

INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES

In the Matter of the Arbitration between

DUKE ENERGY INTERNATIONAL PERU INVESTMENTS NO. 1, LTD.

Claimant

and

REPUBLIC OF PERU

Respondent

Case No. ARB/03/28

DECISION ON JURISDICTION

Date: February 1, 2006

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I. PROCEDURAL HISTORY

A. REGISTRATION OF THE REQUEST FOR ARBITRATION

1. On October 7, 2003, the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) received a request for arbitration (“the Request”) submitted by Duke Energy International Peru Investments No. 1 Ltd. (“**DEI Bermuda**”, or the “**Claimant**”, interchangeably), a company organized under the laws of Bermuda. DEI Bermuda is owned by Duke Energy International Latin America Ltd., another Bermudan company, and indirectly, by Duke Energy International LLC (“**Duke Energy**”).
2. The Request was submitted in regard to a dispute with the Republic of Peru (“**Peru**” and/or the “**Respondent**”) concerning a legal stability agreement concluded between Peru and DEI Bermuda (the “**DEI Bermuda LSA**”). According to DEI Bermuda, Peru has imposed a tax assessment in violation of certain guarantees in the DEI Bermuda LSA. The Request invokes the arbitration provision of the DEI Bermuda LSA.
3. The Centre, on October 9, 2003, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (“**Institution Rules**”) acknowledged receipt of the Request and, on the same day, transmitted a copy to Peru and to the Embassy of Peru in Washington, D.C.
4. The Request was registered by the Centre on October 24, 2003, pursuant to Article 36(3) of the ICSID Convention and, on the same day, the Secretary-General, in accordance with Institution Rule 7, notified the parties of the registration and invited them to proceed to constitute an arbitral tribunal as soon as possible.

B. CONSTITUTION OF THE ARBITRAL TRIBUNAL AND COMMENCEMENT OF THE PROCEEDING

5. On January 23, 2004, the parties agreed that the Arbitral Tribunal in this case was to consist of three arbitrators, one arbitrator appointed by each of the parties and the third arbitrator who would be the President of the Tribunal to be appointed by agreement of the parties. In the event that the parties were to fail to appoint an arbitrator or fail to agree on

the President of the Tribunal, the Chairman of the Administrative Council of the Centre was to appoint the arbitrators not yet appointed.

6. Claimant, by a letter of January 23, 2004, appointed Dr. Hector A. Mairal, a national of Argentina, as its arbitrator. Following Dr. Mairal's decision to recuse himself, communicated to the Centre by letter of March 9, 2004, which further communicated the recusal to the parties by letter of March 11, 2004, Claimant, by a letter of March 19, 2004, appointed Dr. Guido S. Tawil, a national of Argentina, as its arbitrator. Respondent, by letter dated February 20, 2004, appointed Dr. Pedro Nikken, a national of Venezuela, as its arbitrator. By agreement communicated to the Centre by letter of May 12, 2004, the parties appointed Mr. L-Yves Fortier, C.C., Q.C., a national of Canada, as the presiding arbitrator.
7. All three arbitrators having accepted their appointment, the Centre, by a letter of June 3, 2004, informed the parties of the constitution of the Tribunal consisting of Mr. L. Yves Fortier, C.C., Q.C., Dr. Pedro Nikken and Dr. Guido S. Tawil, and that the proceeding was deemed to have commenced on that day pursuant to ICSID Arbitration Rule 6(1). In the same letter the Centre informed the parties that Ms. Gabriela Alvarez Avila, Senior Counsel at ICSID, would serve as Secretary of the Tribunal.

C. WRITTEN AND ORAL PROCEEDINGS

8. After consulting with the parties and the Centre, the Tribunal scheduled a first session for July 28, 2004. The parties, by letter from Claimant (with attachment) of July 26, 2004 and letter from Respondent of the same date, communicated to the Tribunal their agreement on procedural matters identified in the provisional agenda for the first session, which had been sent to them by the Tribunal's Secretary.
9. In its letter of July 26, 2004, Respondent informed the Tribunal that it intended to raise objections to the Tribunal's jurisdiction and the admissibility of the claims, that the parties were unable to agree on the procedure for the jurisdictional phase and that Claimant withheld its agreement to a separate phase on jurisdiction and admissibility. In the same letter, Respondent invoked ICSID Arbitration Rule 41(3), according to which the proceedings on the merits are suspended upon the formal raising of an objection that

the dispute is not within the jurisdiction of the Tribunal, and proposed a schedule for written submissions and a hearing on the issues of the jurisdiction of the Tribunal and the admissibility of the claims.

10. The first session of the Tribunal was held as scheduled on July 28, 2004 at the seat of the Centre in Washington, D.C. The parties reiterated their agreement on the points communicated to the Tribunal in their respective letters of July 26, 2004. In light of Respondent's letter of July 26, 2004, indicating its intention to raise objections to the Tribunal's jurisdiction and the admissibility of the claims, the President invited the parties to present briefly their views on these issues and on the issue of possible bifurcation of the proceedings. Having considered the views of the parties and the relevant rules and, after having deliberated, the Tribunal decided to suspend the proceedings on the merits pursuant to Rule 41(3) of the Arbitration Rules and to bifurcate the proceedings. It was decided that each party would submit its observations on objections to jurisdiction and the admissibility of the claims and that the Tribunal would decide at a later stage whether it would deal with these objections as a preliminary question or join them to the merits of the dispute. The remainder of the procedural issues on the agenda for the session, including the time limits for the jurisdictional submissions, were discussed and agreed. All the conclusions were reflected in the written minutes of the session, signed by the President and Secretary of the Tribunal, and provided to the parties as well as all members of the Tribunal.

1. Written Submissions on Jurisdiction and Admissibility

11. In accordance with the agreed schedule, Respondent filed its Memorial on Jurisdiction and Admissibility on October 4, 2004, Claimant filed its Counter-Memorial on Jurisdiction and Admissibility on December 6, 2004, and Respondent filed its Reply on Jurisdiction and Admissibility on January 24, 2005.
12. On February 3, 2005, Claimant requested the Tribunal to grant Claimant an extension until March 11, 2005 to submit its Rejoinder on Jurisdiction and Admissibility. Claimant cited as the reason for this request the fact that the extension would give Claimant approximately the same amount of time to file its Rejoinder as Respondent had to file its Reply. Respondent, in a letter of February 4, 2005, objected to Claimant's request,

stating that the extension would unfairly burden Respondent and prejudice its preparation for the pre-hearing conference (which had been scheduled for March 14, 2005) and the hearing itself.

13. Following a further letter from Claimant dated February 5, 2005 and a further letter from Respondent dated February 7, 2005, the Tribunal, by its Secretary's letter of February 7, 2005, communicated to the parties its decision to grant Claimant an extension until March 9, 2005 to file its Rejoinder on Jurisdiction and Admissibility. By the same letter, the Tribunal indicated that the date for the pre-hearing conference (*i.e.*, March 14, 2005) remained unchanged.
14. In compliance with the Tribunal's decision, Claimant filed its Rejoinder on Jurisdiction and Admissibility on March 9, 2005.

2. Respondent's Request for Provisional Measures

15. On November 24, 2004, Respondent filed with the Tribunal a Request for Provisional Measures, which had been raised initially by Respondent at the first session with the Tribunal on July 28, 2004 and recorded in paragraph 20 of the minutes of that session. Respondent's Request for Provisional Measures asked the Tribunal to recommend that Duke Energy withdraw a petition it had filed before the United States Trade Representative ("USTR") to revoke or suspend Peru's beneficiary status under the *Andean Trade Preference Act* ("ATPA"). Respondent also requested that the Tribunal recommend that Duke Energy seek no new remedy in any non-ICSID proceeding and that the Tribunal suspend all ICSID proceedings concerning this dispute until Duke Energy complied with the Tribunal's recommendations.
16. As a first step, following further submissions from the parties on Respondent's Request for Provisional Measures, the Tribunal, through its Secretary's letter of December 22, 2004, requested the parties to file additional submissions on the following question:

Can a party claim lack of consent on the one hand (for purposes of Articles 25 and 41 of the ICSID Convention) and, on the other, its right to the exclusivity of ICSID proceedings (including preclusion of the other party's right to seek diplomatic protection) based on the existence

of consent (for purposes of Articles 26, 27 and 47 of the ICSID Convention)?

At the Tribunal's request, the parties exchanged a first round of submissions on this single issue on January 6, 2005, and a second round of submissions on January 12, 2005.

17. Having been informed by letter from Claimant of January 19, 2005, that the results of the preliminary review of the petition to the USTR in respect of Peru had been postponed to May 31, 2005, the Tribunal, through its Secretary's letter of January 27, 2005, informed the parties that it had decided to defer its decision on Respondent's Request for Provisional Measures until such time as both parties had had a full opportunity to present their respective positions. In the same letter, the Tribunal invited Claimant to respond to the Request for Provisional Measures within two weeks and invited Respondent to reply to Claimant within a further two weeks. The Tribunal also indicated in that letter that it would hear the parties' oral arguments on this issue at the start of the hearing on jurisdiction on March 29, 2005. Finally, the Tribunal invited the parties to communicate to the USTR the existence and current status of the ICSID arbitration, noting that Section 3202(c)(2)(C)(iii) of the ATPA appeared to offer some protection to countries whose ATPA beneficiary status was threatened if a dispute over the expropriation alleged in the petition to the office of the USTR had been submitted to arbitration under the provisions of the ICSID Convention.
18. In compliance with the Tribunal's directions, the parties sent a joint letter to the USTR on February 1, 2005, together with copies of the submissions filed with the Tribunal in this proceeding. Following the receipt of the parties' submissions, the USTR informed the parties on February 24, 2005 that it had decided to suspend its review of Duke Energy's petition for the withdrawal or suspension of Peru's beneficiary status under the ATPA during the pendency of this proceeding. In light of the USTR's decision, Respondent, by letter of February 24, 2005, withdrew its Request for Provisional Measures without prejudice to refile such a request if the USTR were subsequently to revisit its decision.

3. Respondent's Request under Arbitration Rule 34(2)

19. By letter of October 21, 2004, Claimant asked the *Superintendencia Nacional de Administración Tributaria* ("SUNAT") to provide Claimant with documentation contained in SUNAT's files regarding Claimant's subsidiary DEI Egenor (as defined in paragraph 43, below). By letter of November 4, 2004, Respondent, citing this request, accused Claimant of attempting to conduct unauthorized discovery and requested the Tribunal to direct Claimant to desist from seeking information without the permission of the Tribunal under Arbitration Rule 34(2). By letter of November 22, 2004, Claimant cited what it considered to be its entitlement to seek information under Peru's Transparency Law¹ and informed the Tribunal that on November 5, 2004, SUNAT had made available to Claimant the requested file. This was confirmed by Respondent's letter of December 3, 2004. By its Secretary's letter of December 14, 2004, the Tribunal informed the parties that inasmuch as the file containing the requested documents had already been produced, it considered the specific issue raised by Respondent's November 4, 2004 letter to be moot and reminded both parties to respect the terms of Arbitration Rule 34(2).

4. The Hearing on Jurisdiction

20. Following the pre-hearing call with the parties of March 14, 2005, at which the parties had indicated that they were not intending to call any witnesses at the hearing, the Tribunal, through its Secretary's letter of March 15, 2005, requested each party to call one witness of its choice to address the history of the negotiations between Peru and Duke Energy in connection with the issues relevant to jurisdiction. By letter of March 17, 2005, Respondent nominated as its witness Mr. Carlos Herrera. By letter of same date, Claimant nominated as its witness Dr. José Daniel Amado. During the pre-hearing call, the parties confirmed their agreement to the appointment of Martin J. Valasek, an associate of the Chairman, as Assistant to the Tribunal.

¹ Unified Text of the Law of Transparency and Access to Public Information, approved by Supreme Decree 43-2003-PCM.

21. In accordance with the schedule agreed on July 28, 2004, the hearing on jurisdiction was held at the seat of the Centre in Washington, D.C. on March 29-30, 2005. The parties were represented at the hearing by their respective counsel, who made presentations to the Tribunal and examined the witnesses. Members of the Tribunal also questioned witnesses. Present at the hearing were:

Members of the Tribunal: Mr. L. Yves Fortier, C.C., Q.C., President; Dr. Guido S. Tawil and Dr. Pedro Nikken.

