaus Deringer US LLP
700 13th Street NW, 10th Floor
Washington, DC 20005-3960
United States of America
Tel.: +1 202 777 4500
Fax: +1 202 777 4555
Email: nigel.blackaby@freshfields.com
caroline.richard@freshfields.com
mariajulia.milesi@freshfields.com
mariapaz.lestido@freshfields.com

97. ICSID is respectfully requested to serve copies of this Request for Arbitration on Peru at each of the following addresses, as required by Article 10.17.4 of the Treaty and indicated by Law No 28933:

Excelentísimo Señor Martín Alberto Vizcarra Cornejo
Presidente de la República del Perú
Edificio Palacio, Jirón de la Unión 264,
Cercado de Lima
15001, Perú

Pedro Paul Herrera Catalán
Dirección General de Asuntos de Economía Internacional
Competencia y Productividad[98]
Ministerio de Economía y Finanzas
Jirón Lampa # 277, piso 5
Lima 1, Perú

Ricardo Ampuero Llerena
Comisión Especial – Ley No 28933
Jr Junín Nº 319
Lima 1, Perú

VIII. CLAIMANTS' REQUEST FOR RELIEF

98. On the basis of the foregoing, without limitation and reserving the Claimants' right to supplement these prayers for relief, Claimants respectfully request that the Tribunal:

(a) DECLARE that Peru has breached Article 10.5 of the Treaty;

(b) ORDER Peru to compensate Claimants for its breaches of the Treaty in an amount to be determined at a later stage in these proceedings, plus interest until the date of payment;

(c) AWARD such other relief as the Tribunal considers appropriate; and

(d) ORDER Peru to pay all of the costs and expenses of this arbitration, including the Claimants' legal and expert fees, the fees and expenses of any experts appointed by the Tribunal, the fees and expenses of the Tribunal and ICSID's other costs.

[98] Formerly Dirección General de Asuntos de Economía Internacional, Competencia e Inversión Privada.

Respectfully submitted on 12 June 2019

Freshfields Bruckhaus Deringer US LLP

Nigel Blackaby
Caroline Richard
María Julia Milesi
María Paz Lestido

Philippi Prietocarrizosa Ferrero DU & Uría

Carolina de Trazegnies

for the Claimants