

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**WASHINGTON, D.C.**

**IN THE MATTER**

**AGUAYTIA ENERGY LLC**

**(HEREAFTER “AEL” OR “CLAIMANT”)**

**AGAINST**

**REPUBLIC OF PERU**

**(HEREAFTER “PERU” OR “RESPONDENT”)**

**CASE No. ARB/06/13**

**AWARD**

MEMBERS OF THE TRIBUNAL

DR. ROBERT BRINER, PRESIDENT

MR. J. WILLIAM ROWLEY QC, ARBITRATOR

DR. CLAUS VON WOBESER, ARBITRATOR

SECRETARY OF THE TRIBUNAL

MS. NATALÍ SEQUEIRA

DATE OF DISPATCH TO THE PARTIES:

11 DECEMBER 2008

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## 1. PROCEDURAL HISTORY

1     Aguaytia Energy LLC, a company incorporated in the State of Delaware (U.S.A.),  
submitted to the International Centre for Settlement of Investment Disputes (“ICSID” or  
“the Centre”) a Request to Institute Arbitration Proceedings (the “Request”) dated  
8 May 2006 against the Republic of Peru.

2     ICSID registered the Request on 17 July 2006.

3     The Parties having been unable to agree on the number of arbitrators and the method for  
their appointment, and sixty days having elapsed since the registration of the Request,  
the Claimant, by letter of 20 September 2006, invoked the formula provided for in  
Article 37(2)(b) of the Convention on the Settlement of Investment Disputes Between  
States and Nationals of Other States (“the Convention”) pursuant to which:

*Where the parties do not agree upon the number of arbitrators and the  
method of their appointment, the Tribunal shall consist of three arbitrators,  
one arbitrator appointed by each party and the third, who shall be the  
president of the Tribunal, appointed by agreement of the parties.*

4     In the same letter, the Claimant appointed as Arbitrator, Mr. J. William Rowley QC (a  
national of Canada), and, by letter dated 13 October 2006, the Respondent appointed  
Dr. Claus von Wobeser (a national of Mexico) as Arbitrator.

5     Upon the failure of the Parties to agree on a presiding arbitrator, the Claimant, by letter  
of 31 January 2007, requested that the appointment be made by the Chairman of the

ICSID Administrative Council (“Chairman”), pursuant to Rule 4 of the ICSID Rules of Procedure for Arbitration Proceedings (“Arbitration Rules” or “ICSID Rules”).

- 6 Following consultation with the Parties, the Chairman appointed Dr. Robert Briner (a national of Switzerland) as the President of the Arbitral Tribunal. By letter of 27 March 2007, the Centre noted that, in accordance with Rule 6(1) of the ICSID Rules, the Arbitral Tribunal was deemed to have been constituted and the proceedings to have begun on 27 March 2007. Mr. Ucheora Onwuamaegbu, Senior Counsel, ICSID, was designated by ICSID as Secretary of the Tribunal.
- 7 By letter dated 20 April 2007, ICSID informed the Arbitral Tribunal that due to the reorganization of the case management undertaken at the Centre, Mr. Ucheora Onwuamaegbu had been replaced as Secretary of the Tribunal by Mr. Tomás Solís, Counsel, ICSID. Mr. Solís was in turn formally replaced by Ms. Natalí Sequeira on 3 November 2008.
- 8 A first session of the Arbitral Tribunal was held on 18 May 2007 at the World Bank offices in Washington D.C. A sound recording of the session was made.

The following persons were present:

The Arbitral Tribunal

Dr. Robert Briner, President

Mr. J. William Rowley QC, Arbitrator

Dr. Claus von Wobeser, Arbitrator

The Secretary of the Arbitral Tribunal

Mr. Tomás Solís

On behalf of the Claimant

Mr. James L. Loftis,  
VINSON & ELKINS RLLP

Mr. Gene J. Silva II,  
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Mr. Mark Beeley,  
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Ms. Adrienne Goins,  
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Ms. Teresa Keck,  
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Ms. Miluska Cervantes,  
AGUAYTIA ENERGY, LLC

Mr. Dean M. Moesser,  
DUKE ENERGY CORPORATION

Mr. Eduardo Maldonado,  
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On behalf of the Respondent

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ESTUDIO ECHECOPAR

Ms. María del Carmen Tovar Gil,  
ESTUDIO ECHECOPAR

Mr. Renzo Villa,  
EMBASSY OF PERU WASHINGTON DC

Mr. Reynaldo Portugal,  
EMBASSY OF PERU WASHINGTON DC

Ms. Abby Cohen Smutny,  
WHITE & CASE LLP

Mr. Jonathan C. Hamilton,  
WHITE & CASE LLP

Ms. Mairée Uran-Bidegain,  
WHITE & CASE LLP

Ms. Sabina Sacco,  
WHITE & CASE LLP

9 Among other matters, it was agreed that

- the place of the proceeding would be the seat of the Centre in Washington, D.C., but without prejudice to the Tribunal's holding of hearings with the Parties at any other location that the Tribunal considered appropriate after consultation with the Parties;
- the procedural language would be English and that pleadings, including supporting documentation as well as witness and expert statements, would be filed with English translations if the original document was not in English. The translations submitted would not need to be certified as set forth in Regulation 30(3) of the ICSID Administrative and Financial Regulations, unless such translation proved controversial;

10 The following timetable for the further written submissions was furthermore agreed upon between the Parties and the Arbitral Tribunal :

- the Claimant would file its Opening Memorial by 9 October 2007;
- the Respondent would file its Counter-Memorial by 29 February 2008;
- the Claimant would file its Reply to Respondent's Counter-Memorial by 15 April 2008;

- the Respondent would file its Rejoinder to Claimant's Reply by 30 May 2008;
- A hearing on the merits would commence in the week starting 14 July 2008.

11 At the end of the First Session, the Parties and the Arbitral Tribunal stated that they had no further issues to discuss, and the Parties confirmed that they were in agreement with the procedure as conducted by the Arbitral Tribunal up to that time.

12 In accordance with the above-mentioned timetable, the Claimant submitted on 9 October 2007 its Opening Memorial together with Supporting Statements and Reports<sup>1</sup>.

13 On 29 February 2008 the Respondent submitted its Counter-Memorial<sup>2</sup>.

14 By letter dated 11 April 2008, the Claimant informed the Arbitral Tribunal that both Parties had agreed to an extension of the deadlines for the filing of Claimant's Reply and Respondent's Rejoinder. The Arbitral Tribunal was requested to confirm the new dates through the issuing of a procedural order amending the previous time table contained in the Minutes of the First Session.

15 The Tribunal issued Procedural Order No. 1 on 16 April 2008, confirming the Parties' agreement on the extension of the procedural timetable. Accordingly, the Claimant was granted an extension of the time-limit until 22 April 2008 to file its Reply and the Respondent until 16 June 2008 to file its Rejoinder, it being understood that this change

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<sup>1</sup> This Submission was also accompanied by Exhibits C-1 to C-43 (Volumes I and II) and Legal Authorities CLA-1 to CLA-78 (Volumes I to IV).

<sup>2</sup> This Submission was accompanied by Declarations (Volume II), Expert Reports/Opinions (Volumes III and IV), Exhibits R-1 to R-140 (Volumes V to VIII) and Legal Authorities RLA-1 to RLA-120 (Volumes IX to XII).



in the timetable would not have any influence on the timing of the Hearing, scheduled to start in the week beginning 14 July 2008.

16 In accordance with this new timetable, the Claimant filed its Reply dated 22 April 2008 which was received by the Centre on 23 April 2008 together with Supporting Statements and Expert Reports<sup>3</sup>. On 20 May 2008, the Claimant filed Supplemental Legal Authorities<sup>4</sup>.

17 By letter of 2 June 2008, the Respondent proposed that the Parties identify by 18 June 2008 the witnesses and experts for cross-examination and that a pre-hearing telephone conference with the Arbitral Tribunal be held on or about 20 June 2008.

18 By letter of 5 June 2008 the Claimant proposed that the exchange of witness lists take place on 23 June 2008 and to hold the pre-hearing conference call on or about 26 June 2008.

19 By letter dated 6 June 2008, the Centre, on behalf of the President of the Arbitral Tribunal, informed the Parties that the identification of witnesses and experts should be made on or before 23 June 2008, thereby modifying Item 15 of the Minutes of the First Session accordingly. A provisional agenda for the Hearing was also submitted to the Parties and they were furthermore invited to advise the Arbitral Tribunal, on or before 23 June 2008, of any points of the said agenda on which they were able to reach an agreement or any observations they might have thereon. The Parties were furthermore informed that should they fail to reach an agreement on any of the points of the

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<sup>3</sup> This Submission was also accompanied by Exhibits C-44 to C-72 (Volume III) and Legal Authorities CLA-79 to CLA-221 (Volumes V to IX).

<sup>4</sup> CLA-151 to CLA-217 (Volume X).

provisional agenda, the Arbitral Tribunal would make itself available for a telephone conference on 26 June 2008.

20 On 16 June 2008 the Respondent filed its Rejoinder <sup>5</sup>.

21 By letter of 23 June 2008 addressed to the Arbitral Tribunal, the Claimant identified the witnesses and experts it wished to call during the Hearing. Enclosed with this letter was a summary table of the Parties' positions and agreements on the items contained in the provisional agenda <sup>6</sup>. The Arbitral Tribunal was also informed that the Parties agreed that a conference call with the Arbitral Tribunal take place on 26 June 2008.

22 By letter of 23 June 2008 addressed to the Arbitral Tribunal the Respondent identified the witnesses and experts it wished to cross-examine during the Hearing.

23 The conference call with the Parties and the Arbitral Tribunal took place on 26 June 2008 as scheduled.

24 In a letter dated 27 June 2008 addressed to the Parties, the Secretary of the Arbitral Tribunal summarized the agreements reached between the Parties during the conference call regarding the organization of the Hearing.

25 By letter of 9 July 2008 addressed to the Parties, the Secretary of the Arbitral Tribunal transmitted a provisional schedule of the Hearing.

26 The Hearing on the merits took place at the seat of the Centre in Washington, D.C. from 14 to 18 July 2008. A sound recording and a transcript of the Hearing were made.

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<sup>5</sup> This Submission was accompanied by further witness declarations and legal opinions.

<sup>6</sup> The items were referenced in a document entitled « Pre-Hearing Items Considered by the Parties ».