Secretary to the Tribunal: Ms. Gabriela Alvarez Avila, ICSID Secretariat.

Assistant to the Tribunal: Mr. Martin J. Valasek, Ogilvy Renault LLP.

Attending on behalf of the Claimant: Messrs. C. Mark Baker, Arif H. Ali and Baiju S. Vasani, from Fulbright & Jaworski LLP; Mr. Dean M. Moesser and Ms. Dora Avendaño, from Duke Energy; and Dr. Luis G. Miranda and Dr. Italo Carrano from Miranda & Amado Abogados.

Attending on behalf of the Respondent: H.E. Eduardo Ferrero, Ambassador of Peru in Washington, D.C.; Dra. Cecilia Blume, Chief of Staff, Ministry of Economy; Dr. Aurelio Loret de Mola, Advisor, Ministry of Economy; Messrs. Alejandro Riveros, Italo Acha and Renzo Villa, Embassy of Peru in Washington, D.C.; Dr. Jorge Santistevan, of Santistevan de Noriega & Gutierrez, Counsel for Respondent; from Sidley Austin Brown & Wood LLP: Messrs. Daniel M. Price, Stanimir A. Alexandrov, Alan Charles Raul, Nicolás Lloreda, Patricio Grané and Cassidy Pinegar.

22. At the beginning of the hearing, the Tribunal considered Claimant's letters of March 25 and March 28, 2005, and Respondent's letters in reply thereto dated March 28, 2005. The Tribunal decided to admit the additional exhibits which were attached to the parties' letters, inasmuch as these were considered to be helpful to the Tribunal's consideration of the jurisdictional issues, but decided to exclude the content of Claimant's March 28, 2005 letter on the basis that it was an unsolicited and irregular pleading.

23. Following the hearing, the members of the Tribunal deliberated by various means of communication, including a meeting for deliberations in Washington, D.C. on March 30, 2005.

II. FACTUAL BACKGROUND

A. PERU'S INVESTMENT PROTECTION SCHEME

24. The current scheme for the promotion and protection of foreign investment in Peru originated in the early 1990s. At that time, Peru began efforts to attract and promote investment in the country, reversing the policies pursued by previous administrations.
25. It was in this context that Law No. 25327 was adopted, authorizing the Executive Branch to legislate on matters of investment and investment protection. Pursuant to it, Legislative Decree No. 662 (Foreign Investment Law), Legislative Decree No. 674 (Privatization Law) and Legislative Decree No. 757 (Private Investment Law) were promulgated, as were the Regulations of the Regime to Guarantee Private Investment, approved by Supreme Decree No. 162-92-EF ("**Investment Regulations**").
26. These instruments provide various guarantees to foreign investors in Peru. In connection with a specific investment, the various guarantees may be implemented through binding contracts referred to as "legal stability agreements" ("**LSA**"), entered into by Peru and the foreign investor. The authorization to enter into LSAs is contained in the Foreign Investment Law and the Private Investment Law. Relevant provisions of both laws are typically incorporated by reference into such agreements.
27. The standard text for all LSAs is incorporated as an annex to the Investment Regulations. The standard text refers in general terms to the stabilization of legal regimes applicable to various fundamental rights of foreign investors, including: (i) the right to equal treatment and non-discrimination; (ii) the right to free convertibility of foreign currency; (iii) the right to free repatriation of invested capital, profits and royalties; (iv) the right to income tax stabilization; and (v) the right to resolve disputes arising out of or in connection with the agreement by international arbitration in accordance with Peru's international treaty obligations, or other agreed method.

28. Under Peruvian law, the *Civil Code* provisions governing private contracts in general are also applicable to LSAs and, as such, these agreements are subject to the principle of *Contrato-Ley*, as set forth in Article 1357 of the 1984 *Civil Code*. That Article states as follows:

Garantía y seguridad del Estado. Por ley, sustentada en razones de interés social, nacional o público, pueden establecerse garantías y seguridades otorgadas por el Estado mediante contrato.²

29. Article 39 of the Private Investment Law confirms the foregoing:

Los convenios de estabilidad jurídica se celebran al amparo del artículo 1357 del Código Civil y tienen la calidad de contratos con fuerza de ley, de manera que no pueden ser modificados o dejados sin efecto unilateralmente por el Estado. Tales contratos tienen carácter civil y no administrativo, y solo podrán modificarse o dejarse sin efecto por acuerdo entre las partes.³

30. Furthermore, as set forth in the last paragraph of Article 62 of the Constitution of Peru, the investment protections provided for by LSAs are guaranteed by the Constitution: :

La libertad de contratar garantiza que las partes pueden pactar válidamente según las normas vigentes al tiempo del contrato. Los términos contractuales no pueden ser modificados por leyes u otras disposiciones de cualquier clase. Los conflictos derivados de la relación contractual sólo se solucionan en la vía arbitral o en la judicial, según los mecanismos de protección previstos en el contrato o contemplados en la ley.

² Unofficial Translation: By law, supported by reasons of social, national or public interest, the State may establish guarantees and assurances by means of a contract.

³ Unofficial Translation: Legal stability investment agreements shall be concluded subject to Article 1357 of the Civil Code and shall have the [legal] effect of contracts enforceable as law, such that they may not be modified or terminated unilaterally by the State. Such contracts shall have a private rather than administrative character, and shall only be modified or terminated by agreement between the parties.

Mediante Contratos-ley, el Estado puede establecer garantías y otorgar seguridades. No pueden ser modificados legislativamente, sin perjuicio de la protección a que se refiere el párrafo precedente.⁴

31. Thus, pursuant to the investment laws of Peru, the main features of LSAs are that (i) the stabilized legal regimes cannot be changed unilaterally by the State, and (ii) the agreements are subject to private or civil law and not administrative law. As private-law contracts, the negotiation, execution, interpretation and enforcement of the provisions set forth in LSAs are subject to the general principles applicable to contracts between private parties under the Peruvian *Civil Code*. As such, the fundamental rights granted by Peru pursuant to an LSA are private contractual rights that are enforceable against the State as if it were a private party.

B. THE PRIVATIZATION OF EGENOR

32. In 1991, Peru began to pursue a far-reaching privatization program designed to attract the participation, in particular, of international investors. For this purpose, the Privatization Law established the *Comisión para la Promoción de la Inversión Privada* (“**COPRI**”), a Peruvian inter-ministerial body charged with overall supervision of the privatization process.
33. In implementing its privatization mandate, COPRI selected the largest state-owned electricity generation company in the country, Electricidad del Perú S.A. or Electroperú S.A. (“**Electroperú**”), to be restructured into distinct, smaller electricity companies for privatization. In September 1994, as part of the privatization process, COPRI authorized the creation of a company named Empresa de Generación Eléctrica Nor Perú S.A. (“**Egenor**”), as a wholly-owned subsidiary of Electroperú. Thereafter, assets were transferred to Egenor from three state-owned companies, including Electroperú.

⁴ Unofficial Translation: Liberty to contract guarantees that parties may validly agree according to the legal norms in force at the time of the contract. Contract terms may not be modified by law or other dispositions of any type. Conflicts that arise from contractual relations may only be resolved by arbitration or judicial decree, according to the mechanisms of protection set forth in the contract or contemplated by law.

Through contracts-law [special investment-related private contracts of an obligatory character], the State may establish guarantees and grant securities. These may not be modified by legislation, without prejudice to the protection referred to in the preceding paragraph.

34. COPRI adopted the following privatization model for Egenor: a controlling 60 percent of the shares of Egenor, representing the company's Class "A" shares, would be sold to a private investor through an international tender process (the "**60 Percent Tranche**"); 30 percent of the shares, these being Class "B" shares, would be retained by Electroperú for a subsequent public offering or share auction (the "**30 Percent Tranche**"); and the remaining 10 percent of the shares (also Class "B" shares) would be held for sale to Electroperú's employees.
35. For each state-owned company being privatized, COPRI established a special committee, known as *Comité Especial de Privatización* ("**CEPRI**"), responsible for managing and implementing the privatization process, based on guidelines, objectives and policies approved by COPRI. The privatization program for Electroperú was administered by the *Comité Especial de Promoción de la Inversión Privada en Electroperú S.A.* ("**CEPRI-ELP**"). By February 1996, CEPRI-ELP had approved the *Bases del Concurso Público Internacional para la Venta de Egenor* (the "**Bidding Rules**") for the privatization of Egenor, setting out the rules governing the relationship between Peru and the investor with regard to the tender bid. On February 28, 1996, CEPRI-ELP issued its privatization tender for Egenor.
36. The winning bidder for the 60 Percent Tranche was Dominion Energy, Inc. ("**Dominion**") of the United States of America, which presented its bid through a locally incorporated wholly-owned subsidiary, Inversiones Dominion Perú S.A. ("**IDP**"). On August 9, 1996, a privatization agreement, governing the purchase of the 60 Percent Tranche, was executed between Electroperú and IDP, with Dominion and Egenor as intervening parties (the "**Privatization Agreement**"). Under the Privatization Agreement, Dominion (as "Operator" and "Holder of the Committed Interest") was required to maintain control of Egenor with a minimum stake totaling 51 percent of IDP.
37. On November 27, 1996, the majority shareholders of Egenor, *i.e.*, IDP (60 percent) and Electroperú (39.98 percent), approved the merger of Egenor and Power North S.A., a shell corporation established by IDP. Pursuant to the terms of the merger, Egenor S.A., the resulting corporation, assumed all of the assets and debts of Egenor and Power North S.A. The merger of Egenor and the shell corporation, Power North S.A., was

consummated on December 31, 1996 by IDP (60 percent), Electroperú (39.98 percent), and Electrolima S.A. (0.02 percent).

38. In 1997, Dominion sold 49 percent of IDP to Gener S.A., a Chilean company. On March 31, 1998, Dominion transferred its remaining 51 percent of IDP to Dominion Holdings Peru S.A. (“**DHP**”), a wholly-owned Peruvian subsidiary. Toward the end of 1998, Duke Energy learned of Dominion’s interest in selling its assets in Central and South America, including Peru. Duke Energy was focusing on a coordinated acquisition of a full 90 percent of Egenor (then named Egenor S.A.), representing its total outstanding or available stock (*i.e.*, the 60 Percent Tranche owned by IDP and the 30 Percent Tranche owned by Peru).
39. Duke Energy acquired Egenor through a series of transactions in late 1999. To comply with Peru’s “two shareholders” rule, the acquisitions were completed through two Delaware-based Duke Energy subsidiaries: Duke Energy International Peru Holdings No. 1 LLC (“**DEI Holdings No. 1**”) and Duke Energy International Peru Holdings No. 2 LLC (“**DEI Holdings No. 2**”, and together with DEI Holdings No. 1, “**DEI Holdings USA**”). On October 7, 1999, DEI Holdings USA acquired the 30 Percent Tranche of Egenor S.A.A.⁵ On October 12, 1999, DEI Holdings USA also acquired 49 percent of IDP from Gener S.A. (and hence Gener S.A.’s indirect 29.4 percent ownership interest in Egenor S.A.A.). Finally, on November 11, 1999, DEI Holdings USA acquired the remaining 51 percent of IDP by purchasing 100 percent of DHP from Dominion.
40. As of the end of 1999, Duke Energy had become (through DEI Holdings USA) the 90 percent owner of Egenor S.A.A. for which it had paid approximately US\$ 288 million.⁶
41. Dominion’s sale of DHP (*i.e.*, of its 51 percent interest in IDP) to DEI Holdings USA was subject to the approval of COPRI pursuant to the terms of the Privatization

⁵ On April 16, 1999, Egenor S.A. amended its bylaws and changed its name to Egenor S.A.A. in accordance with the new *Ley General de Sociedades*.

⁶ Duke Energy later increased its interest in Egenor S.A.A. (by that time named Duke Energy International Egenor S.A.A., which we have defined below as DEI Egenor) from 90 percent to 99.7 percent by a tender offer initiated in July 2001 by DEI Egenor.

Agreement. Under the Privatization Agreement, Dominion (as Operator and Holder of the Committed Interest) was obligated to maintain its 51 percent interest in IDP for five years from the date of the Agreement (*i.e.*, until August 2001), unless another entity (to which the interest was being transferred) could meet the requirements specified in the Bidding Rules for the Operator and Holder of the Committed Interest. COPRI approved the sale of DHP, and thus Dominion's ownership interest in Egenor, to Duke Energy (through DEI Holdings USA) on September 22, 1999. On October 5, 1999, Dominion obtained and provided Duke Energy with a Guarantee Agreement between IDP and Peru ("**Guarantee Agreement**") pursuant to which Peru guaranteed, in connection with the 60 Percent Tranche, that all of the original obligations assumed, representations and warranties made, and liabilities of Electroperú remained effective and enforceable against Peru.

42. Duke Energy's acquisition of Dominion's Latin American assets had a number of international tax implications which Duke Energy intended to account for in a corporate reorganization. At the same time, Duke Energy needed to implement an ownership structure for Egenor S.A.A. generally mirroring the structure reflected in the Privatization Agreement. It was against this backdrop that DEI Bermuda was incorporated in August 1999. Subsequently, in May 2000, Duke Energy International Peru Holdings SRL ("**DEI Peru Holdings**") was established as a holding company wholly-owned by DEI Bermuda.
43. On July 26, 2000, Egenor S.A.A. changed its name to Duke Energy International Egenor S.A.A. ("**DEI Egenor**"). This entity changed its name to Duke Energy International Egenor S.A. in February 2001 and on June 26, 2003, to Duke Energy International Egenor S en C por A, evidencing a change in its corporate form .
44. On October 29, 2002, DEI Bermuda acquired 99 percent of DHP from DEI Holdings USA (and hence 51 percent of IDP), and the remaining 49 percent of IDP from DEI Holdings USA. On December 1, 2002, DHP and IDP merged to form Duke Energy International Peru Inversiones No. 1 SRL ("**DEI Investments SRL**"), as a result of which DEI Bermuda became the 99 percent owner of DEI Investments SRL, through which it owned 60 percent of DEI Egenor. The remaining 30 percent of DEI Egenor continued to be held by DEI Holdings USA.

45. On December 18, 2002, Duke Energy made a capital contribution of US\$ 200 million to DEI Peru Holdings, through DEI Bermuda. DEI Peru Holdings used these funds to acquire 90 percent of the capital stock of DEI Egenor from DEI Investments SRL and DEI Holdings USA.⁷

C. THE INVESTMENT PROTECTION GRANTED BY PERU

1. The Investment Protection Granted to Dominion

46. As an integral part of the Egenor privatization program and Dominion's investment in Peru, Peru approved LSAs for Dominion, IDP and Egenor.
47. Specifically, shortly after Electroperú executed the Privatization Agreement, Peru entered into two LSAs on July 24, 1996: one with IDP, as an investor in Egenor (the "**IDP Domestic Investor LSA**"); the other with Egenor, as a recipient of the investment from IDP (the "**Egenor LSA**"). Under the former, IDP undertook to pay US\$ 228.2 million for 60 percent of the capital stock of Egenor. Under the latter, Egenor agreed to issue shares representing 60 percent of its capital stock in favor of IDP.
48. On August 9, 1996, Peru entered into two additional LSAs: one with Dominion, as a US\$ 228.2 million foreign investor in IDP (the "**Dominion LSA**"); the other with IDP, as a US\$ 228.2 million investment recipient from Dominion (the "**IDP Recipient LSA**").
49. Peru agreed to guarantee legal stability, in accordance with the terms of these LSAs and the foreign investment laws of Peru, for a period of 10 years, from the effective date of the respective LSAs. The Dominion LSA provided for ICSID arbitration, in the following terms:

TEN.- It being the intention of both parties that problems arising in connection with the enforcement of this Agreement be resolved as expeditiously as possible, the parties agree hereinafter that any dispute, controversy or claim between them, relative to the interpretation, performance or validity of this Agreement, shall be submitted to the International Centre for Settlement of Investment Disputes to be resolved

⁷ See Independent Auditors' Report dated April 3, 2003, Claimant's Exhibit 58.

by de jure international arbitration, pursuant to the Conciliation and Arbitration Rules set forth in the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States which was approved by Peru pursuant to Legislative Resolution N. 26210.

The costs incurred in connection with the application of this clause shall be shared by both parties in equal parts.

2. The Investment Protection Granted to Duke Energy

50. In connection with its investment in Peru, Duke Energy sought to obtain the same investment protection, through LSAs, as Dominion had obtained. Duke Energy and its outside counsel worked with Peru on different structures by which Duke Energy would obtain protection for its investment. The possibility of transferring or assigning to Duke Energy at least some of the LSAs that had been entered into by Dominion was seriously and actively considered. These discussions took place while Duke Energy was taking steps to acquire the various direct and indirect interests in Egenor S.A.A.
51. In the event, the Dominion LSA was not assigned due to concerns regarding its effectiveness due to a possible incurable default by Dominion under the LSA. As of the closing date for DEI Holdings USA's acquisition of the 30 Percent Tranche (*i.e.*, October 7, 1999), the first step in Duke Energy's indirect acquisition of Egenor S.A.A., no mutually acceptable solution had been identified to implement the investment protection regime for Duke Energy. It was thus agreed that DEI Holdings USA would be given an interim LSA, based on the express understanding that it would complete its acquisition of the 60 Percent Tranche of Egenor S.A.A. within 60 days of the date of this interim LSA. Peru and DEI Holdings USA thus executed a foreign investor LSA relating to the 30 Percent Tranche (the "**DEI Holdings USA 30 Percent Tranche LSA**") on October 13, 1999.
52. On October 14, 1999, the Egenor LSA was assigned to Egenor S.A.A. This assignment was performed in order "to extend the rights granted by the Legal Stability Agreement dated July 24, 1996, signed by Empresa de Generación Eléctrica Nor Perú S.A. –

E.G.E.N.O.R. to Egenor S.A.A.”⁸ By the end of 1999, Duke Energy had become the owner of 90 percent of Egenor S.A.A. However, a solution regarding the assignment of the Dominion LSA had not yet been found.

53. As explained earlier, as part of Duke Energy’s corporate reorganization, DEI Bermuda was incorporated in August 1999 and DEI Peru Holdings, wholly-owned by DEI Bermuda, was established in May 2000. With reference to the Privatization Agreement, DEI Bermuda was designated as the Operator and Holder of the Committed Interest and DEI Peru Holdings was designated as the bidder and owner of DEI Egenor. Thus, following an application by Duke Energy that was accepted by Peru, DEI Bermuda took the place of Dominion, and DEI Peru Holdings took the place of IDP, under the Privatization Agreement.
54. In February 2000, Duke Energy presented Peru with a proposal to obtain the same foreign investor protections that it would have obtained under the Dominion LSA, if the latter had been assignable. The proposal was premised on the requirements of the Privatization Agreement, Duke Energy’s corporate and tax-related reorganization strategy as well as the need to maintain the effectiveness of the LSAs that were already in place (*i.e.*, the DEI Holdings USA 30 Percent Tranche LSA, the IDP Domestic Investor LSA, and the Egenor LSA).
55. The proposal presented by Duke Energy was implemented as follows:
 1. application for a foreign investor LSA by DEI Bermuda;
 2. application for a recipient company LSA by DEI Peru Holdings;
 3. the assignment of the DEI Holdings USA 30 Percent Tranche LSA, as modified, in favor of DEI Peru Holdings; and
 4. the assignment of the IDP Domestic Investor LSA in favor of DEI Peru Holdings.

⁸ See *Resolución Ministerial* No. 566-99-EM/VME, dated October 6, 1999, Respondent’s Exhibit 45.

56. On June 20, 2000, Duke Energy filed its request for a foreign investor LSA, through DEI Bermuda, with Peru (previously defined as the DEI Bermuda LSA). A second application for a recipient company LSA was filed that same day through DEI Peru Holdings (the “**DEI Peru Holdings LSA**”).
57. On April 3, 2001, Peru provided drafts of the DEI Bermuda LSA and the DEI Peru Holdings LSA to Duke Energy’s outside counsel for review. With respect to the former, Duke Energy reverted to Peru to request that the draft LSA be modified to provide for ICSID arbitration:

We hereby advise you that, with the exception of the suggestion contained in the following paragraph, we agree with the text of the draft Legal Stability Agreement you submitted.

Without prejudice of the above, we hereby request that Clause Nine of the draft agreement submitted be amended so that in case it is necessary to resolve any conflict or controversy among the parties, it is done by means of international de jure arbitration, in accordance with Convention for the Settlement of Investment Disputes between States and Nationals of other States, and not by means of national arbitration, because the investor is established abroad.

The substantial delay of almost 10 months between Duke Energy’s application for the DEI Bermuda and DEI Peru Holdings LSAs and Peru’s response can be attributed to a strong backlash against legal stability agreements in Peru.

58. Finally, on July 24, 2001, Peru executed the DEI Bermuda LSA and the DEI Peru Holdings LSA. By their terms, the LSAs were effective immediately. The final version of the DEI Bermuda LSA executed by the parties contained an ICSID arbitration clause, in precisely the same terms as the clause that had been included in the Dominion LSA.⁹
59. The DEI Holdings USA 30 Percent Tranche LSA and the IDP Domestic Investor LSA were assigned to DEI Peru Holdings on April 3 and March 14, 2003, respectively.

⁹ See above, para. 49.

D. THE TAX ASSESSMENT AND TAX AMNESTY

60. In the midst of Duke Energy's corporate restructuring of its Peruvian holdings, on November 24, 2000, SUNAT initiated a tax audit of DEI Egenor for tax year 1999 (*i.e.*, the tax compliance of Egenor S.A.A.). SUNAT expanded the scope of the audit to include tax years 1996, 1997, and 1998 (*i.e.* the tax compliance of Egenor and Egenor S.A.) on May 9, 2001.
61. On November 22, 2001, SUNAT assessed a tax liability of approximately US\$ 48 million against DEI Egenor for what SUNAT determined were tax underpayments in 1996, 1997, 1998 and 1999, including interest and penalties (the "**Tax Assessment**").
62. The Tax Assessment had two main components. The first component was based on SUNAT's view, under its interpretation of Rule VIII of the Peruvian Tax Code, that the 1996 merger between Egenor and Power North S.A. ("**Power North**"), resulting in the creation of Egenor S.A. was a sham transaction concluded solely to take improper advantage of tax benefits provided for under Merger Revaluation Law No. 26283 (the "**Merger Revaluation Assessment**"). Under its interpretation of Rule VIII, SUNAT determined that it had the authority to disregard the merger on the grounds that it was concluded to circumvent the payment of taxes.
63. The second component was based on SUNAT's view that Egenor should have depreciated the assets that Electroperú had transferred to it during the privatization process using a special decelerated depreciation rate that had been provided by SUNAT to Electroperú in December 1995, rather than the general statutory depreciation rate set forth in the income tax regulations (the "**Depreciation Assessment**").
64. DEI Egenor decided to apply for amnesty, under an explicit reservation of rights, for a portion of the assessment, and appealed the balance of the assessment to the Peruvian Tax Court.
65. On December 24, 2001, DEI Egenor applied for tax amnesty in connection with the Merger Revaluation Assessment. On March 21, 2002, SUNAT accepted DEI Egenor's amnesty application. The amnesty payment, totalling approximately US\$ 12 million, was

made through the relinquishment of various loss carry-overs, using advance income tax overpayment credits, and a small cash payment.

66. With respect to the Depreciation Assessment, DEI Egenor initiated an administrative complaint with SUNAT. In September 2002, SUNAT notified DEI Egenor that its complaint had been rejected. SUNAT restated its demand for collection of the Depreciation Assessment, with additional interest and penalties for non-payment. On September 23, 2002, DEI Egenor appealed SUNAT's denial of its claim to the Tax Court.
67. As we noted earlier, on October 6, 2003, Claimant filed for ICSID arbitration under the DEI Bermuda LSA. On April 23, 2004, the Tax Court issued its decision, finding mainly in favor of SUNAT and against DEI Egenor. On July 27, 2004, SUNAT issued a revised tax assessment against DEI Egenor, in accordance with the Tax Court's decision, for approximately US\$ 26 million.
68. On August 27, 2004, DEI Egenor applied for amnesty in connection with the Depreciation Assessment. On August 27, 2004, SUNAT accepted DEI Egenor's amnesty application. On the same date, DEI Egenor paid the amnesty amount, in cash, in the sum of S/. 43,721,786.