The following persons were present:

The Arbitral Tribunal

Dr. Robert Briner, President

Mr. J. William Rowley QC, Arbitrator

Mr. Claus von Wobeser, Arbitrator

The Secretary of the Arbitral Tribunal

Ms. Natalí Sequeira  
(in the absence of Mr. Tomás Solís)

On behalf of the Claimant

Mr. James L. Loftis,  
VINSON & ELKINS RLLP

Mr. Gene J. Silva II,  
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Mr. Mark Beeley,  
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Witnesses and Experts  
on behalf of the Respondent

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Mr. Edwin Quintanilla

Mr. Alfredo Bullard

Ms. María del Carmen Vega

Dr. Michael Rosenzweig

Ms. María Teresa Quiñones

Representatives of the Republic of Peru

Mr. Carlos Ramírez,  
COMMISSION FOR THE DEFENSE OF THE  
PERUVIAN STATE

Mr. Pedro Gamio,  
MINISTRY OF ENERGY AND MINES

Ms. Mariana Cazorla,  
MINISTRY OF ENERGY AND MINES

Mr. Daniel Cámac,  
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Mr. Percy León,  
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Mr. José Luis Luna,  
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Mr. Víctor Ormeno,  
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Mr. Manuel Talavera,  
EMBASSY OF PERU

Ms. Yesenia Cabezas,  
EMBASSY OF PERU

- 27 At the end of the examination of the witnesses and experts, counsel for both Parties presented their Closing Statements. At the end of the Hearing, the Parties and the Arbitrators stated that they had no further issues to discuss, and the Parties confirmed that they were in agreement with the procedure as conducted by the Arbitral Tribunal up to that time. The Tribunal thereupon invited the Parties to provide material comments regarding the Transcript of the Hearing within a time period of three weeks.
- 28 By its letter dated 14 August 2008 addressed to the Tribunal, the Claimant communicated its revisions to the Transcript and informed the Tribunal that the Respondent had agreed to the Claimant's proposed changes. By its letter of the same date to the Tribunal, the Respondent enclosed a document containing corrections related to the testimony of those witnesses and experts who testified in Spanish and informed the Tribunal that the Claimant had agreed to the Respondent's corrections.
- 29 By letter dated 3 November 2008, the Acting Secretary-General of ICSID informed the Arbitral Tribunal and the Parties that due to an internal reorganization of tasks at the Centre, Mr. Tomás Solís had been replaced by Ms. Natalí Sequeira as Secretary to the Tribunal.

30 By letter dated 26 November 2008, Mrs Eloise M. Obadia, Senior Counsel at ICSID (in the absence of Ms Natalí Sequeira) informed the Parties that the Arbitral Tribunal had, as of 26 November 2008, declared the proceeding closed in accordance with ICSID Arbitration Rule 38(1).

## 2. THE CLAIMS AND RELIEF SOUGHT

31 The Claimant formulated in its Opening Memorial of 9 October 2007 (hereinafter referred to as “CI”) its Claims and the Relief sought as follows :

*Peru induced AEL to make a significant investment into its infrastructure on the basis of a guarantee that AEL’s investment would be treated at least as well as any other investor operating in the same economic sector. Despite this guarantee, Peru proceeded not only to offer a significantly more advantageous investment model to favored investors, but also to treat such investments in an arbitrarily better fashion than it treated AEL.*

*These acts of discrimination have been compounded by the inability of the Peruvian courts to grant effective remedies for the same, despite clearly finding that discrimination has occurred (discrimination being a violation of Peruvian domestic law irrespective of the Conite Agreement). Even where one organ of Peru has been forced to accept that it has acted improperly, another has then stepped in to continue the violation. Such a campaign of discrimination is all the more offensive as this claim is not based on a generalized open ended promise found in an investment treaty, but is instead founded on an direct bilateral contractual promise voluntarily and specifically extended by Peru to AEL in contemplation of this very investment.*

*AEL has accordingly been deprived of the benefit of its bargain with the Peruvian state, a bargain which was the keystone of AEL’s investment of over US\$300,000,000. It is entitled, as matter of both Peruvian law and under international law to be made whole for these breaches.*

*AEL therefore seeks, and is entitled to, the following relief:*

*(a) a declaration that Peru has breached the Conite Agreement by creating investment regimes providing favorable treatment to comparable investors and not affording such comparable treatment to AEL’s investment;*

- (b) a declaration that Peru has breached the Conite Agreement by:*
  - (i) discriminating against AEL's investment by refusing to define L-252 as part of the STP, whilst defining a competitor's transmission line, with the same characteristics, as part of the STP, and*
  - (ii) failing in such circumstances to effectively remedy such a breach of AEL's right to non-discrimination;*
- (c) a declaration that Peru has breached the Conite Agreement by:*
  - (i) discriminating against AEL's investment by failing to recognize L-251 as an Exceptional Case, and failing to grant the full financial benefits such a recognition affords whilst granting such benefits to other similarly classified lines, and*
  - (ii) failing in such circumstances to effectively remedy such a breach of AEL's right to non-discrimination;*
- (d) a declaration that Peru has breached the Conite Agreement by:*
  - (i) discriminating against AEL's investment by discounting the VNR, Average Cost, and O&M costs data supplied by Eteselva, whilst allowing other entities to recover 100% of their actual cost, and*
  - (ii) failing in such circumstances to effectively remedy such a breach of AEL's right to non-discrimination;*
- (e) an order that the Respondent pays to the Claimant the sum of US\$ 140,600,000<sup>7</sup>, which is inclusive of interest and discounted in accordance with applicable Peruvian regulations, in compensation for the Respondent's breaches of the Conite Agreement;*
- (f) the award of:*
  - (i) its share of the fees and expenses of the Tribunal and the charges for the use of ICSID's facilities; and*
  - (ii) its legal and related fees in connection with these proceedings.*

32 In its Reply Memorial of 22 April 2008 (hereinafter referred to as "CII"), the Claimant sought the following relief:

*In short, AEL avers that the Tribunal should reach the following findings as to the remaining contentious issues between the parties:*

- (a) The Conite Agreement recognizes and provides a substantive right to AEL that its investment (which consists of the Termoselva, Eteselva and their assets) would not be discriminated against;*

<sup>7</sup>

In its Reply Memorial this amount was reduced to US\$ 132,310,000 (§ 151). At the Hearing this amount was further reduced to US\$ 91.1 million (see Transcript, p. 475, 476, 477 and C-73).



*(b) Peru has in fact discriminated against AEL's investment by affording superior treatment (which AEL was never given the opportunity to enjoy) to investors engaged in the same economic activity as AEL;*

*(c) Peru has no lawful excuse for such discrimination; and*

*(d) As a result of such discrimination AEL has suffered loss, which it may recover in full measure.*

*In the circumstances of Peru not denying its conduct, but instead seeking to defend such conduct through contorted, illogical readings of an agreement designed to encourage foreign investment, any alternative finding would signal a complete failure of the Conite Agreement to provide the protections which were promised to AEL.*

33 In its Counter-Memorial of 29 February 2008 (hereinafter referred to as “RI”), the Respondent concluded that :

*This case ultimately centers on contracts that Claimant sought from Peru and agreed with Peru, pursuant to specific provisions of Peruvian law. Claimant now wants this Tribunal to disregard those contracts.*

*Claimant's Stability Agreement acts, by law, only to “freeze” certain laws for a period of ten years. Claimant insists on interpretations of this contract that are so strained as to present concerns of bad faith.*

*Claimant's Electricity Transmission Concession Agreement provides, by law, that Claimant's transmission lines are subject to the Electricity Concessions Law and its Regulations. Claimant instead urges this Tribunal to disregard its own Transmission Concession and instead grant Claimant the supposed benefits of the ISA BOOT Concession – a completely distinct contract granted by public bidding to another foreign investor under different economic terms and laws. Claimant wants the Tribunal to ignore the Transmission Concession altogether because Claimant failed even to submit it or cite it to the Tribunal. There can be no sufficient excuse invented for such an omission.*

and requested that “... *the Tribunal dismiss Claimant's claims in their entirety.*”.

34 In its Rejoinder of 16 June 2008 (hereinafter referred to as “RII”), the Respondent concluded that :

*The Stability Agreement is a “freezing agreement” that provides, in pertinent part, for the “stability of the right to non-discrimination” as specified therein for a specified term of ten years. Nothing in the Stability Agreement, Peruvian law or any other conceivably applicable source of law leads to the conclusion that claimant is entitled to cherry-pick from the BOOT contract of a third party – at prejudice to other holders of 185 electricity transmission concession, as well as Peruvian consumers. Claimant has utterly failed to satisfy its burden of proof.*

### **3. BACKGROUND**

#### **3.1. THE CLAIMANT**

35 The Claimant is a limited liability company created and existing under the laws of the State of Delaware, (U.S.A.) It is the parent of the Peruvian company Aguaytia Energy del Peru S.R.L. (“Aguaytia Energy”). In turn, Aguaytia Energy is the parent of two further Peruvian legal entities, Eteselva S.R.L. (“Eteselva”) and Termoselva S.R.L. (“Termoselva”). These companies were set up in connection with the Aguaytia Project.

36 The Aguaytia gas fields are located in a remote region of Peru, east of the Andes Mountains. The fields were discovered by Mobil Oil Corporation in 1961 but had not been commercialized due to a lack of market for natural gas. At the beginning of the 1990s Peru enacted new laws for the hydrocarbon sector and the electric power circuit together with the privatization of both these sectors.

37 The Executive Summary of the Information Memorandum prepared by The Chase Manhattan Bank N.A. dated 9 September 1994 described the Aguaytia Project as follows <sup>8</sup>:

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<sup>8</sup> C-37, Original Chase Information Memorandum, 9 September 1994.

*The Maple Gas Corporation ("Maple") was formed in 1986 to invest in oil and gas related entities and assets. During the following six years, Maple operated oil and gas producing properties, gas gathering and transmission facilities, and gas processing and treating facilities. In addition, Maple drilled and completed wells, constructed gas pipelines and plant facilities, and marketed crude oil, natural gas, and natural gas liquids ("NGLs").*

*In March, 1993, Maple was awarded the Aguaytia Project (the "Project") by the Government of Peru pursuant to the terms of an international tender. One year later after negotiating the contractual terms of the Project and receiving the necessary governmental approvals, Maple's Peruvian Branch signed a 30-year license contract with the Government for the development of the Aguaytia gas field. Though the field was discovered by Mobil Oil Corporation in 1961, it had not been commercialized due to a lack of market for the natural gas. The field has an estimated 302 billion cubic feet of recoverable gas reserves and 21.9 million barrels of recoverable NGL reserves.*

*With the enactment of new laws in Peru for the hydrocarbon sector and the electric power sector as well as the current privatization of both these sectors, free markets for hydrocarbons and electricity are being established that make it possible to commercialize the gas field at this time. In addition, under the leadership of President Alberto Fujimori, a number of structural reforms have been successfully implemented in Peru which have revitalized the Peruvian economy and pacified the country. The free market environment coupled with a resurgent economy make Peru an attractive investment opportunity.*

*The Project consists of both a Gas Project and a Power Project. The Gas Project includes the drilling of additional gas wells in the field, the construction and operation of gas processing facilities, the construction and operation of two gas pipelines and one NGL pipeline, and the construction and operation of NGL fractionation and storage facilities at a total capital cost of U.S. \$50.8 million. Gas from the field will be supplied to two new power plants Maple will construct. NGLs will be fractionated, and the resulting propane, butane, and natural gasoline will be sold to an existing domestic market.*

*The Power Project includes the construction and operation of two gas-fired thermoelectric power plants, as well as related electric substations and transmission facilities. One plant with 110 megawatts ("MW") of capacity (at peak conditions) will supply energy to the main power grid in Peru. This grid is highly dependent on hydroelectric energy and requires additional thermal capacity to increase its reliability and to satisfy increasing electrical demand. With a revitalized economy, demand for energy is growing rapidly. In 1993, for example, electric demand grew by seven percent. Since the cost for gas is low relative to that of liquid hydrocarbons such as diesel or residual fuel oil, and since Maple's plant is the only gas-*

*fired thermoelectric plant connected to the main power grid under active development, it should be the lowest cost thermoelectric producer of energy on the grid. As a result, the Maple plant will be a very competitive source of electric energy and it is expected to be the first thermoelectric power plant dispatched on the main power grid. A second power plant with a capacity of 30 MW (at peak load) will be built by Maple in the city of Pucallpa, the largest city in the central jungle of Peru. This plant will become the base load supply for the electric distribution system in the Pucallpa area and will essentially displace the existing diesel fired generation facilities which are inefficient and expensive to operate. The total capital cost for both power plants and related substation and transmission facilities is U.S.\$ 66.3 million.*

*A summary of the economics of the Gas and Power Projects are shown below:*

Project	Capital Expenditures (U.S. \$million)	After-Tax Internal Rate of Return
Gas	50.8	32.9%
Power	66.3	24.8%
Total	117.1	28.3%

38 The Application for Registration of Legal Stability Contracts of 1996 contained the following information on the Project <sup>9</sup>

*The investment will be made in developing the Aguaytia Comprehensive Project (the "Project"), whose development will be assumed by The Maple Gas Corporation del Peru, Sucursal Peruana ("Maple"), based on the signing with Perupetro S.A. of the License Agreement for Site 31-C Hydrocarbons Production dated March 30, 1994 (the "License Agreement"). Maple will assign to Aguaytia Energy del Per0 S.R. Ltda. ninety-nine percent (99%) of its rights in the License Agreement, subject to authorization and approval by the competent authority, in order to participate jointly with the latter as contractor under the License Agreement (the "Contractor").*

*Among other things, the License Agreement grants the Contractor the right to produce natural gas from the Aguaytia reservoir located approximately one hundred kilometers (100 kms.) west of the city of Pucallpa in the department of Ucayali for an initial period of thirty (30) years, which may be extended forty (40) years.*

<sup>9</sup> C-6, AEL Application for Registration of Legal Stability Contracts, 1996; see also § 42 *infra*.

*The Project has a hydrocarbon production component (the “Gas Component”) and one for generation and transmission of thermoelectrical power (the “Power Component”).*

*The Gas Component includes, among others, the production integrity and capacity test of existing wells and drilling of additional wells for production of natural gas in the contract area of the License Agreement; construction and operation, either directly or indirectly, of: (a) a natural gas processing plant; (b) a natural gas liquids fractioning plant; (c) a liquefied petroleum gas (LPG) supply plant; (d) gas pipelines for transportation of residue gas and fuel pipelines for transportation of natural gas liquids, natural gasolines, and liquefied petroleum gas; and (e) facilities for LPG storage, loading, and unloading.*

*The Power Component includes, among others, the construction and operation, either directly or indirectly, of: (a) a thermoelectric power plant with minimum installed capacity of one hundred forty megawatts (140 MW), near the city of Aguaytia (the “Aguaytia Thermoelectric Plant”); (b) a two hundred twenty kilovolts transmission line (220 kV) approximately three hundred ninety-eight kilometers (398 kms.) long; and (c) power transmission and transformation facilities for transportation of power generated at the Aguaytia Thermoelectric Plant from the latter to the town of Paramonga on the country’s northern coast.*

39 After having obtained the Legal Stability Agreement<sup>10</sup> and the necessary concession for the power transmission activities<sup>11</sup>, it solicited a number of other entities and obtained their involvement as initial shareholders in the Claimant<sup>12</sup>.

### **3.2 THE RESPONDENT**

40 The Respondent is the Republic of Peru.

41 According to the Claimant and not disputed by the Respondent the Republic of Peru is

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<sup>10</sup> § 43 *infra*

<sup>11</sup> § 51 *infra*

<sup>12</sup> C-1, Opening Memorial, § 29

responsible for its own conduct through the agency of the Ministry for Energy and Mines (“MEM”) and for that of :

(a) the **Comisión Nacional de Inversiones y Tecnologías Extranjeras** (“**Conite**”) to whom the co-ordination of foreign investment promotion was delegated by means of Legislative Decree 662, Articles 23 and 30.<sup>13</sup>

(b) the **Comisión de Tarifas de Energía** (“**CTE**”), which prior to May 17, 1999 was known as the **Comisión de Tarifas Eléctricas**, and which was absorbed into the **Organismo Supervisor de la Inversión en Energía**<sup>14</sup> (“**Osinerg**”) on May 10, 2001.<sup>15</sup> Prior to its absorption one of CTE’s functions was to set the tariffs and compensations for the use of electricity transmission systems.

(c) **Osinerg**, to which, since May 10, 2001, the regulation and supervision of investments made in Peru’s electricity market (including the compensations and tariffs related to the same) is delegated by means of Laws 2673410 and 27332,11 and by Supreme Decrees 032-2001-PCM, 054-2001-PCM and 055-2001-PCM.<sup>12</sup> In the recitals to Supreme Decree 032-2001-PCM, it is specifically noted that one of **Osinerg**’s functions is to act as a guarantee to companies that operate and invest in the electricity sector “that the regulatory activity of such agencies will be based exclusively on legal, technical and economic criteria”. This is further explained in Articles 6 and 9 of Supreme Decree 054-2001-PCM:

*Decisions and actions by OSINERG shall be aimed at guaranteeing that there is no discrimination among the ENTITIES to the effect that some are given an unjustified competitive advantage over others.*

*OSINERG shall apply all laws and regulations in effect. Cases or situations having similar characteristics shall be treated similarly.*

*As a matter of domestic law, the conduct of CTE, Conite and Osinerg is attributed to Peru. For domestic law purposes there is only one Republic of Peru or ‘government’.<sup>16</sup> Therefore, each administrative agency cannot be considered independently, but rather must be considered as part of the*

<sup>13</sup> Following the date of the Conite Agreement, the functions and role of CONITE were assumed by a successor entity, *Agencia de Promoción de la Inversión Privada – Proinversión*. Legislative Decree 662 is exhibited as CLA-1.

<sup>14</sup> Renamed, since January 25, 2007, as *Organismo Supervisor de la Inversión en Energía y Minería & sometimes referred to as “OSINERGMIN”*.

<sup>15</sup> By way of Supreme Decree 054-2001-PCM, Third Transitional Provision, (Exhibit CLA-2) authorized under Law 27332 Third Final Provision (2000) (Exhibit CLA-3).

<sup>16</sup> Article 43 of the Political Constitution of Peru, exhibited as CLA-7. See also Avendaño at ¶¶[129-147].

*Peruvian government when performing a function delegated to it by the government. Accordingly, acts of an agency such as CTE, Conite or Osinerg, when performing a governmental function delegated to it under Peruvian law, are those of Peru.*<sup>17</sup>

### **3.3 DEVELOPMENTS BETWEEN 1996 AND 2005**

42 After having received the license for the gas exploration for the Aguaytia field, Maple with the assistance of Chase Manhattan Bank approached a number of prospective investors<sup>18</sup> which on 10 January 1996 gave rise to the formation of Aguaytia Energy LLC.<sup>19</sup>

43 Maple also submitted to the Peruvian authorities an application for registration of legal stability contracts<sup>20</sup>. A *Convenio de Estabilidad Jurídica con Aguaytia Energy, LLC de Estados Unidos de América* was entered into between the Republic of Peru and Aguaytia Energy, LLC on 17 May 1996 (hereinafter “Agreement”)<sup>21</sup>. This Agreement was concluded on the letterhead of the *Comisión Nacional de Inversiones y Tecnologías Extranjeras* (“CONITE”). The Claimant has submitted one translation into English as C-1, the Respondent another translation under R-3. When citing this document, the Tribunal shall use the translation furnished by the Claimant (C-1). Although the two translations differ, especially in their syntax, the Parties have not

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<sup>17</sup> Cl, pp. 7 and 8.

<sup>18</sup> C-37

<sup>19</sup> C-5

<sup>20</sup> C-6

<sup>21</sup> C-1 and R-3 (the Claimant usually refers to this document as the « Conite Agreement », the Respondent employs the term « Stability Agreement »).

drawn the attention of the Tribunal to any material differences between the two translations which would have a bearing on the issues to be decided.