III. ANALYSIS

69. Article 25 of the ICSID Convention is the touchstone for determining the jurisdiction of this Tribunal. Article 25 provides, in relevant part:
 - (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that 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.
70. Respondent has raised objections to the Tribunal's jurisdiction *ratione materiae*, *ratione personae* and *ratione temporis*. In the alternative, Respondent has raised objections to

the admissibility of Claimant's claims. The Tribunal considers each of Respondent's objections in turn.

A. JURISDICTION *RATIONE MATERIAE*

1. The Parties' Positions

71. Article 25 of the ICSID Convention restricts the subject-matter jurisdiction of this Tribunal to a "legal dispute arising directly out of an investment ... which the parties to the dispute consent in writing to submit to the Centre."
72. Respondent argues that the only legally relevant investment for purposes of the Tribunal's jurisdiction is the US\$ 200 million capital contribution by DEI Bermuda to DEI Peru Holdings. Respondent takes the position that the claims in this arbitration, which relate to Duke Energy's indirect investment in DEI Egenor, cannot arise out of the DEI Bermuda LSA and are not covered by the parties' consent to arbitration in the arbitration agreement contained in Clause Nine thereof.
73. Claimant takes the position that the contemporaneous documentary evidence, and the testimony of its witnesses, provide the necessary context for understanding the DEI Bermuda LSA and demonstrate that Peru understood and accepted the broad scope of the parties' consent to ICSID arbitration in Clause Nine thereof. According to Claimant, Peru's consent to ICSID arbitration was provided in connection with Duke Energy's multimillion-dollar acquisition of DEI Egenor in the context of its privatization. Thus, Claimant argues that Peru, when it approved the DEI Bermuda LSA, fully understood and accepted that it was consenting to resolve any disputes "relative to" Duke Energy's investment in DEI Egenor through ICSID arbitration.

2. The Tribunal's Analysis

74. To evaluate the parties' arguments, the Tribunal analyzes (a) the scope of the arbitration agreement (which contains the parties' written consent to ICSID arbitration), (b) the nature of the dispute in question, and (c) the proper characterization of the relevant investment.

(a) The Arbitration Agreement

75. Claimant asserts that the Tribunal's jurisdiction is derived from the consent to ICSID arbitration contained in Clause Nine of the DEI Bermuda LSA. Clause Nine reads as follows:

It being the intention of both parties that problems arising in connection with the enforcement of this Agreement be resolved as expeditiously as possible, the parties agree hereinafter that any dispute, controversy or claim between them, concerning the interpretation, performance or validity of this Agreement, shall be submitted to the International Centre for Settlement of Investment Disputes to be resolved by de jure international arbitration, pursuant to the Conciliation and Arbitration Rules set forth in the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States which was approved by Peru pursuant to Legislative Resolution N. 26210.

The costs incurred in connection with the application of this clause shall be shared by both parties in equal parts.

76. ICSID jurisprudence, cited by both parties, confirms that an arbitration agreement should be interpreted with due respect for the principle of good faith, should not follow an *a priori* strict or broad construction, and should be construed to achieve an objectively fair and functional solution that is consistent with the underlying facts.
77. For example, in *Société Ouest-Africaine des Bétons Industriels (SOABI) v. the Republic of Senegal*, a case relied upon by both Claimant and Respondent, the Tribunal held that:

In the opinion of the Tribunal an arbitration agreement, like any agreement, must be interpreted with due respect for the principle of good faith, that is to say, taking account of the consequences of their commitments which the parties must be considered to have reasonably and legitimately contemplated. It is this course, rather than that of an *a priori* strict or, on the contrary, broad or liberal interpretation, which the Tribunal has followed.¹⁰

¹⁰ *Société Ouest-Africaine des Bétons Industriels (SOABI) v. the Republic of Senegal*, ICSID Case No. ARB/82/1, Award of February 25, 1988, published in Yearbook of Commercial Arbitration, Vol. XVII (1992), pp. 42-72, at para. 4.10.

78. Similarly, in *Amco Asia Corp. et al v. The Republic of Indonesia*, also relied upon by both parties, the Tribunal found that:

[A] convention to arbitrate is not to be construed restrictively, nor, as a matter of fact, broadly or liberally. It is to be construed in a way which leads to find out and to respect the common will of the parties: such a method of interpretation is but the application of the fundamental principle *pacta sunt servanda*, a principle common indeed, to all legal systems of internal law and to international law. Moreover – and this is again a general principle of law – any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of the commitments the parties may be considered as having reasonably and legitimately envisaged.¹¹

79. For the purpose of construing Clause Nine of the DEI Bermuda LSA, the Tribunal will focus in particular on the following sentence: “... the parties agree hereinafter that any dispute, controversy or claim between them, concerning the interpretation, performance or validity of this agreement, shall be submitted to the International Centre for Settlement of Investment Disputes ...”
80. On the one hand, the Tribunal notes that the consent to ICSID arbitration contained in Clause Nine is expressed as being restricted to “this Agreement” (i.e., the DEI Bermuda LSA), and thus does not expressly extend to the other LSAs entered into by Respondent in connection with the investment protection granted to Duke Energy, namely the DEI Peru Holdings LSA, the DEI Holdings USA 30 Percent Tranche LSA, the IDP Domestic Investor LSA and the Egenor LSA.¹²
81. On the other hand, the Tribunal also notes that in relation to the DEI Bermuda LSA, the parties consented to ICSID jurisdiction in the broadest terms, covering “any dispute, controversy or claim between them, concerning the interpretation, performance or validity of this Agreement.” In respect of disputes under the DEI Bermuda LSA, it

¹¹ *Amco Asia Corp. et al v. Republic of Indonesia*, ICSID Case No. ARB/81/8, Decision on Jurisdiction of September 25, 1983, published in 1 ICSID Reports, p. 394 at para. 14; cited with approval in *Ceskoslovenska Obchodni Banka A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction of May 24, 1999, at footnote 5. See also *Cable TV v. St. Kitts and Nevis*, ICSID Case ARB/95/2, Award of January 13, 1997, 13 ICSID Review – FILJ 328, 386 (1998).

¹² See Section II.C.2, above.

appears to the Tribunal that the parties intended to submit to ICSID arbitration any dispute, controversy or claim arising between them if it concerned the interpretation, performance or validity of the DEI Bermuda LSA.

82. The Tribunal must therefore determine whether the dispute before it concerns the interpretation, performance or validity of the DEI Bermuda LSA.

(b) The Nature of the Dispute

83. The dispute at issue in this arbitration is defined by the claims submitted to the Centre by Claimant. These are stated in the Request for Arbitration, and are formulated as follows:

1. breach of the guarantee of non-discrimination and equal treatment of DEI Bermuda's investment in Peru, in violation of Clause Three, Section 5 of the DEI Bermuda LSA;¹³
2. breach of the guarantee of tax stabilization with respect to DEI Bermuda's investment in Peru, in violation of Clause Three, Section 1 of the DEI Bermuda LSA;¹⁴
3. breach of the guarantee regarding the free repatriation of DEI Bermuda's investment in Peru, in violation of Clause Three, Section 3 of the DEI Bermuda LSA;¹⁵ and
4. breach of the obligations of good faith and fair dealing and the *Doctrina de los actos propios* in connection with DEI Bermuda's investment in Peru, obligations that are implied under the Peruvian *Civil Code* in all contracts, and here specifically in the DEI Bermuda LSA.¹⁶

¹³ See Request for Arbitration, paras. 42-44.

¹⁴ See Request for Arbitration, paras. 45-49.

¹⁵ See Request for Arbitration, paras. 50-51.

¹⁶ See Request for Arbitration, paras. 52-56.

84. Clause Three of the DEI Bermuda LSA contains the “contractual” obligations (except those implied under the Peruvian *Civil Code*) that Claimant alleges Respondent has failed to perform. Clause Three sets out, in five sections, the specific terms according to which Respondent guarantees legal stability for Claimant “in connection with the investment referred in Clause Two.”
85. Clauses Two and Three of the DEI Bermuda LSA will be reproduced here since they are crucial to the Tribunal’s analysis:

TWO - By virtue of this Agreement DUKE ENERGY INTERNATIONAL agrees to the following:

1. To make contributions to the capital stock of the company DUKE ENERGY INTERNATIONAL PERU HOLDINGS, S.R.L., incorporated in the city of Lima, registered in Entry No. 1184295 of the Registry of Companies of the Office of Registration of Lima and Callao, in the amount of U.S. \$ 200,000,000 (Two hundred million Dollars of the United States of America) within a term of no more than two (2) years, from the date of execution of this Agreement.
2. To channel the foreign capital contribution referred to in section 1 above, through the National Financial System, as evidenced in the certification to be issued by the bank involved in such transaction.
3. To register its foreign investment referred to in section 1 above, and valued in freely convertible currency, with CONITE.

THREE - By virtue of this Agreement, the STATE, and as long as it remains in effect, in connection with the investment referred in CLAUSE TWO, the STATE guarantees legal stability for DUKE ENERGY INTERNATIONAL, according to the following terms:

1. Stability of the tax regime with respect to the Income Tax, as stipulated in subsection a) of Article 10° of Legislative Decree No. 662, in effect at the time this Agreement was executed, according to which dividends and any other form of distribution of profits, are not taxed, in accordance with the stipulations of subsection a) of article 25 of the Amendment Text of the Income Tax Law, approved by the Supreme Decree No. 054-99-EF in

effect at the time this Agreement was executed. Neither the remittances sent abroad of amounts corresponding the DUKE ENERGY INTERNATIONAL for any of the items contemplated in this subsection are taxed pursuant to the aforementioned law.

2. Stability of the regime of unrestricted availability of foreign currency as set forth in subsection b) of Article 10° of Legislative Decree No. 662, which entails that DUKE ENERGY INTERNATIONAL may freely access foreign currency in the exchange markets at the most favorable exchange rate, and in connection with the investment referred in CLAUSE TWO, the STATE may not apply thereto any exchange market regulations or mechanism that limits or restricts this right or which entails a less favorable treatment to DUKE ENERGY INTERNATIONAL than the one applied to any individual or company in the execution of any type of currency exchange transaction.

3. Stability of the right to freely remit its dividends and capitals pursuant to Article 10(b) of Legislative decree No. 662, which implies that DUKE ENERGY INTERNATIONAL may transfer abroad in freely convertible currency, without requiring prior authorization from any entity of the Central, Regional or Local Government as long as the investment was registered before the Competent National Organism and all corresponding tax obligations have been complied with, and without the STATE being allowed any restriction or limitation to this right, the following:
 - a) All its capitals brought from abroad, including the capital from the transfer of its shares, interests or rights over companies, of the reduction of the capital equity and partial or total liquidation, which come from the investment referred to in CLAUSE TWO.

 - b) All the dividends and the actually obtained net profits obtained from the investment referred to in CLAUSE TWO, as well as the profits obtained as consideration for the use and enjoy the assets physically located in the country used for such investment; and

 - c) All the royalties and considerations for the use and transfer of technology; trademarks and patents; and any other industrial property element authorized by the Competent National Organism.