44 In view of the importance of this Agreement for the decision in this dispute, the Tribunal finds it useful to cite the relevant parts of the Agreement:

*ONE. AGUAYTIA has put forward before the National Commission of Foreign Investments and Technologies CONITE an application for the execution of a Juridical Stability Agreement under the provisions set forth in Title II, Legislative Decree 662, and in Chapter One, Title V, of Legislative Decree 757, and in the Regulations thereof approved by Supreme Decree 162-92-EF dated October 12, 1992, hereinafter referred to as the REGULATIONS.*

*TWO. Pursuant to this Agreement, AGUAYTIA accepts the investment terms established in Item a), Article 16, of the REGULATIONS. Hence, it binds itself to the following:*

- 1. To make cash contributions in the amount of US\$ 28,000,000 (Twenty Eight Million US Dollars) within a term not to exceed two (02) years as from the date of execution hereof to the capital stock of AGUAYTIA ENERGY DEL PERU S.R.LTDA. a company incorporated in the city of Lima, registered in Card 123779 of the Registry of Legal Entities of the Public Records Office in and for Lima and Callao.*
- 2. To channel the contribution originating from abroad, referred to in Point 1, through the National Financial System, which must be evidenced on the certification issued by the bank taking part in the transaction.*
- 3. To register its investment with CONITE, which investment shall be valued in freely convertible currency.*

*THREE Pursuant to the Agreement and throughout its effectiveness, the STATE undertakes to guarantee juridical stability for AGUAYTIA in connection with the investment referred to in ARTICLE TWO under the terms set forth below:*

- 1. Stability of the tax system applicable to the Income Tax (VAT) as provided for in item a), article 10, of Legislative Decree 662, effective as of the date of execution hereof. Pursuant to this regulation, dividends and any other form of profit distribution are tax-exempt, as provided for in item a), article 25, of the Law on the Income Tax approved by Legislative Decree 774 and any amending provisions being in effect as of the date of execution hereof. According to the*



*aforesaid Law and the amending provisions thereto, any remittances abroad of amounts payable to AGUAYTIA for any of the items provided for herein are also tax-exempt.*

*2. Stability of the foreign currency free availability system, as provided for in item b, article 10, of Legislative Decree 662, which implies that AGUAYTIA shall have ready free access to the foreign currency at the exchange market at the most favorable rate it can obtain, and that the STATE shall not be entitled to enforce upon it, with regard to the investment referred to in ARTICLE TWO, any exchange market regulatory system or mechanism intended to limit or restrict such right or to imply for AGUAYTIA a less favorable treatment than that extended to any individual or body corporate in the performance of any foreign currency exchange operation.*

*3. Stability of the right of free remittance, of its profits and capital cash flows pursuant to the provisions of item b), article 10, of Legislative Decree 662, which implies that AGUAYTIA shall be empowered to transfer abroad, in freely convertible foreign currency and waiving the requirement of any prior authorization from any agency of the Central Government, Regional or Local Governments, so long as the relevant investment has been registered with the national Competent Body and compliance has been provided with any applicable tax obligations, without the STATE being capable of imposing any restrictions or limitations whatsoever upon such right, the following:*

*a) the full amount of its capital cash flows originating from abroad, including the equity obtained from the sale of its stock, participations or rights in and to companies, from the reduction of capital or from the partial or full winding-up of companies, originating from the investment referred to in ARTICLE TWO.*

*b) the full amount of dividends or proven net earnings drawn from the investment addressed in ARTICLE TWO, as well as any profits obtained from the consideration earned from the use or enjoyment of those assets physically located in the country, and intended for such investments; and*

*c) the full amount of the royalties and consideration earned from the use and transfer of technology, trademarks and patents, and any other industrial property item authorized by the Competent National Body.*

*4. Stability of the right to use the most favorable exchange rate pursuant to the provisions of item b), article 10, of Legislative Decree 662, which implies that AGUAYTIA shall have ready access to the foreign currency at the exchange market at the*

*most favorable exchange rate it can obtain and that the STATE shall not be empowered to force it to perform its foreign exchange transactions under some system or mechanism which extends a less favorable treatment than that currently applied to any individual or body corporate. In the performance of any foreign exchange operation, in accordance with the following:*

*a) in the case of the conversion of foreign currency into national currency, AGUAYTIA shall be entitled to sell such currency to any individual or body corporate at the most favorable buying exchange rate it is able to obtain at the foreign exchange market, at the time of performing the foreign exchange transaction; and,*

*b) in the case of the conversion of national currency into foreign currency, AGUAYTIA shall be entitled to buy such currency from any individual or body corporate at the most favorable selling exchange rate it is able to obtain at the foreign exchange market, at the time of performing the foreign exchange transaction.*

*5. Stability of the right to non-discrimination, as provided for in item c), article 10, of Legislative Decree 662, which implies that the STATE or neither one of its bodies, notwithstanding these may include entities or companies from the Central Government, Regional or Local Governments, may apply a differentiated treatment to AGUAYTIA by reason of its nationality, the sectors or types of economic activity it shall develop, or the geographical location of the firm in which it invests, and neither as far as the matters herein below specified:*

*a) exchange matters, accordingly, the STATE shall not be entitled to apply to AGUAYTIA, as far as the investment referred to in ARTICLE TWO, a foreign exchange system that shall imply a less favorable treatment than that currently extended to any individual or body corporate in the performance of any type of foreign exchange transaction;*

*b) prices, rates or non-customs fees; accordingly, the STATE shall not be empowered to apply to AGUAYTIA for these items, as far as the investment referred to in ARTICLE TWO, any differentiated amounts or rates;*

*c) a specific form of business incorporation; accordingly, the STATE shall not be empowered to require from AGUAYTIA that the firm AGUAYTIA ENERGY DEL PERU S.R.LTDA. in which it shall invest, should adopt a specific business organization type;*

*d) its capacity as an individual or as a body corporate; accordingly, the STATE shall not be entitled to apply to AGUAYTIA a differentiated treatment for this reason; and,*

*e) no other reason of equivalent effects, as is the case with the application of discriminatory treatments for AGUAYTIA, derived from any combination of the various items included in this Article.*

*This Article is applicable without prejudice to the restrictions set forth under article 3 of the REGULATIONS.*

...

*FIVE The term of effectiveness of this juridical Stability Agreement is ten (10) years counted as from the date of its execution. Accordingly, throughout this term, it may not be amended by either of the parties individually, regardless of whether the national legislation could be eventually amended and notwithstanding the fact that such amendments to the national legislation may turn out to be more beneficial or harmful to any of the Parties, than those agreed hereunder.*

*SIX AGUAYTIA shall be entitled to waive, for a single time only, the juridical stability agreement granted to it hereunder, and must formalize such waiver through a written notice to CONITE, which shall become effective as of the date of its receipt by the latter.*

*If AGUAYTIA elects to exercise its right to waive the Stability Agreement acknowledged to it herein, it shall automatically be governed by common law.*

...

*NINE It is the intention of both parties that any problems that may arise in connection with the performance of this Agreement shall be settled in the most expeditious manner possible. As from this moment, it is agreed that any litigation, controversy or claim among the parties, in connection with the construction, performance, enforcement or validity hereof, shall be submitted to the International Center for the Settlement of Investment-Related Discrepancies, to be solved through international de jure arbitration under the Conciliation and Arbitration Rules set forth in the Covenant for the Settlement of Investment-Related Discrepancies among States and Nationals from Other States, approved by Peru through Legislative Resolution 26210.*

*Any expenses to be incurred in enforcing this Article shall be borne in equal parts by the parties hereto.*

45 This Agreement was modified on 14 May 1998, by an Agreement of Partial Amendment of Juridical Stability executed with Aguaytia Energy, LLC. (U.S.A.) (*“Acuerdo de Modificación Parcial del Convenio de Estabilidad Jurídica celebrado con Aguaytia Energy, LLC de Estados Unidos de América”*), according to which the amount to be invested according to Article 2 of the Agreement was increased from USD 28,000,000 to USD 63,200,000.

46 Article 1 of the Agreement refers to various Decrees. The parts relevant for this dispute read as follows:

*Legislative Decree 662 Approving the Juridical Stability System for Foreign Investment*<sup>22</sup> published on 2 September 1991:

*5<sup>th</sup> WHEREAS Clause*

*The Government should grant a juridical stability system to foreign investors by the acknowledgement of certain guaranties securing the continuity of the established rules.*

*TITLE II*

*JURIDICAL STABILITY FOR FOREIGN INVESTMENT*

*Article 10.- The Competent National Organization, on behalf of the State, may execute with foreign investors, prior to the investment and registration thereof, agreements to guarantee the following rights:*

*a) Stability of the effective tax system at the time of the agreement’s execution.*

*By virtue of the tax system stability hereby guaranteed, a rate greater than the one established in the appropriate agreement will not be imposed on the foreign investors in the case of the income tax to be paid by the company receiving the investment, or on profits and/or dividends distributed in their favor. Thus, if the income tax to be paid by the company increases, the rate imposed on foreign investors will be reduced accordingly to allow the company’s profit they may freely dispose of, to be at least equal to the one guarantee;*

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<sup>22</sup>

*b) Stability of the free foreign currency disposal system and the rights established in Articles 7 and 9 hereof; and,*

*c) Stability of the right to non-discrimination established in Article 2 hereof.*

47 Article 2 of this same Decree reads as follows :

*Foreign investors and the companies in which these participate have the same rights and obligations as the local investors and companies). Such rights and obligations are only limited by the exceptions established in the Political Constitution of Peru and the provisions hereof.*

*In no case the domestic juridical regulations will discriminate among investors or the companies based on the local or foreign share in the investments.*

48 Legislative Decree 757 of 13 November 1999, Title V (Judicial Stability of Investments), Chapter 1 (Juridical Stability Agreements) contains Article 39 which is relevant to the present dispute<sup>23</sup>

*The juridical stability agreements are executed pursuant to the provisions of Article 1357° of the Civil Code and have force of law. Thus, they cannot be unilaterally amended or terminated by the State. Such contracts have a civil and non-administrative nature and may only be amended or cancelled by agreement between the parties.*

49 Supreme Decree 162-92 EF Approving the Regulations for Private Investment Guarantee Systems of 12 October 1992<sup>24</sup> provides the following :

*TITLE III  
JURIDICAL STABILITY  
CHAPTER II*

*GUARANTIES FURNISHED BY JURIDICAL STABILITY*

*Article 19.- Juridical stability guaranties investors and the companies in which they participate, as applicable, the following rights:*

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<sup>23</sup> CLA-18

<sup>24</sup> CLA-19

- a) *Stability of the tax system referred to the Income Tax effective at the time of the agreement's execution in the cases foreseen in section a of Article 10° of Legislative Decree N° 662, and Articles 38°, 40° and 41° of Legislative Decree N° 757 pursuant to the provisions of Article 23° hereof;*
- b) *The stability of the foreign currency free availability system, pursuant to the provisions of section b of Article 10° of Legislative Decree N° 662, which is applied pursuant to the provisions of section a of Article 3° hereof;*
- c) *Stability of the right to free remittance of profits, dividends, capitals and other income received subject to the provisions of Article 15° hereof;*
- d) *Stability of the right to use the most favorable exchange rate in the exchange market subject to the provisions of Article 13° hereof;*
- e) *Stability of the right to non-discrimination, which is subject to the provisions of Article 3° hereof;*
- f) *Stability of the workers' recruitment systems in any form, under the provisions of section a of Article 12° of Legislative Decree N° 662, especially when referred to the systems regulated in Legislative Decree N° 728 - Labor Promotion Law;*
- g) *Stability of the export promotion systems pursuant to the provisions of section b of Article 12° of Legislative Decree N° 662 which includes the indirect tax refund system regulated by Article 8° of Legislative Decree N° 668, as well as the special systems included in Legislative Decree N° 704- Free Trade, Special Treatment and Special Development Zones Law; and,*
- h) *In the case of leasing agreements: total stability of the tax system.*

50 Article 3 referred to in Article 19 e) states :

## *CHAPTER I*

### *INVESTORS' RIGHTS*

*Article 3.- The right to non-discrimination among investors and companies implies that the State, at any of its levels, in the case of Central, Regional or Local Government entities, or companies owned thereby, should grant an equal treatment thereto. Thus, they have the same rights and obligations, with no other exceptions than the ones established in Article 126° of the 1979 Constitution and Article 13° of Legislative Decree N° 757 due to national security reasons. Such exceptions are regulated by the provisions of title IV hereof.*

*The non-discrimination referred to in this Article implies that no entity or company of the Central, Regional or Local Governments, as appropriate, will establish a differentiated treatment among investors or the companies in which they participate based on the nationality thereof, the sectors or the type of economic activities they are engaged in, or the geographical location of companies. Neither will they be able to establish a discriminatory treatment among investors or companies in which they participate in the following matters :*

...

*b) Prices, tariffs of non-tariff duties. Thus, no differentiated amount or charges will be applied thereto, except in the case of prices in which, as a result of the company's geographic location, the cost of assets is greater.*

*For the purposes of the provisions of this section, the following concepts are defined as follows:*

*b. 1. Prices: Those referred to assets and services of public entities and companies owned directly or indirectly by the State;*

*b.2. Tariffs: Those referred to utility services supplied by public entities and companies owned directly or indirectly by the State; and,*

*b.3. Non-tariff duties: Those taxes charged by public entities in any of their levels for the supply of services inherent to the State or the execution of public works other than taxes and import duties. Administrative proceedings fees are comprised within such duties.*

*c) Form of incorporation, ...*

*d) Their individual or corporate status, ...*

*e) Any other cost with equivalent effects ...*

51 With Supreme Resolution Nr. 050-96-EM of 20 June 1996<sup>25</sup> the Maple Gas Corporation of Peru, Peru Branch, was granted the necessary concession for its power transmission activities :

***Article 1.-** To grant The Maple Gas Corporation of Peru, Peru Branch, the final concession to develop electric power transmission activities subject to the terms and conditions set forth in the resolution hereto and those described in the concession agreement approved by Article 2, assigning it Code No. 14057796.*

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<sup>25</sup>

R-1, p. 11.

and

*Article 2.- Approve the concession agreement No. 078-96 to be executed with The Maple Gas Corporation of Peru, Peru Branch, which contains 18 clauses and 8 exhibits.*

52 This Resolution was published in the official gazette “El Peruano” on 21 June 1996.

53 The Final Concession Agreement which was executed between the Ministry of Energy and Mines and the Maple Gas Corporation of Peru, Peru Branch <sup>26</sup> and signed before the Notary Public on 16 July 1996 contains the following relevant parts :

**Second.**

***Aim.***

*The aim of the agreement hereto is to establish the conditions, rights and duties that regulate the electrical transmission final concession granted by the Ministry to the concessionaire.*

**Third.**

***Applicable Governing Law.***

*The legal framework to which the agreement hereto is compulsorily subject to is the Electric Concessions Law – Law Decree No. 25844 and its Regulations approved by Supreme Decree No. 009-93-EM with the amendments incorporated by Supreme Decree No. 02-94-EM, and the rest of Peruvian laws in force in each instance.*

**Fourth.**

***Term of the Concession.***

*This final concession is granted for an indefinite term, effective as of the date of the publication of the Granting Supreme Resolution.*

**Fifth.**

***General Conditions.***

*The final concession is granted subject to the following conditions:*



*5.1 The Ministry, at the Commission's proposal, determines the Principal Transmission Systems and the Secondary Transmission Systems pursuant to Article 58 of the Law.*

*5.2 The use of the Concession's electricity lines will be subject to a compensation that shall be paid separately through two concepts named:*

*\* Income Tariff and Connection Toll, for the lines in the Principal Transmission System pursuant to Article 60 of the Law.*

*\*Income Tariff and Secondary Toll, for the lines in the Secondary Transmission System, pursuant to Article 139 of the Regulations.*

*5.3 There shall be no compensation for the use of the lines in the Secondary Transmission System in a direction opposite to the preponderant flow of energy.*

*In case of discrepancy and upon one of the parties' request, the Commission shall perform as resolver/decider pursuant to Article 62 of the Law.*

*5.4 If there were any discrepancies between the concessionaire and the users due to the use of the facilities with respect to the transmission capacity or the required extensions, these shall be resolved through an arbitration proceeding.*

*The investments carried out by the user shall be reimbursable pursuant to Article 62 of the Regulations.*

*5.5 According to the law and other regulations on the matter, the concessionaire shall preserve the environment and the cultural patrimony of the nation when developing its activities.*

*5.6 The Directorate shall carry out the enforcement, control and supervision of the compliance with the agreement hereto pursuant to Article 101 of the Law, which the parties acknowledge to be an administrative agreement.*

*5.7 The parties shall be able to submit to arbitration the disputes derived from specific technical aspects of the agreement hereto pursuant to the General Arbitration Act – Law No. 26572.*

*5.8 The concessionaire owning the principal transmission system is not allowed to market electricity pursuant to Article 233 of the Regulations.*

*5.9 The concessionaire shall be able to directly attend to clients who do not use electricity as a public utility by contractually establishing with these clients the conditions of such supply.*

**Sixth.**

***Rights and Duties.***

*6.1 Rights: The concessionaire shall have the following rights:*

*6.1.1 to provide electricity transmission service in the facilities owned by it.*

*6.1.2 to request from the Ministry the imposition of easements pursuant to the provisions of Articles 110 and 111 of the Law.*

*6.1.3 to use, at no charge, the soil, undersoil and airspace of public roads, streets, squares and any other property of public ownership, as well as to cross rivers, bridges, railroads, electric and communication lines and any other rights included in Article 109 of the Law, subject to the observance of the law's provisions.*

*6.1.4 to execute legal stability agreements, tax stability agreements and free disposal of foreign currency agreements pursuant to item b) of Article 106 of the Law, complying with the corresponding paperwork and informing the Directorate.*

*6.1.5 to an installment agreement of up to 36 monthly installments of the CIF ad valorem rights pursuant to item a) of Article 106 of the Law, and Supreme Decree No. 234-92-EF, for which it shall comply with the corresponding paperwork.*

*6.1.6 to enforce the rights that the agreement hereto grants it with respect to third parties, especially those related to the collection of a compensation for use.*

*6.1.7 to request the support of the State, in cases of public disasters, internal commotion and/or uprisings, so as to protect the works and facilities and guarantee the continuance of the operation, pursuant to article 120 of the Law.*

*6.1.8 to participate, if it is a transmission concessionaire of a principal system, in the COES pursuant to the provisions of Article 81 of the Regulations; and*

*6.1.9 all the others conferred by the relevant legislation.*

*6.2 Duties: The concessionaire undertakes the obligation to:*

*6.2.1 transmit electricity efficiently according to the provisions of clause 7 of the agreement hereto.*

*6.2.2 preserve and maintain its works and facilities in good conditions for an efficient operation according to the quality standards set forth in the agreement hereto.*

6.2.3 allow the use of its systems by third parties, who shall bear the costs of extensions to be performed if needed and a compensation for the use pursuant to Article 33 of the Law.

6.2.4 apply the regulated prices or compensations for the use, fixed by the Commission, to the corresponding supply.

6.2.5 comply with all the rules of the national Electricity Code and the applicable technical provisions as provided by Article 99 of the Law.

6.2.6 contribute to the sustainment of statutory and regulatory agencies through allocations which in no case shall exceed 1% of the value of its annual income, in accordance with item g) of Article 31 of the Law.

6.2.7 be part of the COES, if it is a concessionaire of a principal system, as provided by Article 39 of the Law, contributing to its sustainment and strictly respecting its regulations.

6.2.8 operate its facilities in accordance with the provisions issued by the COES, pursuant to Article 32 of the Law.

6.2.9 file the corresponding information before the Directorate and the Commission in accordance with the provisions of Articles 58 and 59 of the Law.

6.2.10 develop its activities by respecting fair competition and/or antitrust rules in force, or that may be enacted in the future, applicable to the electric subsector.

6.2.11 perform the construction of works and assembly of facilities in the terms established in Exhibit No. 5 called “The New Works”.