4. Stability of the right to use the most favorable exchange rate as stipulated in subsection b) of Article 10° of Legislative decree No. 662, which entails that DUKE ENERGY INTERNATIONAL may access foreign currency on the exchange market at the most favorable exchange rate it can obtain, and the STATE may not require it to carry out its exchange to operations under any regime or mechanism that grants a less favorable treatment than the one applied to any individual or company in the execution of any exchange operation according to the following:
 - a) In the case of conversion of foreign currency into local currency: DUKE ENERGY INTERNATIONAL may sell it to any individual or legal entity at the most favorable exchange rate it finds on the exchange market at the time the exchange transaction is carried out; and,
 - b) In the case of conversion of local currency into foreign currency: DUKE ENERGY INTERNATIONAL may buy it from any individual or legal entity at the most favorable exchange rate it finds on the exchange market at the time the exchange transaction is carried out:

5. Stability of the right to non-discrimination as stipulated in subsection c) of Article 10° of Legislative decree No. 662, which implies that STATE at none of its levels, whether entities of companies of the Central Government, or Regional or Local Governments, may apply to DUKE ENERGY INTERNATIONAL a different treatment by virtue of its nationality, the sectors or types of economic activity in which it engages, or the geographic location of the company in which it invests, or in the following matters:
 - a) Foreign exchange, such that with respect to the investment referred to in CLAUSE TWO, the STATE may not apply to DUKE ENERGY INTERNATIONAL a currency exchange regime that entails a less favorable treatment than the one applied to any individual or legal entity in the execution of any type of foreign exchange transaction.
 - b) Prices, tariffs or non-customs duties, such that the STATE may not apply differential amounts or rates to DUKE INTERNATIONAL ENERGY with respect to the investment referred to in CLAUSE TWO.

- c) The form of corporate organization, such that the STATE may not require that DUKE ENERGY INTERNATIONAL organizes DUKE ENERGY INTERNATIONAL PERU HOLDINGS, S.R.L., in which it is going to invest, as a certain type of company;
- d) its status as an individual or legal entity, such that the STATE, may not apply differentiated treatment to DUKE ENERGY INTERNATIONAL because of this status; and,
- e) Any other cause with equivalent effects, such as may be arise from application of discriminatory treatment to DUKE ENERGY INTERNATIONAL resulting from any combination of the various paragraphs of this section.

This sub-section applies without prejudice to the limitations set forth in Article 3 of the REGULATIONS.

86. In this jurisdictional phase of the arbitration, the sole issue before the Tribunal is whether it has jurisdiction over the dispute. The Tribunal must not in any way prejudge the merits of the case, but simply examine whether the merits dispute, as stated by Claimant, is within its jurisdiction.

87. We agree with the Tribunal in the Amco case, which held, in its Decision on Jurisdiction, that:

[...] the Tribunal must not attempt at this stage to examine the claim itself in any detail, but the Tribunal must only be satisfied that prima facie the claim, as stated by the Claimants when initiating this arbitration, is within the jurisdictional mandate of ICSID arbitration, and consequently of this Tribunal.¹⁷

¹⁷ *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on jurisdiction of September 25, 1983, 23 *ILM* 351 at 376 (1984). (Emphasis added) The decision of the Ad Hoc Committee that annulled (in part) the award on the merits of the Tribunal in the original proceeding left untouched the Tribunal's Award on Jurisdiction (see E. Gaillard, Introductory Note to Decision of the Ad Hoc Committee, 25 *ILM* 1439 at 1439 (1986)).

This principle has been followed and endorsed, in one form or another, by several international arbitration tribunals deciding jurisdictional challenges.¹⁸

88. Respondent argues that Claimant has failed to establish a *prima facie* case against Respondent:

The Tribunal should also decline to hear this case because it is apparent that Claimant has utterly failed to establish a *prima facie* case of violation of the DEI Bermuda Legal Stability Agreement. As demonstrated by the compelling evidence submitted by Peru, the claims asserted by Claimant are incapable of constituting a breach of the DEI Bermuda Legal Stability Agreement.¹⁹

89. The crux of the issue is whether the literal reading of Clause Two, which would seem to restrict the definition of “investment” to DEI Bermuda’s capital contribution to DEI Peru Holdings, excludes the possibility that the Tax Assessment (against DEI Egenor) could violate the protections granted to DEI Bermuda in Clause Three of the DEI Bermuda LSA, which are expressed as being granted “in connection with the investment.” If that were the case, with the possible exception of the claim alleging breach of the implied duties under Peruvian law, the claims could not be said to concern the interpretation or performance of the DEI Bermuda LSA, and thus would not be covered by the consent to ICSID arbitration contained in Clause Nine.
90. For the reasons set out in the next section, the Tribunal cannot accept that the wording of Clause Two limits the Tribunal’s jurisdiction to consider the merits of Claimant’s claims under Clause Three (and Peruvian law generally). As will be explained later in this Decision, the Tribunal finds that Claimant has made a *prima facie* case that the dispute falls within its jurisdiction, in the sense that the claims stated in the Request for Arbitration are capable of constituting a breach of the DEI Bermuda LSA.

¹⁸ See, *inter alia*, *Methanex v. USA*, *SGS v. Philippines*, *Salini v. Jordan*, and, most recently, *PCL v. Bulgaria*.

¹⁹ See Respondent’s Reply, paragraph 153

(c) The Investment

91. It is true that Clause Two of the DEI Bermuda LSA, by its express terms, refers only to DEI Bermuda's US\$ 200 million capital contribution to DEI Peru Holdings. The Tribunal cannot accept, however, Respondent's argument that such capital contribution is "the only legally relevant investment" for purposes of determining the Tribunal's jurisdiction.
92. In particular, the Tribunal finds, for the following reasons, that the meaning of "investment" in the heading of Clause Three of the DEI Bermuda LSA, and for purposes of Article 25 of the ICSID Convention, cannot be restricted to DEI Bermuda's US\$ 200 million capital contribution to DEI Peru Holdings:
1. the capital contribution, without more, would not appear to satisfy the requirement, under Peruvian law, that an "investment" in relation to which an LSA is granted contribute to economically productive activity (i.e., that it be an "active" investment);
 2. the capital contribution was not an isolated transaction, but was rather one of many transactions deliberately concluded as part of the privatization of Egenor;
 3. a narrow focus on the wording of Clause Two of the DEI Bermuda LSA as an indication of the "investment" elevates form over substance, by ignoring the purpose of the capital contribution, which was described in the application DEI Bermuda submitted for the DEI Bermuda LSA referred to in Clause One thereof; and
 4. in determining their jurisdiction, ICSID tribunals have recognized the unity of an investment even when that investment involves complex arrangements expressed in a number of successive and legally distinct agreements.
93. Each of these reasons is discussed in greater depth in the sections that follow.

(i) Peru's Requirement that an Investment Contribute to Economically Productive Activity

94. Article 1 of the Foreign Investment Law provides that "foreign investments will be considered to be any investments coming from abroad in any income-generating activities ..." Article 1357 of the Peruvian *Civil Code* provides that a law-contract (i.e., an LSA) can be established only when "supported by reasons of social, national or public interest." It is difficult to see how the Peruvian authorities could have concluded that a mere contribution of funds from DEI Bermuda to its holding-company subsidiary (DEI Peru Holdings), considered in isolation of the context of the transaction, meets the requirements of this regime.

95. Respondent takes the following position:

It is important to note that the Legal Stability Agreement does not explicitly or implicitly cover DEI Bermuda's indirect interest in DEI Egenor. The fact that DEI Egenor is not addressed in the DEI Bermuda Legal Stability Agreement is no oversight – it was simply not, in the language of Peru's foreign investment law, the relevant "company that is the recipient of invested funds."²⁰

96. Respondent's argument is unconvincing, however, because the Foreign Investment Law in Peru does not contemplate a holding-company structure. The investment-protection regime in Peru does not specifically contemplate the three-tiered structure of the kind that was used for Duke Energy's investment in Peru (and that mirrored the structure that was used for Dominion's investment in the initial privatization). The investment-protection regime instead contemplates the basic structure of an investor and the target of the investment. The preamble to the Investment Regulations states that LSAs provide guarantees to "the investors and enterprises in which they participate." The two-tiered structure of "investor" and "enterprise" is reflected throughout the Investment Regulations, notably in Articles 1, 19 and 25–27 thereof.

²⁰ See Respondent's Memorial, paragraph 33, citing Article 10(a) of Legislative Decree No. 662.

97. Under Peruvian law, an investment is a capital contribution that seeks the development of the Peruvian economy. A capital contribution to a holding company must therefore be analyzed in its broader context. It is an operation carried out by a foreign investor in order to have interests and participate in a productive national enterprise.²¹ Similarly, any associated LSA must be analyzed in such broader context. Indeed, according to Claimant's expert, it would have been against the law for Respondent to have issued the DEI Bermuda LSA under Respondent's narrow view of the investment covered by the agreement.²²
98. The Tribunal does not, and indeed cannot, decide at this stage what specific impact the segmentation of the stability agreements has on the segmentation of the protection for the investment. It will be at the merits stage for the Tribunal to decide whether the guarantees in the DEI Bermuda LSA have in fact been violated by Respondent. For jurisdictional purposes, however, the Tribunal finds that the integrity of the investment-protection regime in Peru requires that the Tribunal look beyond the formalities of the holding-company structure of Duke Energy's investment in the country.
99. Considering all of the relevant circumstances, the Tribunal finds that Respondent granted its approval for the DEI Bermuda LSA because it was part and parcel of the investment being made by Duke Energy in DEI Egenor, an operating company generating wealth, jobs and providing public services in Peru (*i.e.*, an active investment).

(ii) The Privatization

100. As summarized above, the privatization of Egenor was a complex process.²³ Claimant has presented compelling evidence that both parties understood that the transaction underlying the DEI Bermuda LSA (*i.e.*, the US\$ 200 million capital contribution to DEI

²¹ See Supplementary Expert Report of Fernando de Trazegnies Granda, dated 22 February 2005, at paragraph 1.6 (at page 4).

²² See Trazegnies Second Expert Report at para. 81. Respondent did not offer any expert evidence to challenge Professor Trazegnies' conclusions.

²³ See Section II.B, above.

Peru Holdings) was made in connection with Duke Energy's overall investment in Peru, namely in the operating company DEI Egenor.

101. Respondent argues that the DEI Bermuda LSA did not require Claimant to invest a single dollar in DEI Egenor, and that indeed, no new investment was made in DEI Egenor as a result of the US\$ 200 million capital contribution made by DEI Bermuda to DEI Peru Holdings:

The fact that DEI Bermuda's subsidiary, DEI Holdings SRL, acquired shares of DEI Egenor from other affiliates of Claimant is of no legal significance under the DEI Bermuda Legal Stability Agreement. The Agreement did not compel or direct DEI Holdings SRL to invest in DEI Egenor. And, thus, the DEI Bermuda Legal Stability Agreement provided no guarantees whatever with respect to DEI Holdings SRL's interest in DEI Egenor S.A. Simply stated, Respondent did not undertake any obligations to DEI Bermuda or DEI Holdings SRL in respect of DEI Egenor, and DEI Bermuda and DEI Holdings SRL did not undertake any obligations to Peru regarding DEI Egenor.²⁴

102. The Tribunal cannot accept Respondent's argument. The evidence demonstrates that Duke Energy, through various subsidiaries, entered into various LSAs as part of a single, concerted effort (the Tribunal leaves for the merits phase the question of whether the effort was successful) to obtain complete protection for its investment in Egenor, S.A.A. The Tribunal notes, in particular, the following relevant facts:

- In connection with its investment in Peru, Duke Energy sought to obtain the same investment protection, through LSAs, as Dominion had obtained. The September 13, 1999, communication from Duke Energy's Peruvian outside counsel to COPRI and CEPRI stated that if the LSAs provided to Dominion could not be assigned to Duke Energy "*before the closing date and based on the investment to be made by Duke in Egenor S.A., a new legal stability structure be arranged ...*".²⁵

²⁴ See Respondent's Memorial, paragraph 80.

²⁵ See Claimant's Exhibit 44.

- As of the closing date for DEI Holdings USA's acquisition of the 30 Percent Tranche (*i.e.*, October 7, 1999), the first step in Duke Energy's indirect acquisition of Egenor S.A.A., no mutually acceptable solution had been identified to implement the investment protection regime for Duke Energy.
- By the end of 1999, Duke Energy owned 90 percent of Egenor S.A.A. (the 60 Percent Tranche and the 30 Percent Tranche) through two Delaware holding companies (earlier defined as DEI Holdings USA). This holding structure was considered too cumbersome from a corporate and tax planning standpoint. It also did not reflect the structure that Dominion had used under the Privatization Agreement. Accordingly, Duke Energy decided to restructure its holdings in Peru by consolidating its ownership interest in Egenor S.A.A. in a Peruvian holding company (*i.e.*, DEI Peru Holdings), which in turn would be wholly owned by a Bermudan holding company (*i.e.*, DEI Bermuda).
- DEI Bermuda was incorporated in August 1999 and DEI Peru Holdings, wholly-owned by DEI Bermuda, was established in May 2000.
- In February 2000, Duke Energy presented Peru with a proposal to obtain the same foreign investor protections that it would have obtained under the Dominion LSA, if the latter had been assignable.
- The proposal presented by Duke Energy was implemented as follows:
 1. application for a foreign investor LSA by DEI Bermuda;
 2. application for a recipient company LSA by DEI Peru Holdings;
 3. the assignment of the DEI Holdings USA 30 Percent Tranche LSA, as modified, in favor of DEI Peru Holdings; and
 4. the assignment of the IDP Domestic Investor LSA in favor of DEI Peru Holdings.
- On July 24, 2001, Peru executed the DEI Bermuda LSA and the DEI Peru Holdings LSA. The DEI Holdings USA 30 Percent Tranche LSA and the IDP

Domestic Investor LSA were assigned to DEI Peru Holdings on April 3 and March 14, 2003, respectively.

103. The terms of the DEI Bermuda and DEI Peru Holdings LSAs required that the capital contribution be completed within a 24-month period from July 24, 2001 in order for the LSAs to remain in effect. DEI Bermuda's capital contribution to DEI Peru Holdings was made on December 16, 2002, in return for which DEI Peru Holdings issued capital stock to DEI Bermuda. The evidence shows that the capital contribution was used for its intended purpose, and that there was never any question of using it for any other purpose. In particular:
- On December 16 and 18, 2002, DEI Peru Holdings used the capital contribution to acquire 90 percent of the capital stock of DEI Egenor from DEI Investments SRL and DEI Holdings USA.
 - Duke Energy's internal corporate documentation confirmed that the purpose of the capital contribution from DEI Bermuda to DEI Peru Holdings was the transfer of the shares of DEI Egenor held by DEI Investments SRL and DEI Holdings USA to DEI Peru Holdings.
 - On July 23, 2003, in order to maintain the effectiveness of the DEI Bermuda and DEI Peru Holdings LSAs, DEI Peru Holdings provided Peru with a Deloitte & Touche report, confirming that the cash contribution received from DEI Bermuda was applied by DEI Peru Holdings to acquire DEI Egenor's shares from DEI Investments SRL and DEI Holdings USA.²⁶
104. The specific terms and conditions of the Bidding Rules and Privatization Agreement also reveal the true nature of the investment, namely an investment by a foreign conglomerate with expertise and experience in power generation (Dominion, and subsequently Duke Energy) in a power-generation company in Peru (Egenor). The nature of the investment did not change when Duke Energy stepped into Dominion's shoes.

105. Under the Privatization Agreement, IDP was the "Buyer" of the shares of Egenor, and Electroperu was the "Seller". Under Clause 7.1.1 of the Privatization Agreement, IDP (Dominion's subsidiary, at the time wholly-owned by Dominion) – as the Buyer – assumed the obligation to ensure that Egenor carried out the power generation project referred to in the Bidding Rules, and to increase Egenor's effective capacity to 100 megawatts. It was made very clear that IDP – a Peruvian holding company – had to have the full and committed backing of Dominion – its parent – in order to be able to satisfy this obligation. Indeed, Dominion's financial and technical backing was indispensable to the transaction, and accordingly, Dominion was designated the "Operator" and the "Holder of the Committed Interest," as these terms were defined in the Bidding Rules.

106. The term "Operator" is defined in the Bidding Rules (at page 5) as follows:

The shareholder or member of a Bidder which is dedicated, directly or through a Related Company, to the generation of electricity; and which meets the characteristics indicated in sub-point 5.4.3 and satisfies the commitment to participate in the Bidder indicated in sub-point 5.7.2.

107. Article 5.4.3 of the Bidding Rules identifies the following characteristics that have to be satisfied by the Operator: a) at least five years' experience operating a hydroelectric or thermoelectric power generation project; and b) operation for at least two years as of the date of issuance of the bid specifications: a hydroelectric or thermoelectric power generation plant whose operating power is over 400 MW; or several plants that, combined, total more than 600 MW in operation. Article 5.7.2 provides that the Operator has to hold an interest equal to at least 25 percent of the capital equity of the Buyer (IDP) for a period of at least five years from the closing date of the Privatization Agreement. The term "Committed Interest" is defined in Article 5.7.3 of the Bidding Rules as "The minimum participation of twenty six percent (26%) of the capital stock of the Buyer that must maintain one or more of its shareholders for a term of five (5) years, counted as of the Closing Date."

²⁶ See Claimant's Exhibit 58.

108. As both the Operator and the Holder of the Committed Interest, Dominion was required to maintain ownership of a minimum of 51 percent of IDP's equity shares of Egenor for a period of at least five years. Pursuant to article 12.3.2 of the Privatization Agreement, any sale by Dominion of more than 49 percent of IDP's equity shares had to be explicitly authorized by Peru to ensure that the new buyer met the same qualification criteria as Dominion had been required to meet when it originally made its tender bid.

Article 12.3.2 provides, in relevant part, as follows:

[...] during the above-mentioned five (5) year period, class "A" Shares may be transferred by [IDP] solely to another person that complies with the same requirements with which it complied at the time to qualify as a Bidder in the Tender, provided: (a) the new purchaser has the prior qualification granted by the competent entity or authority regarding the fact that it does in fact comply with such requirements and (b) the mechanism proposed to effect the transfer does not result in failure to comply with any of the obligations assumed by the Buyer, the Operator or the Holder(s) of the Committed Interest.

The foregoing competent entity or authority will be the CEPRI-ELP, so long as said body is operating. Once the CEPRI-ELP stops operating, the prior qualification in question shall be granted by the COPRI. If in turn the COPRI should stop operating, such qualification shall be granted by the body that succeeds it or that itself decides on and, in the absence of the foregoing, by the Ministry of Energy and Mines.

109. Accordingly, before acquiring Dominion's interests in Egenor, Duke Energy had to submit the application form contained in the Bidding Rules (Form 2),²⁷ the very same form that Dominion had submitted some three years earlier. The application was accepted. Eventually, DEI Bermuda was designated as the Operator and Holder of the Committed Interest and DEI Peru Holdings was designated as the Bidder and Owner of DEI Egenor. Thus, following an application by Duke Energy that was accepted by Peru, DEI Bermuda replaced Dominion, and DEI Peru Holdings replaced IDP, under the Privatization Agreement.

²⁷ See Claimant's Exhibit 43.

110. Because the underlying investment by Dominion (and later Duke Energy) in the Peruvian electricity generator – Egenor – underpinned all of these transactions, including the capital contribution from DEI Bermuda to DEI Peru Holdings,²⁸ the Tribunal cannot accept Respondent’s argument on the characterization of the investment as defined in Clause Two of the DEI Bermuda LSA.

(iii) The Relevance of the Application for the LSA

111. The wording of the application referred to in Clause One of the DEI Bermuda LSA is another evidentiary element which assists the Tribunal in concluding that the investment contemplated by the parties when they entered into the DEI Bermuda LSA included DEI Bermuda’s indirect ownership of DEI Egenor.

112. Respondent argues that the applications filed by Duke Energy for the DEI Bermuda and DEI Peru Holdings LSAs have no bearing on the question of what investment was intended to be protected by those instruments. For the following reasons, the Tribunal cannot accept Respondent’s position.

113. Pursuant to Article 13 of the Foreign Investment Law, an LSA can only be granted on the basis of the filing of an application by the investor with the Peruvian authorities.²⁹ The application must contain specific information relevant to the investment on the territory of Peru. This information includes the name, legal status, domicile and nationality of the investor, details regarding the investor’s legal representative, the amount of the investment, the target of the investment, and a description of the project in which the investment is being made.

²⁸ In its letter to Duke Energy dated 22 September 1999 (Claimant's Exhibit C-46), Peru's competition agency (Indecopi) refers to "the investment of your company in the Peruvian electricity generator Egenor."

²⁹ See Article 13 of the Foreign Investment Law (“In order to benefit from the stability regime referred to in Article 10° hereof, foreign investors must file an application with the National Competent Authority in respect of any of the forms stipulated in Article 11° hereof.”) See also Investment Regulations, Article 29 (“In order to be entitled to the legal stability regime referred to in this title, an application for the execution of the respective agreement should be filed before the Competent National Authority pursuant to the format indicated in Annex II, which is an integral part of this Supreme Decree.”).

114. The importance of the formalities that must be observed to obtain an LSA is underscored by the fact that specific reference is made to the LSA application in the body of the corresponding LSA. Thus, Clause One in each of the DEI Bermuda LSA and DEI Peru Holdings LSA refers specifically to the fact that each LSA was issued pursuant to the application which had been submitted.

115. The Preamble and Clause One of the DEI Bermuda LSA provide as follows:

Witnesseth hereby the Legal Stability Agreement entered into by and between **THE PERUVIAN STATE** ... on the one part; and, on the other, **DUKE ENERGY INTERNATIONAL PERU INVESTMENT NO. 1, LTD.** ... hereinafter referred to as **DUKE ENERGY INTERNATIONAL**, under the following terms and conditions:

ONE. – **DUKE ENERGY INTERNATIONAL** has submitted a request to the National Foreign Investment and Technology Commission to execute a Legal Stability Agreement in accordance with [the Foreign Investment Law, the Private Investment Law and the Investment Regulations].³⁰

(underlined emphasis added)

116. The Preamble and Clause One of the DEI Peru Holdings LSA provide as follows:

Witnesseth hereby the Legal Stability Agreement entered into by and between, on the one part, the **PERUVIAN STATE** ... and, on the other, **DUKE ENERGY INTERNATIONAL PERU HOLDINGS SRL** ... hereinafter referred to as **DUKE ENERGY PERU**, under the following terms and conditions:

ONE. – **DUKE ENERGY PERU** has submitted a request to the National Commission of Foreign Investments and Technologies, hereinafter referred to as **CONITE**, in order to execute a Legal Stability Agreement in accordance with [the Foreign Investment Law, the Private Investment Law and the Investment Regulations].³¹

³⁰ Preamble and Clause One, DEI Bermuda LSA, Claimant's Exhibit 1.

³¹ Preamble and Clause One, DEI Peru Holdings LSA, Claimant's Exhibit 20.

(underlined emphasis added)

117. The application for each of the DEI Bermuda and DEI Peru Holdings LSAs confirms that the purpose of the capital contribution from DEI Bermuda to DEI Peru Holdings was to permit the consolidation of Duke Energy's ownership interest in Egenor S.A.A. under DEI Peru Holdings (*i.e.*, the company that would ultimately serve, with Respondent's consent, as the Bidder and Buyer for the purposes of the Privatization Agreement). Relevant parts of the applications are:

DEI Bermuda LSA Application

Target of the Investment

3.1 Economic Sector: DUKE's capital contribution shall be made to [DEI PERU HOLDINGS], which shall act as a holding company (controlling company) for the investments that the Duke Energy International Group currently has in Peru.

3.2 Brief Description of the Project: Duke's capital contribution shall be made to [DEI PERU HOLDINGS] for the acquisition of 90% of the representative shares of the social capital of EGENOR S.A.A., as part of the corporate reorganization process of the investments that Duke Energy International Group has currently in Peru.

DEI Peru Holdings LSA Application

Amount of the Investment: US\$ 263,430,000

2.1 Economic Sector: Holding company (company holding the instruments representing the social capital).

2.2 Brief Description of the Project: The capital contribution that [DEI Bermuda] shall make to [DEI Peru Holdings] shall be utilized by the latter to acquire 90% of the representative shares of the social capital of EGENOR S.A.A., as part of the corporate reorganization process of the investments that the Duke Energy International Group has currently in Peru.

118. The plain terms of these two applications make it abundantly clear that the sole and exclusive purpose of the capital contribution by DEI Bermuda in DEI Peru Holdings was

to permit the latter to acquire the shares of Egenor S.A.A. (renamed DEI Egenor at the time of acquisition) held by DEI Investments SRL and DEI Holdings USA.

(iv) Unity of the Investment

119. Finally, in deciding on the nature of the investment, the Tribunal agrees with the position adopted by other ICSID tribunals involving situations in which the parties' consent to ICSID arbitration was included in one of several successive agreements connected to an investment. This is the case in the present arbitration.