## **Twelfth**

### ***End of Concession and Grounds for Expiration***

*The concession shall end by a declaration of expiration or resignation; in both cases the conveyance of the concession rights and of the assets required to continue with its operation shall be carried out in accordance with the provisions of the Law and its Regulations.*

#### ***12.1 Expiration***

*The concession shall expire in the cases set out in Article 36 of the Law, and additionally, in the case of a concessionaire of a principal system, pursuant to Article 233 of the Regulations.*

#### ***12.2 Resignation***

*The concessionaire shall be able to resign to its final concession by notifying the Ministry of this decision with at least a years’ notice, pursuant to Article 233 of the Regulations.*

*The Directorate shall process the corresponding Supreme Resolution of Acceptance, in which, during the years' notice, the exact date that it shall become effective shall be determined.*

*If there were any unfinished or not performed works, the Directorate shall enforce the guarantees that the concessionaire had pledged.*

#### **Fourteenth**

##### **Judicial Jurisdiction**

*The agreement hereto is exclusively subject to the jurisdiction of the judges and courts of the capital of Peru. The concessionaire hereby waives any intention to submit the disputes that may arise to foreign courts as well as to file any claim through diplomatic channels.*

- 54 It appears that the electric transmission lines were ready for operation in the Summer 1998 when:

*Aguaytia Energy requested the General Directorate of Electricity of the Ministry of Energy and Mines ("DGE") to acknowledge the completion by Aguaytia Energy, directly or indirectly, of the performance of the works and the start of the operation of the facilities of the Transmission Final Concession identified by Code No. 14057795 (the "Concession's Facilities").*

*That, in response to the request set forth in the Remedy, through Written Notice No. 649-98-EM/DGE of June 26, 1998, whose copy is included in Exhibit I attached hereto and that makes part of it (the "Written Notice"), the DGE informed Aguaytia Energy that, since the emergency situation, which gave rise to Electrocentro S.A.'s request endorsed by the DGE in the sense that Aguaytia Energy could operate the concession's facilities, has come to an end, the formal start of the electric power transmission activities through the Concession's Facilities shall depend on the compliance of the obligations that in the opinion of the DGE are still pending, without clarifying what those obligations are.*

*That, Aguaytia Energy is about to start the commercial operation of Aguaytia's Thermoelectric Plant. In order to transport the electric power that this Plant generates, it requires to start the operation of the Concession's Facilities immediately, even if it's temporarily under an emergency condition like the one that caused the Concession's Facilities to*

*be commercially used to attend to the emergency put forward by Electrocentro S.A.*<sup>27</sup>

### 3.4 THE CLASSIFICATION OF THE TRANSMISSION LINES

55 The transmission lines erected by the Claimant are the following<sup>28</sup>:

*(a) transmission line L-251 (from the Aguaytía sub-station to the Tingo María sub-station);*

*(b) transmission line L-252 (from the Tingo María sub-station to the Vizcarra sub-station);*

*(c) transmission line L-253 (from the Vizcarra sub-station to the Paramonga Nueva sub-station); and*

*(d) certain transmission and transformation facilities located at the Tingo María sub-station (the “Tingo María Facilities”).*

56 According to the Claimant, transmission lines in Peru were classified as follows :

*As noted, the activities of generation, transmission, distribution and marketing of electricity are in Peru governed by the provisions of the LCE (the Electrical Concessions Law). Under the LCE, the transmission of electricity is subject to price regulation. As a consequence the amount of compensation earned for the use of the Transmission Facilities (and the responsibility for the payment of the same) depends on the provisions of the LCE and the RLCE. Under these provisions, the regulator (i.e. Osinerg and previously CTE), must apply Article 58 of the LCE and Article 132 of the RLCE to make a recommendation to MEM regarding the proper classification of transmission systems.*

*Article 58 of the LCE, until July 24, 2006, required MEM to classify lines L-251 and L-252 in one of two ways<sup>29</sup>, either as:*

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<sup>27</sup> RI, p. 13

<sup>28</sup> CI, § 35

<sup>29</sup> The same is true of both L-253 and the Tingo María Facilities, but these were classified as part of the STP by way of Ministerial Resolution No. 413-2000-EM/VME in November 2000 and do not accordingly form part of the Classification Dispute

(a) part of the STP (the primary transmission system), in which case the compensation for their use is paid exclusively by all the consumers of electricity in Peru, or

(b) part of the SSTT (the secondary transmission system), in which case, at all relevant times, the compensation for their use has to be paid by one of the following, as determined by Osinerg:

(i) by the generators connected to the SEIN (to be applied if L-251 and L-252 are used by the generators to connect to a busbar of SEIN's<sup>30</sup> SPT);

(ii) by the Demand connected to the SEIN (to be applied if L-251 and L-252 are used by the Demand to connect to a busbar of SEIN's SPT); or

(iii) by the generators, the Demand and/or a combination of the same, on the basis of regulator's assessment of the use and/or economic benefit that the transmission lines in question provides to each group, if L-251 and L-252 are Exceptional Cases, being cases not falling into either of the above two categories.

For these purposes, Termoselva is a generator. Accordingly, MEM's classification of L-251 and L-252 will determine what percentage of Eteselva's transmission fee Termoselva will be required to pay, and what percentage will be payable by third parties – i.e. what income AEL's investment will receive.<sup>31</sup>

### 3.5 THE BOOT CONCESSION

57 Towards the end of the 1990's the Peruvian authorities came to the conclusion that the main grid needed to be reinforced.

*On 1 December 1999, COPRI<sup>32</sup>, the agency responsible at the time for conducting bids for bid-based public works concessions for infrastructure projects, decided to conduct an international public bid for a BOOT concession pursuant to the bid-based concessions regime explained above. On 31 December 1999, a Supreme Resolution ratified COPRI's decision*

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<sup>30</sup> SEIN = *Sistema Eléctrico Interconectado Nacional*, or National Electrical Interconnected System

<sup>31</sup> CI, §§ 75-77

<sup>32</sup> COPRI = *Comisión para la Promoción de la Inversión Privada*, the Commission for the Promotion of Private Investment, charged with promoting foreign investment into Peru.

*and appointed the special “CELE”<sup>33</sup> committee charged with conducting the international bid.*

*The subsequent bidding history is detailed in the witness declaration of Mr. Anthony Laub Benavides, a member of the CELE. As Mr. Laub describes, the CELE prepared an executive summary, dated April 2000, which described the purpose of the proposed concession and noted the need for this infrastructure project in Peru:*

*This planned 220 kV line, which will be linked at strategic points to the 220 kV line that runs parallel to the coast, will enhance the reliability of the system due to its ring design. Moreover, it will permit a better use of the hydroelectric units of the mountains region, and will provide energy to mining projects nearby such as the Antamina project.*

*The CELE’s financial advisor (InterInvest), along with COPRI, circulated this executive summary among potential investors. On 26 May 2000, InterInvest submitted to the CELE a “Final Pre-Promotion Report” detailing the progress of these invitations. In it, InterInvest noted that 15 companies had been contacted as potential operators, including both ISA and Duke Energy (which currently holds a “controlling interest” over Aguaytia).<sup>34</sup>*

58 In July 2000, CELE prepared (and COPRI approved) a “plan for the promotion of private investment” setting forth the main terms for the BOOT concession.<sup>35</sup>

59 This investment model was based on a Build, Operate, Own and, ultimately, Transfer (“BOOT”) basis. Among various other incentives to potential bidders, the offer envisaged “a stable remuneration scheme, independent of the actual load flow, due to its classification as part of the Main (i.e. Principal) Transmission System”<sup>36</sup>.

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<sup>33</sup> CELE = *Comité Especial Líneas Eléctricas*, Special Committee for Electricity Lines established by CONITE.

<sup>34</sup> RI, §§ 134 – 136.

<sup>35</sup> R-26.

<sup>36</sup> RI, § 143 and Executive Summary dated April 2000 (R-24).

60 The Republic of Peru called for an International Tender (“Concurso Público Internacional”) for the BOOT Concession. Among the various qualified bidders the concession went to ISA (from Columbia). The ISA BOOT Concession was signed by ISA and MEM representatives on 26 April 2001<sup>37</sup>. Neither the Claimant nor its principal shareholders submitted bids to obtain this concession.<sup>38</sup>

### 3.6. CLAIMANT’S CLASSIFICATION AND DISCRIMINATION DISPUTES IN PERU

61 Shortly after the completion of the Transmission Facilities, the Claimant requested the competent Peruvian authorities to review the classification of the Transmission Lines. In part, these endeavors were successful, but the classification of L-251 and L-252 was never decided in a manner fully satisfactory to the Claimant notwithstanding a substantial number of decisions by the regulatory instances and by the Peruvian civil and administrative courts based on various different procedures open to the Claimant under Peruvian legislation. In the context of this Award it is not, however, necessary to deal with the details of these various, partly unsuccessful, attempts by the Claimant to obtain the result it requested. The claims were partially based on technical criteria (direction of the flow of the electricity, etc.) or then based on alleged discrimination. The discrimination claims were based on constitutional grounds. In this context the Constitutional Tribunal of Peru in its decision of 30 January 2004 stated the following:

*In this respect, it should be pointed out that **equality before the law** is a constitutional right that has two fundamental components. As explained by Peruvian author Francisco Eguiguren Praeli, one of them is **equality of the law or in the law**, which consists of the preventing legislators from passing laws that contravene the principle of equality of treatment, to which*

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<sup>37</sup> R-4.

<sup>38</sup> RI, § 137.



*everyone has a right. The other is equality in the application of the law, which imposes the obligation of all public agencies "to refrain from applying the law in a different manner to persons in similar cases or situations" (EGUIGUREN PRAELI, Francisco. Constitutional Studies. ARA Editores. 1st Edition, May 2002, page 97)*<sup>39</sup> (emphasis added)

62 In view of the lack of full success with the internal administrative and court procedures, the Claimant commenced on 10 May 2006 the present ICSID proceedings.

## 4. THE DISPUTE

### 4.1. POSITION OF THE PARTIES

#### 4.1.1. Position of the Claimant

63 In order to justify its claims the Claimant advanced the following arguments<sup>40</sup>

#### *AEL's Contract*

1. *AEL and Peru entered into the Conite Agreement on 17 May 1996. The Conite Agreement was entered as a part of Peru's general inducement to foreign investors to invest capital into Peru.*

2. *The Conite Agreement contained:*

*(a) A promise by Peru to "guarantee legal stability for (AEL) in the following terms: ... Stability of the right to non-discrimination, as provided in Sub-paragraph c) of Article 10 of (LD 662)"*

*(i) While this is a stabilization of an existing right rather than a new right to non-discrimination itself, legal stability cannot be said to exist if Peru itself takes uncorrected action contrary to AEL's right to stability (i.e. an act of discrimination by Peru is prima facie evidence of a breach of the right to stability).*

*(ii) The reference to Art. 10 of LD 662 is enabling rather than defining in nature (i.e. it speaks to Peru's capacity to give the promise rather than the*

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<sup>39</sup> CLA-21, § 10.

<sup>40</sup> Excerpt from the "Case on behalf of Claimant" submitted in writing after the oral presentation at the Opening Statement of the Hearing of 14 July 2008, pp. 1-3.