120. Respondent has raised the concern that the Tribunal might import into this proceeding, inappropriately, a broad definition of investment of the kind typically found in Bilateral Investment Treaties (“**BITs**”) on this subject. Respondent states:

Instead of calling on the Tribunal to interpret the Agreement, normally and naturally, as a contract between specified parties, and establishing specified rights and obligations, Claimant would have the Tribunal mistakenly import into this proceeding the general definition of “investment” from bilateral investment treaties (“**BITs**”), together with inapposite BIT jurisprudence. Because the instrument of consent before this Tribunal contains a narrowly focused definition of investment, and not the broad definition found in BITs, Claimant's arguments are wholly misdirected, and should be ignored. In the case at hand, the relevant investment is precisely delineated in the DEI Bermuda Legal Stability Agreement, and it is not that investment on which Claimant predicates its claims.³²

121. The Tribunal is not importing into this proceeding a general definition of “investment” from BITs together with inapposite BIT jurisprudence. In the relevant cases, which are discussed below, ICSID tribunals have applied the principle of the “unity of the investment” in situations where consent to ICSID arbitration is found in individual investment agreements or contracts, not in an umbrella instrument such as a BIT. The Tribunal is of the view that the principles derived from those cases are directly applicable to its determination of the investment in relation to which the parties consented to ICSID arbitration in Clause Nine of the DEI Bermuda LSA.

122. In *Holiday Inns v. Morocco*, an ICSID arbitration agreement was included in a “Basic Agreement” for the establishment and operation of hotels. Government financing for the hotels was secured by means of separate loan agreements involving parties affiliated with (but different from) those who signed the Basic Agreement. The loan agreements contained choice of forum clauses in favor of the Moroccan courts.³³ Claimants sought to bring a financing dispute within the jurisdiction of the ICSID tribunal constituted under the dispute-resolution provision of the Basic Agreement.
123. Morocco objected to the jurisdiction of the ICSID tribunal, arguing that the dispute related to separate transactions, between separate parties, for which other dispute-settlement procedures had been agreed.³⁴ The tribunal rejected these contentions and asserted its jurisdiction over the loan agreements. In doing so, it emphasized “the general unity of an investment operation.” The tribunal held:

It is well known, and it is being particularly shown in the present case, that investment is accomplished by a number of juridical acts of all sorts. It would not be consonant either with economic reality or with the intention of the parties to consider each of these acts in complete isolation from the others. It is particularly important to ascertain which is the act which is the basis of the investment and which entails as measures of execution the other acts which have been concluded in order to carry it out.³⁵

124. In *CSOB v. Slovakia*, a Consolidation Agreement between the claimant, a former state-owned bank, and the Ministries of Finance of the Czech and Slovak Republics provided for the assignment by CSOB of certain non-performing receivables to two “Collection Companies,” one in each Republic, created for this purpose. Each Collection Company was to pay CSOB for the assigned receivables. To enable them to do so, each Collection Company was to receive loans from CSOB, which were to be repaid according to an agreed repayment schedule. The Consolidation Agreement included a clause stating that

³² See Respondent’s Reply, paragraph 3.

³³ *Lalive*, The First ‘World Bank’ Arbitration, p. 156.

³⁴ *Lalive*, The First ‘World Bank’ Arbitration, pp. 156-159.

³⁵ Decision on Jurisdiction, 12 May 1974, *Lalive*, The First ‘World Bank’ Arbitration, p. 159.

it was to be governed by the laws of the Czech Republic and the BIT between the Czech and Slovak Republics.

125. After the Slovak Collection Company (“SCC”) was established, it concluded Loan Agreements with CSOB. Under the terms of both the Consolidation Agreement and the Loan Agreements, the loan was secured by a guarantee of the Slovak Ministry of Finance. When SCC defaulted in its payment, CSOB instituted ICSID proceedings. Slovakia argued that the claims against it did not arise directly out of the loan and were, therefore, outside of the tribunal’s jurisdiction, which was based on the arbitration agreement contained in the separate Consolidation Agreement.³⁶ The tribunal rejected this argument. It held that

[a]n investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment. Hence, a dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an investment under the Convention, provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment.

[...]

The foregoing analysis indicates that the term ‘directly’, as used in Article 25(1) of the Convention, should not be interpreted restrictively to compel the conclusion that CSOB’s claim is outside the Centre’s jurisdiction and the Tribunals’ competence merely because it is based on an obligation of the Slovak Republic which, standing alone, does not qualify as an investment.

Hence, in deciding whether the obligation referred to in CSOB’s requested relief forms part of an investment, the Tribunal has to determine whether the purported obligation of the Slovak Republic forms an integral part of a transaction which qualifies as an investment.

[...]

³⁶ As such, the BIT here played only an indirect role, in that it contained the ICSID arbitration agreement that was incorporated by reference in the Consolidation Agreement. The claim itself was not brought under the BIT.

The contractual scheme embodied in the Consolidation Agreement shows, however, that the CSOB loan to the [SCC] is closely related to and cannot be disassociated from all other transactions involving the restructuring of CSOB. ...

[...]

The Slovak Republic's undertaking and the loan form an integrated whole in the process defined in the Consolidation Agreement. Hence, individual transactions comprising it may still meet the requirements of an investment under the Convention, provided the overall operation for the consolidation of CSOB, to which it is closely connected, qualifies as an investment.³⁷

126. The CSOB case is particularly instructive for the issue facing this Tribunal. In CSOB, as is the case here, it was necessary to consider contracts and transactions outside the scope of the single agreement that contained the ICSID arbitration agreement in order to find, as the tribunal did in that case, that the dispute before it arose directly out of an investment.
127. At the same time, the tribunal confirmed, in a supplementary decision on jurisdiction, that the application of the concept of the unity of the investment (the "overall operation") did not mean that the Tribunal "automatically acquires jurisdiction with regard to each agreement concluded to implement the wider investment operation."³⁸ As such, the CSOB decision was more restrictive than the decision reached by another ICSID tribunal in *Société Ouest-Africaine des Bétons Industriels (SOABI) v. The Republic of Senegal*, a case also involving an ICSID arbitration agreement contained in one of several successive agreements.

³⁷ *Ceskoslovenska Obchodni Banka A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction of May 24, 1999, at *paras.* 72, 74-75, 80 & 82. (Emphasis added)

³⁸ Supplementary Decision of 1 December 2000, para. 28.

128. In *SOABI*,³⁹ three successive agreements were entered into by the parties in connection with the construction of low-cost dwellings in Senegal. Only the last agreement to be signed (the “Establishment Agreement”), which related to the establishment of a plant for the pre-fabrication of reinforced concrete for the planned dwellings, contained an ICSID arbitration agreement, which by its express terms was limited to disputes between the parties relating to the Establishment Agreement.
129. The majority of the tribunal held that “the agreements between the parties other than the Establishment Agreement, with respect to the construction of the plant as well as the construction of the 15,000 dwelling units, are implicitly encompassed by the Establishment Agreement.”⁴⁰ The majority reasoned that “one could not dissociate the two parts of the operation,”⁴¹ and accused the dissent of “hid[ing] behind hypotheses that are refuted by ... reality ...”⁴²
130. Professor Schreuer summarizes these and other cases as follows:

These cases suggest that ICSID tribunals are inclined to take a broad view of consent clauses where the agreement between the parties is reflected in several successive instruments. Expressions of consent are not applied narrowly to the specific document in which they appear but are read in the context of the parties’ overall relationship. Therefore, a series of interrelated contracts may be regarded, in functional terms, as representing the legal framework for one investment operation. ICSID clauses contained in some, though not all, of the different contracts may be interpreted to apply to the entire operation.⁴³

³⁹ *Société Ouest-Africaine des Bétons Industriels (SOABI) v. the Republic of Senegal*, ICSID Case No. ARB/82/1, Award of February 25, 1988, published in *Yearbook of Commercial Arbitration*, Vol. XVII (1992), pp. 42-72, at *para.* 4.10.

⁴⁰ *Ibid.* at *para.* 4.13.

⁴¹ *Ibid.* at *para.* 4.17.

⁴² *Ibid.*

⁴³ C. Schreuer, *The ICSID Convention: A Commentary*, at p. 245 (2001).

131. The Tribunal has no hesitation in applying the unity-of-the-investment principle⁴⁴ to refute Respondent's argument that the narrow description of the transaction in Clause Two of the DEI Bermuda LSA necessarily determines the scope of the "investment" for purposes of the DEI Bermuda LSA. The reality of the overall investment, which is clear from the record, overcomes Respondent's objection that it could never have consented to arbitration of a dispute related to the broader investment by Duke Energy in DEI Egenor.
132. However, the Tribunal also acknowledges the corollary finding in the CSOB case, namely that Claimant will need to substantiate its claims, during the merits phase, by reference solely to the guarantees contained in the DEI Bermuda LSA, and not those contained in any of the other LSAs. This is a function of the specific wording of Clause Nine of the DEI Bermuda LSA, and of the legal basis of Claimant's claims as formulated in the Request for Arbitration, namely the alleged breach of the protections contained in the DEI Bermuda LSA, not in any of the other LSAs.
133. While the Tribunal's lack of jurisdiction over the other LSAs will not prevent it from taking them into consideration for the purposes of the interpretation and application of the DEI Bermuda LSA (indeed, that is "perfectly possible, normal and called for"),⁴⁵ it will not be in a position to "give effect" to the protections in those LSAs.⁴⁶ In other words, in the peculiar circumstances of this case (successive agreements *for the protection* of the investment), the unity of the investment does not necessarily imply the unity of the protection of the investment.
134. Finally, by focusing on the guarantees included in the DEI Bermuda LSA, and excluding the application of the guarantees included in the other LSAs, the Tribunal is not limiting Claimant strictly to the text of the DEI Bermuda LSA. First, Claimant is entitled to the

⁴⁴ We are guided here principally by the reasoning adopted by the CSOB tribunal in reaching its balanced decision.

⁴⁵ *Klökner v. United Republic of Cameroon*, Ad Hoc Committee Decision, para. 164.

⁴⁶ *See ibid.*

guarantees that are implied in the DEI Bermuda LSA by Peruvian law.⁴⁷ Second, Claimant is entitled to the guarantees provided by such rules of international law as may be held by the Tribunal to be applicable to the merits of the dispute by virtue of Article 42(1) of the ICSID Convention.

3. The Tribunal's Decision

135. For the reasons set out above, the Tribunal finds that Claimant's claims are *ratione materiae*, within the jurisdiction of ICSID and of the present Tribunal in accordance with Article 25 of the ICSID Convention.

B. JURISDICTION *RATIONE PERSONAE*

1. The Parties' Positions

136. Respondent argues that the Tribunal lacks jurisdiction *ratione personae*. Respondent argues that while DEI Bermuda may currently be the indirect, beneficial owner of all or most of DEI Egenor, such alleged ownership is indirect, and that the parties who could claim for alleged violations arising from the Tax Assessment (*viz.*, DEI Peru Holdings and DEI Egenor) are not before this Tribunal since Peru consented to ICSID arbitration only in respect of DEI Bermuda's specified investment in DEI Peru Holdings.

137. Claimant argues that the only *ratione personae* requirement of Article 25(1) of the ICSID Convention is that the dispute be between a Contracting State and a national of another Contracting State.

138. Claimant avers that its claims are for injuries that it has suffered in its own right under the DEI Bermuda LSA. It stresses that even if these claims are based on actions taken by Peru against DEI Egenor, this does not in any way vitiate Claimant's standing to assert claims against Peru for breaches by Peru of obligations that it independently owed to DEI

⁴⁷ In this respect, the Tribunal notes that one of the claims put forward by Claimants is for breach of the obligations implied under the Peruvian *Civil Code* in all contracts, and here specifically in the DEI Bermuda LSA. *See* Request for Arbitration, paras. 52-56.

Bermuda. The question of whether there has been a breach or not, adds Claimant, is one for the merits.

2. The Tribunal's Analysis

139. Article 25 of the ICSID Convention requires that the dispute before the Tribunal be between a Contracting State and a national of another Contracting State. There can be no controversy that these basic requirements are satisfied in the present case.
140. By virtue of its nationality as a Bermudan company, the Claimant is a national of a Contracting State. Bermuda is an overseas territory of the United Kingdom, which has been a party to the ICSID Convention since January 18, 1967. The United Kingdom extended the application of the ICSID Convention to Bermuda through the Arbitration (International Investment Disputes) Act 1966 (Application to Colonies, etc.), Order 1967 (Statutory Instruments, 1967, No. 159, February 10, 1967). The ICSID Convention was ratified by the United Kingdom to the same effect on December 9, 1966.
141. Respondent is a Contracting State. Peru signed the ICSID Convention on September 4, 1991. The ICSID Convention entered into force in Peru on September 8, 1993.
142. Respondent does not contest these facts.
143. The arguments raised by Respondent as objections to the Tribunal's jurisdiction *ratione personae* are, in reality, subject-matter objections in relation to the claims brought before this Tribunal by DEI Bermuda, dressed up as objections to the Tribunal's personal jurisdiction over putative claims by entities (such as DEI Peru Holdings and DEI Egenor) that are not claimants before the Tribunal.
144. As has been established in the previous section of this Decision, it is evident that the claims brought by Claimant are claims brought only by DEI Bermuda, and only in respect of alleged violations of the DEI Bermuda LSA.

3. The Tribunal's Decision

145. For these reasons, the Tribunal finds that it has jurisdiction *ratione personae* in this proceeding.

C. JURISDICTION *RATIONE TEMPORIS*

1. The Parties' Positions

146. Respondent takes the position that the claims are outside the jurisdiction of the Tribunal *ratione temporis* because they are addressed to matters arising before the DEI Bermuda LSA entered into force (*i.e.*, July 24, 2001). In particular, Respondent stresses that:

- SUNAT's tax audit of DEI Egenor was initiated on November 24, 2000;
- the tax liability at issue in SUNAT's tax audit was incurred by DEI Egenor with respect to tax years 1996 to 1999; and
- SUNAT applied tax laws that were already in force prior to the date the DEI Bermuda LSA was signed.

147. Claimant argues that under Article 25(1) of the ICSID Convention, it is the point in time at which the parties' legal dispute arose that is decisive of the Tribunal's jurisdiction. The investment dispute with Peru is within the temporal parameters of the parties' consent, Claimant argues, because it arose on November 22, 2001, the day on which SUNAT imposed the Tax Assessment, which is after 24 July 2001, the effective date of the DEI Bermuda LSA.

2. The Tribunal's Analysis

148. What is decisive of the Tribunal's jurisdiction *ratione temporis* is the point in time at which the instant legal dispute between the parties arose, not the point in time during which the factual matters on which the dispute is based took place. As discussed in *Maffezini v. Spain*, while the parties may have disagreed on matters prior to the entry into force of the relevant instrument containing the legal guarantees, "this does not mean that a legal dispute ... can be said to have existed at the time."⁴⁸

⁴⁸ *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction of January 25, 2000, at para. 95.

149. Here, the legal dispute arose only after Respondent imposed the Tax Assessment on DEI Egenor, on November 22, 2001, several months after the effective date of the DEI Bermuda LSA. It was in the Tax Assessment, and not before, that SUNAT decreed a tax liability of approximately US\$ 48 million against DEI Egenor for what SUNAT determined, at that time, were tax underpayments in 1996 through 1999.
150. Naturally, during the merits phase, the Tribunal will have full jurisdiction to consider all of the factual matters related to the dispute, including those that preceded the effective date of the DEI Bermuda LSA, for the purposes of determining whether Respondent violated the DEI Bermuda LSA through conduct which took place or reached its “consummation point” after its entry into force (*i.e.*, the Tax Assessment).⁴⁹

3. The Tribunal’s Decision

151. For these reasons, the Tribunal finds that it has jurisdiction *ratione temporis* in this arbitration.

D. ADMISSIBILITY OF THE CLAIMS

1. The Parties’ Positions

152. Finally, Respondent takes the position that should the Tribunal decide that it has jurisdiction to hear this dispute and that the claims are within the scope of the DEI Bermuda LSA, it should nevertheless decline to exercise its jurisdiction and, instead, find that the claim is inadmissible because the key issues in dispute have already been fully resolved within the Peruvian tax system by operation of the Peruvian Tax Court and Peru’s Tax Amnesty Law.
153. Claimant replies that the concept of admissibility is misplaced in the context of an objection to ICSID jurisdiction. Claimant argues that Respondent’s arguments under the heading of admissibility are nothing more than a presentation of a facet of Respondent’s likely defenses on the merits.

154. Claimant argues that DEI Egenor's applications for tax amnesty do not preclude Claimant's claims in this arbitration. According to the tax amnesty regulations, a tax debt subject to an amnesty arrangement may not be subject to appeal. Claimant argues that this arbitration was not filed as an appeal of the Tax Court's substantive rulings but, rather, to protect and enforce the protections promised by Peru in the DEI Bermuda LSA. In addition, Claimant takes the position that DEI Egenor's tax amnesty applications bind only DEI Egenor but not its affiliate, DEI Bermuda. Accordingly, says Claimant, the obligation not to appeal a tax debt may not be extended to entities other than the tax debtor itself, DEI Egenor.
155. Furthermore, Claimant argues that DEI Egenor clearly reserved its rights in each of its applications for tax amnesty, and that these reservations of rights are consistent with the concept under Peruvian law that a taxpayer can acknowledge the debt but may reject the underlying obligation or arguments raised by the taxing authority. Moreover, submits Claimant, Peru's acceptance of DEI Egenor's reservations should be reviewed under international law.
156. Finally, Claimant points out that, under the circumstances, DEI Egenor had no reasonable alternative but to avail itself of Peru's amnesty program since its failure to have done so could have meant a huge increase in the size of its tax liability, including default, interest, penalties and fines. DEI Egenor's application for amnesty was therefore consistent with a party's duty, recognized as a universal principle of law, to mitigate or minimize its damage or losses.

2. The Tribunal's Analysis

(a) Objection based on the Finality of the Decision of the Peruvian Tax Court

157. Respondent argues that the Tribunal should decline to sit as an Appellate Body for the Peruvian Tax Court, and not hear an appeal of the April 23, 2004 decision of the Peruvian

⁴⁹ See *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award of May 29, 2003, at para. 66.

Tax Court, which found mainly in favor of SUNAT in connection with the Depreciation Assessment.⁵⁰

158. The Tribunal cannot accept Respondent's argument.
159. First, the issues raised in the present ICSID proceedings are different from those that were at issue in the proceedings before the Tax Court. The issue before the Tribunal is not a dispute about taxes but, rather, an investment dispute arising out of the imposition of taxes. Furthermore:
- there is no commonality of parties (the parties to the Tax Court proceedings were DEI Egenor and SUNAT, while the parties to this arbitration are DEI Bermuda and Peru);
 - none of the issues in this arbitration (*i.e.*, the claims for breaches by Peru of the guarantees contained in the DEI Bermuda LSA) was, or could have been, within the purview or jurisdiction of the Tax Court;
 - the Tax Court did not determine, nor could it determine, the tax regime that was stabilized for Claimant's investment under the DEI Bermuda LSA;
 - the causes of action under the proceedings arise from different laws and under different obligations;
 - distinct relief is sought under each of the proceedings; and
 - for the purposes of adjudicating DEI Bermuda's claims, what the Tribunal must determine is not whether the decision of the Tax Court is right or wrong as a matter of Peruvian Tax Law, but whether that interpretation of the law in 2004, confirming SUNAT's opinion of November 2001, is consistent with the rights stabilized for DEI Bermuda under its LSA.

⁵⁰ See Section II.D, above.

160. In addition, by agreeing to international arbitration in the DEI Bermuda LSA, Respondent affirmed Claimant's right to a review by an ICSID tribunal of the matters considered by the Peruvian administration and court system, to the extent those matters fall within the guarantees contained in the DEI Bermuda LSA. As noted by the Tribunal in *Azinian v. United Mexican States*:

The Claimants have cited a number of cases where international tribunals did not consider themselves bound by decisions of national courts. Professor Dodge ... stressed the following sentence from the well-known ICSID case of *Amco v. Indonesia*: "An international tribunal is not bound to follow the result of a national court." As the Claimants argued persuasively, it would be unfortunate if potential claimants under NAFTA were dissuaded from seeking relief under domestic law from national courts, because such actions might have the salutary effect of resolving the dispute without resorting to investor-state arbitration under NAFTA.⁵¹

161. Of course, the same argument applies under the ICSID system more broadly, and the Tribunal finds that it is particularly persuasive in this case, where the Peruvian Tax Court is not a part of the Peruvian judiciary, but rather an autonomous governmental body existing under the Peruvian Ministry of Finance and Economy.

162. Respondent argues that the Tribunal must apply Peruvian law to resolve this dispute. In fact, the question of the applicable law to the merits of this case is somewhat more complicated. The DEI Bermuda LSA contains no specific provision regarding the applicable substantive law. In such circumstances, Article 42(1) of the ICSID Convention requires the Tribunal to apply "the law of the Contracting State party to the dispute (including its rules on conflicts of laws) and such rules of international law as may be applicable." Furthermore, even if the law of Peru were held to apply to the interpretation of the DEI Bermuda LSA, this Tribunal has the authority and duty to subject Peruvian law to the supervening control of international law.⁵²

⁵¹ ICSID Case No. ARB(AF)/97/2, Award of November 1, 1999, at para. 86.

⁵² See Schreuer, at pp. 585-90, paras. 62-70 (and the cases cited therein).

(b) Objection based on the Finality of the Tax Amnesty

163. Respondent argues that DEI Bermuda's effort to re-open a matter that DEI Egenor had already settled with Peru, through the application for tax amnesty (which Respondent accepted), should be barred by the doctrine of equitable estoppel: "DEI Bermuda seeks to be indemnified in this arbitration for the very tax liability that DEI Egenor conceded and promised not to challenge further."⁵³
164. It is the Tribunal's view that the effect of the amnesty is a matter for the merits phase of these proceedings. Similarly, Respondent's points in relation to Respondent's right to enforce its tax laws,⁵⁴ the change in the applicable depreciation rate,⁵⁵ and non-discrimination,⁵⁶ are all matters for the merits phase.

3. The Tribunal's Decision

165. The Tribunal finds that its jurisdiction is not affected by the April 23, 2004, decision of the Peruvian Tax Court. To the contrary, that decision is part of the factual matrix the Tribunal must consider in evaluating the merits of Claimant's claims against Respondent.
166. Respondent's remaining objections under the broad heading of admissibility are also closely intertwined with the merits of the dispute. In the circumstances, the Tribunal prefers to resolve all of these issues after a full hearing on the merits, and not at this stage of the proceedings. In other words, even if it were open to the Tribunal to dismiss some or all of the claims on grounds of admissibility, the Tribunal would exercise its discretion not to do so.
167. The Tribunal need not and does not decide whether, in appropriate circumstances, as a matter of ICSID law and practice, preliminary objections based on the concept of "admissibility" could be sustained.

⁵³ Respondent's Memorial on Jurisdiction and Admissibility, para. 133.

⁵⁴ See Respondent's Memorial on Jurisdiction and Admissibility, paras. 86 *et seq.*

⁵⁵ See Respondent's Memorial on Jurisdiction and Admissibility, paras. 97 *et seq.*


⁵⁶ See Respondent's Memorial on Jurisdiction and Admissibility, paras. 102 *et seq.*

IV. DECISION


168. For the above reasons, the Tribunal unanimously decides that:

1. The dispute submitted by DEI Bermuda is within the jurisdiction of the Centre and the competence of the Tribunal.
2. Respondent's objections to the admissibility of the dispute based on the finality of the decision of the Peruvian Tax Court are rejected. Respondent's remaining objections to the admissibility of the dispute are joined to the merits.
3. The costs of the jurisdictional phase of the arbitration are reserved.

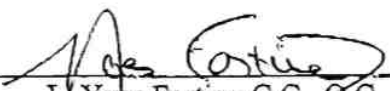
So decided.



Guido Santiago Tawil, Esq.
Co-arbitrator



Pedro Nikken, Esq.
Co-arbitrator



L. Yves Fortier, C.C., Q.C.
Chairman