*scope of that promise). Art. 10 refers to Art. 2 which does offer a definition of the scope of the right - "Foreign investors (i.e. AEL) and the companies in which these participate (i.e. AEL Energy, Termoselva and Eteselva) shall have the same rights and obligations as the local investors and companies (the full suite of anti-discrimination protections offered under LD 757 and the Constitution). Such rights and obligations are only limited by the exceptions established (in the Constitution)."*

*(iii) It is noteworthy that the protection is expressed to cover both AEL and its investments (although the investment vehicles will not, of course, have an independent right to sue on this agreement).*

*(b) A representation (the Representation) as to the scope of the right to nondiscrimination: "which implies that (Peru), at none of its levels ..., may impose on (AEL) a differentiated treatment based on its nationality, the sectors or types of economic activity it develops ...and no other cause with equivalent effect."*

*3. The rights generally enjoyed by local investors, and thus guaranteed to AEL in a stabilized form (irrespective of the additional level of protection granted through the Representation), arise out of:*

*(a) Art. 2 of the Constitution (general right to equality before the law);*

*(b) Art. 60 of the Constitution / Art. 7 of LD 757 '(businesses to receive same treatment irrespective of public/private ownership);*

*(c) Ar. 63 of the Constitution / Art. 12 of LD 757 (no discrimination on the basis of nationality);*

*(d) Art. 12 of LD 757 (no discrimination or differentiation in respect of tariffs on the grounds of type of economic activity); and*

*(e) SD 162-1992- EF (general restatement of the above principles).*

*4. The Conite Agreement grants a more comprehensive promise to AEL than this broad web of protections however.*

*(a) The Representation represents a clear, absolute and unqualified promise that AEL will not be discriminated against, including on the basis of economic activity.*

*(b) This is a self-contained promise as to the scope of the protection that the Conite Agreement affords, and is not limited by the excuses found in the general Peruvian anti-discrimination regime (e.g. the ability to differentiate or justify under the 'six step test).*

*(c) In the event that the stabilized protection afforded under Peruvian law does not reach this standard, then Peru will have separately breached its contractual obligations if it does not honour the Representation in any event.*

*5. The interpretation of the Conite Agreement, and the standards by which Peru's performance of the obligations contained therein are to be judged, is governed by Peruvian law, subject to the prescriptive effect of international law.*

*(a) The Conite Agreement contains no express nomination of governing law, but does select ICSID arbitration, thereby importing Art. 42 of the Washington Convention, which specifies that international law shall have a prescriptive function in circumstances such as these.*

*(b) Peru's argument that the requirements of the first limb of Art. 42 are satisfied by an implied choice of law in the Conite Agreement or through the application of conflicts of law principles is bad - if such an argument were correct, there are no circumstances where the second limb of Art. 42 would ever be triggered.*

*(c) In any event, as a consequence of Peru reaching beyond its borders to attract investment, its conduct attracts international law supervision as a base line standard for its treatment of AEL.*

*(d) In the premises, Peruvian law and international law are materially the same on the relevant issues, both recognizing:*

*(i) that Peru is under a duty to negotiate, execute and implement contracts in good faith;*

*(ii) the principle of pacta sunt servanda;*

*(iii) that discrimination should not take place between investors; and*

*(iv) principles of contractual interpretation which require the use of textual, purposive and systematic approaches, applying an assumption that the parties negotiated in good faith.*

## *II Peru's Breach of the Conite Agreement*

*6. Peru has breached the Conite Agreement by taking actions inconsistent with the stability of AEL's right to non-discrimination:*

*(a) Osinerg/CELE-COPRVMEM applying more favourable treatment to Etecen (a state entity) and ISA (an investor in the same sector) than Eteselva in the classification of transmission lines as PTS or STS. This violation has been exacerbated by the recognition of such discrimination by the Constitutional Court, and the subsequent failure of Peru to remedy the position.*

*(b) Osinerg/MEM applying more favourable treatment to other private and state-held generation companies than Termoselva in allocating the responsibility for paying the tariff for the use of STS lines;*

*(c) Osinerg/CELE-COPRVMEM affording more favourable treatment to BOOT investors than to Eteselva in setting the tariff governing the amounts payable for the use of transmission lines by third parties; and*

*(d) Allowing other foreign investors to take advantage of a more favourable investment mechanism (i.e. the BOOT) than was available to AEL, but denying access to such mechanism to AEL.*

*7. To be clear: AEL agrees that Peru is entitled to offer BOOTs and provide the treatment it has to Etecen, Etesur, ISA, REP etc. Peru's breach of the Conite Agreement is its failure to afford the same (or equivalent) treatment to AEL.*

#### 4.1.2. Position of the Respondent

64 The Respondent states that according to the plain language of the Agreement, the Claimant was guaranteed the stability of the right to non-discrimination but no substantive right to non-discrimination.

65 Furthermore, the Claimant has not proven that it was discriminated against by the Respondent and, lastly, the Claimant has failed to satisfy the requirement for the alleged damages, the analysis of which is fraught with error.

## 5. DISCUSSION

### 5.1. JURISDICTION

66 Article 9 of the Agreement provides that

*“... any litigation, controversy or claim among the parties, in connection with the construction, performance, enforcement or validity (of this Agreement), shall be submitted to the International Centre for the Settlement of Investment-Related Discrepancies, to be solved through international de jure arbitration under the Conciliation and Arbitration Rules set forth in the Covenant for the Settlement of Investment-Related Discrepancies amongst States and Nationals from Other States.”*

67 The requirements of Article 25 of the Convention are fulfilled in the present case. The dispute is a legal dispute and arises directly out of an investment by AEL, a national of a Contracting State (U.S.A.) in the Republic of Peru, another Contracting State. In the Agreement, both Parties to the dispute have consented in writing to submit such a dispute to the Centre. The Tribunal furthermore notes that no Party has questioned the jurisdiction of this Tribunal and the Parties have confirmed that the Tribunal had been properly constituted<sup>41</sup>.

68 On 18 July 2008, at the close of the Hearing in Washington D.C., the Parties and the Arbitrators confirmed that they had no further issues they wished to raise and both Parties confirmed that they were in agreement with the procedure as it had been conducted up to that moment.<sup>42</sup>

69 The Concession Agreement of 16 July 1996 in Article 14 provides:

***Judicial Jurisdiction***

*The agreement hereto is exclusively subject to the jurisdiction of the judges and courts of the capital of Peru. The concessionaire hereby waives any intention to submit the disputes that may arise to foreign courts as well as to file any claim through diplomatic channels.*

70 It therefore follows that this Tribunal is only competent to decide disputes between the Parties which arise “*in connection with the construction, performance, enforcement or validity*” of the Agreement. However, all disputes or controversies which might arise in connection with “*the conditions, rights and duties that regulate the electrical*

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<sup>41</sup> Minutes of the May 18, 2007 Session, Chapter I, § 1.

<sup>42</sup> Transcript, p. 1110, 18-22; p. 1111, 1-13.

*transmission final concession*” (Concession Agreement, Second Article, Aim) fall fully and entirely within the jurisdiction of the Peruvian judges and courts.

## 5.2. APPLICABLE LAW

71 Article 42(1) of the Convention provides:

*The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.”*

72 The Tribunal therefore notes that basically the laws of the Republic of Peru shall apply together with such rules of international law as may be applicable. The Parties have developed this point to some extent and have also submitted expert reports, especially on the question of what rules of international law might be applicable. However, both Parties agree that the Agreement is a contract governed by the Peruvian Civil Code (PCC). At the end of the procedure, both Parties seem to have come to the same conclusion because, as Mr. Loftis for the Claimant stated:

*We submit that Peruvian Law, properly understood and applied, and international law lead to the same conclusion, so the issue is really of limited currency.<sup>43</sup>*

73 And Ms. Cohen Smutny for the Respondent stated

*The question is does it matter, and maybe for different reasons both Parties are of the view that it does not ultimately matter because Peruvian law*

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<sup>43</sup> Transcript, p. 943, 17 to 19.

*applies here, and it is consistent in all material respects with international law.*<sup>44</sup>

74 The Tribunal has also reached the conclusion that for the resolution of this dispute it need not look beyond Peruvian law.

### **5.3. MERITS**

75 The basic question for the Arbitral Tribunal is: (i) whether the Agreement is to be interpreted as providing a substantive guarantee of non-discrimination against the investor under Article III(5); or (ii) whether the various Article III guarantees are to be interpreted in the sense that the State may not, for the duration of the Agreement (ten years), change the laws, rules, regulations, etc. which are in force at the time the Agreement was concluded, but do not grant any substantive rights against future discriminatory action as such to the investor.

76 If we conclude that the Agreement, properly construed, guarantees that the legal framework in the five fields enumerated in Article III will not be modified during its term, rather than creating a free standing, substantive protection against discrimination, that is the end of the matter. This is because the Claimant asserts no case based on detrimental legislative or other legal framework change, and it is common ground that the Peruvian courts, and not this Tribunal, have jurisdiction over any alleged breach by the state of its anti-discrimination laws.

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<sup>44</sup> Transcript 1040, 9 to 14.

- 77 The Agreement constitutes a contract between the Republic of Peru and the Claimant subject to the PCC and therefore, has to be interpreted based on the rules established to interpret contracts governed by Peruvian civil law.
- 78 In his first statement, Professor Jorge Avendaño, expert witness for the Claimant, opined as follows regarding the interpretation of agreements under Peruvian Law :

*50. The Civil Code contains specific provisions regarding the way in which contracts must be interpreted, negotiated, entered into and executed.*

*51. The first rule is mentioned in Article 168, according to which “The legal act must be interpreted in accordance with what is stated therein, and according to the principle of good faith”.*

*52. Article 169 of the Civil Code contains the systematic method of contract interpretation, according to which “The clauses of legal documents are interpreted through each other, attributing to the doubtful ones the sense resulting from the clauses considered as a whole”. Indeed, “In legal businesses the provisions of the parties should not be interpreted in isolation, but should be correlated with the general context and economic purpose they pursue”. “This is because businesses are usually a harmonic whole or group, in such a way that the provisions that make them up should be interpreted on a complementary basis, without the absolute individualization thereof seeming correct, since the business as a whole seeks global purposes, without prejudice to the particular provisions which said ends or purposes contribute to.”*

*53. The finalist method of contractual interpretation is contained in Article 170 of the Civil Code, which provides that “Expressions having several senses should be understood in the one that is most adequate to the nature and object of the document”. The purpose of this method of interpretation is to find the sense of the contractual agreement, taking into account the nature of the business entered into between the parties. This criterion makes it mandatory to consider the economic-social function of the business, as well as the practical end it pursues.*

*54. On the other hand, according to Article 1361 of the Civil Code “Contracts are mandatory as to whatever is stated therein. It is presumed that the express declaration made in the contract responds to the common will of the parties and whoever denies this coincidence must prove it”. In other words, the interpretation refers to the declaration made in the legal business and not to the subjective will of the contracting parties.*



*55. Finally, Article 1362 of the Civil Code provides that “Contracts must be negotiated, entered into and performed in accordance with the rules of good faith and the common intention of the parties”. In this way, good faith is not only a contractual interpretation criterion but also has the function of being an integrating principle of the content of the legal acts.*

79 Professor Alfredo Bullard González, in his first opinion<sup>45</sup> as expert for the Respondent, cites the same articles from the PCC while stressing that the starting point of the Peruvian system is the interpretation based on the expression of the parties’ will set forth in the contract and not on the will itself, referring to Articles 168 and 1361 PCC:

*Literal interpretation must be contrasted with the other interpretive criteria, but without contradicting what the parties expressly indicated.*<sup>46</sup>

80 A further principle is that of the unity of the contract (systematic interpretation) contained in Article 169 PCC.

81 According to Professor Bullard, the search for the true will is derived from the principle of good faith set forth in Article 168 PCC.

82 Finally, Professor Bullard invokes the functional interpretation according to which

*... one must search for or prefer, among various possible interpretations, the interpretation that is consistent with the purpose or intent of the clause that is subject to interpretation.*<sup>47</sup>

83 In this context he bases his opinion on Article 170 PCC.

84 Both Parties seem to agree that the starting point of any interpretation must be the wording of the text agreed upon between the parties. The Tribunal therefore starts its

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<sup>45</sup> §§ 35 through 54.

<sup>46</sup> § 40.

<sup>47</sup> § 51.

analysis with the text of the Agreement and the legal documents referred to therein, and then examines whether the result requires modification after taking into account further rules of interpretation under Peruvian civil law, especially the issue of whether this result is consistent with the requirement of good faith and the common intention of the Parties as provided for in Article 1362 PCC.

85 The Agreement in Article III states that:

*... the STATE undertakes to guarantee juridical stability for AGUAYTIA in connection with the investment referred to in ARTICLE TWO under the terms set forth below: (emphasis added)*

86 Section 5 of Article III provides:

*5. Stability of the right to non-discrimination, as provided for in item c), article 10, of Legislative Decree 662, which implies that the STATE or neither one of its bodies, notwithstanding these may include entities or companies from the Central Government, Regional or Local Governments, may apply a differentiated treatment to AGUAYTIA by reason of its nationality, the sectors or types of economic activity it shall develop, or the geographical location of the firm in which it invests, and neither as far as the matters herein below specified:*

*The term of effectiveness of this juridical Stability Agreement is ten (10) years counted as from the date of its execution. Accordingly, throughout this term, it may not be amended by either of the parties individually, regardless of whether the national legislation could be eventually amended and notwithstanding the fact that such amendments to the national legislation may turn out to be more beneficial or harmful to any of the Parties, than those agreed hereunder. (emphasis added)*

87 The Agreement refers to the Legislative Decree 662<sup>48</sup>, Article 10 (c). Legislative Decree 662 of 2 September 1991 identified the purpose of the legislation in its 5<sup>th</sup> WHEREAS Clause as follows:

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<sup>48</sup> CLA-1

*The Government should grant a juridical stability system to foreign investors by the acknowledgement of certain guaranties securing the continuity of the established rules. (emphasis added)*

It provides that the Competent National Organization (in our case CONITE) may enter into agreements guaranteeing among other the following rights:

*c) Stability of the right to non-discrimination established in Article 2° hereof. (emphasis added)*

88 Article 2 of this same Decree reads as follows:

*Foreign investors and the companies in which these participate have the same rights and obligations as the local investors and companies. Such rights and obligations are only limited by the exceptions established in the Political Constitution of Peru and the provisions hereof. (emphasis added)*

*In no case the domestic juridical regulations will discriminate among investors or the companies based on the local or foreign share in the investments.(emphasis added)*

89 The conclusion from the plain wording of the Agreement and the various legal texts referred to in the Agreement, and underlying the juridical stability regime of Peru, can only be that the legal framework in the crucial various fields enumerated in the Agreement will not be modified, either in favor of or to the detriment of the foreign investor, Aguaytia, during the ten years duration of the Agreement. Nowhere, however, are any individual, substantive rights created or guaranteed. What is guaranteed is the stability of the legislative framework as it existed on 17 May 1996.

90 According to the Claimant, “*even if a literal interpretation did support Peru’s position, such an interpretative approach can only be the start of the exercise, and in applying*

*the other factors, such as context and good faith, a very different picture would emerge.”<sup>49</sup>*

91 The Claimant then turns to the “Drafting Intent Interpretation”<sup>50</sup>. Claimant points out that the Agreement is principally a standard form contract with little scope for the negotiation of its terms and the Claimant agrees that *“no such substantive negotiations took place. AEL did not benefit from any insight into what the drafters of the standard form had intended – it could only judge what it would receive from the words of the Conite Agreement itself and the objective context against which it was entered into.”<sup>51</sup>*

92 The Claimant has not drawn the attention of the Arbitral Tribunal to any contemporaneous documents reflecting its understanding of the Agreement at the time it entered into it. The Agreement contains in Article III five different areas which were being stabilized. The Claimant has not adduced any documentation regarding its contemporaneous evaluation of these different rights. Especially, why the stability of the right to non discrimination, as now interpreted by the Claimant, would have been of particular importance to it, nor why it could consider at the time it entered into the Agreement, that it contained a substantive right that it would not in any way be discriminated by future actions of the State. The Claimant also did not identify any Peruvian authority or publicly available arbitral authority to the effect that a Stability Agreement stabilizing laws of non discrimination constitutes, in effect, a warranty or

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<sup>49</sup> CII, § 46

<sup>50</sup> CII, p. 16

<sup>51</sup> CII, § 47.

representation by the State that there will not be discrimination against the Contracting Party as had been asked by Arbitrator Rowley.<sup>52</sup>

93 Of course “*the guarantee is said to run to the ‘investor’s rights’*” and they have been “*acknowledged as being given to protect the investor’s “long-term investment”*”.<sup>53</sup> This, however, in no way implies a substantive right protecting against future discrimination.

94 According to the Claimant, such a reading, that the Agreement does not convey any substantive rights, would have the following consequences

*“The word “stability” is defined (in other laws) in such a narrow way that the guarantee (i) has no effective meaning, such that a subsidiary organ of the State may actively discriminate, in violation of the allegedly stabilized right to non-discrimination, without the State being in breach of the guarantee in Clause 3(5); and (ii) its meaning is directly contradictory to the Parties’ express agreement as to the meaning of the guarantee.”*<sup>54</sup>

95 First of all, the Claimant has not produced any evidence which supports its allegation that such an interpretation would be “*directly contradictory to the Parties’ express agreement*”. Furthermore, it is beyond doubt that stability undertakings, such as those entered into by the Respondent in the Agreement and contained in Article III, are of undoubted importance for investors. There is no need here to dwell on the importance for investors, obviously including the Claimant, of the stability guarantees given in the field of taxes, foreign currency, free remittance of profits and capital and exchange rates. Also, the “*stability of the right to non-discrimination*” itself is of obvious importance for a foreign investor. It freezes the laws, rules and regulations applicable to

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<sup>52</sup> Transcript 96, 22; 97, 1-6

<sup>53</sup> CII, §54.

<sup>54</sup> Claimant’s Closing Presentation, pp. 6 and 7.

it, as they were in existence at the time the Agreement was concluded. This means that no new law may be passed which would state that certain rules regarding non-discrimination would no longer apply to the Claimant. It especially guaranteed the constitutional right to equality before the law<sup>55</sup> (for instance a Peruvian Legislature hostile to foreign investment could not have, during the duration of the Agreement, worsened the status of the Claimant by modifying this constitutional right that foreign investment would not be treated different from national investments).

96 It is also clear from the wording of the Agreement that the guarantees it contains concerning juridical stability do not convey a most favored investor status. Whether and to what degree such a status is possibly available to the Claimant is a question to be resolved solely by the Peruvian authorities in applying the non-discrimination provisions of the Constitution and the specific laws applicable in this context. However, this ICSID Tribunal has no jurisdiction over the question, either in the first instance or by way of an appeal against decisions of Peruvian Courts and administrative bodies as the Agreement does not grant any substantive rights.

97 The claim of the Claimant is therefore denied.

## **6. COSTS**

98 Article 9, paragraph 2 of the Agreement (the arbitration clause) provides:

*Any expenses to be incurred in enforcing this Article shall be borne in equal parts by the parties hereto.*

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<sup>55</sup> See above § 59 and Decision of the Constitutional Tribunal of Peru of 30 January 2004 (CLA-21).

99 The Claimant in its Opening Memorial requested as part of its relief the award of :

*(i) its share of the fees and expenses of the Tribunal and the charges for the use of ICSID's facilities; and*

*(ii) its legal and related fees in connection with these proceedings.<sup>56</sup>*

100 The Respondent in its Counter-Memorial stated :

*Article 9 of the Aguaytia Stability Agreement expressly provides: "Any expenses incurred as a result of the application of this Clause shall be borne by the contracting parties in equal parts." Claimant thus cannot recover costs.<sup>57</sup>*

101 Claimant in its Reply Memorial did not rebut the position of the Respondent, nor did it repeat its claim for costs. The matter was not raised by the Parties during the Hearing.

102 The Tribunal therefore need not decide whether Article 9(2) of the Agreement deals with all costs incurred by the Parties (including legal fees, fees and expenses of witnesses, etc.) or covers only the amounts paid to ICSID. In view of the interpretation given by the Respondent to Article 9(2) of the Agreement (and not rebutted by the Claimant), and in view of the outcome of these proceedings, the Arbitral Tribunal does not have to apply the basic rule contained in Article 61(2) of the ICSID Convention. Each Party shall therefore bear its own legal costs and expenses and shall equally share the payments requested by ICSID and made by the Parties.

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<sup>56</sup> pp. 62 and 63.

<sup>57</sup> § 399, p. 127.

NOW THEREFORE, the Arbitral Tribunal

**DECIDES AND AWARDS AS FOLLOWS:**

1. Denies the claim of the Claimant.
2. The Claimant and the Respondent shall bear their own legal costs and expenses and share equally the payments requested by the International Centre for the Settlement of Investment Disputes and made by the Parties.

*[signed]*

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Robert Briner  
President of the Tribunal  
Date: 27 November 2008

*[signed]*

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J. William Rowley QC  
Arbitrator  
Date: 28 November 2008

*[signed]*

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Claus von Wobeser  
Arbitrator  
Date: 28 November 2008