

THE PARTIES

4. Petitioner is a company organized under the laws of Bermuda.
5. Respondent is Peru.

THE AWARD

6. The dispute between the parties arose out of a Legal Stability Agreement (“LSA”) concluded on July 24, 2001, between Peru and DEI. DEI alleged that certain tax assessments imposed by Peru breached the guarantees contained in the LSA.

7. On November 26, 2001, the Peruvian Tax Authority (SUNAT) assessed a tax liability (plus interest and penalties) against Duke Energy International Egenor S.A. (“DEI Egenor”), a Peruvian subsidiary of DEI.

8. As a result of such assessments, DEI Egenor made payments to the Peruvian Tax Authorities of approximately US \$16.5 million.

9. The tax assessments were improper and in violation of the LSA. As a consequence, on October 7, 2003, DEI submitted a request for arbitration to the International Centre for Settlement of Investment Disputes (ICSID).

10. The arbitration took place pursuant to the ICSID Rules of Procedure for Arbitration Proceedings. On August 18, 2008, the Tribunal issued an Award on the merits.

11. The Tribunal found Peru liable to DEI for breaches to the LSA and concluded that DEI had “sustained a loss as a result of SUNAT’s assessment against Egenor”, and awarded compensation in the amount of US \$18,440,746 plus interest in favor of DEI. The Tribunal provided that simple interest would be applicable from June 15, 2007, “calculated using the actual interest rate(s) stipulated for that period by SUNAT (*i.e.*, the interest rate(s) SUNAT credits to taxpayers on tax refunds).”

12. On December 15, 2008, Peru applied for annulment of the Decision on Jurisdiction and in the alternative for partial annulment of the Award.

13. On March 1, 2011, the Annulment Committee issued a decision dismissing Peru's application for annulment in its entirety and terminating the stay of enforcement of the Award. This decision confirmed the Award's grant of compensation in favor of DEI, and left Peru with no further legal recourse to challenge the Award.

SUNAT'S INTEREST RATE(S)

14. There is no disagreement between the parties regarding the interest rate applicable between June 15, 2007 and January 31, 2008. Both parties understand that the applicable rate for this period was a monthly rate of 0.30%.¹ However, effective on February 1, 2008, the Peruvian Tax code changed, by virtue of Law No. 29191.

15. Article 38 of the Peruvian Tax Code, as amended, changed the law to provide two different interest rates on amounts paid to taxpayers. Section (a) provides that the rate for interest in arrears (TIM) will apply in the event of wrongful or excessive payments, *i.e.*, that are "made as a consequence of any document issued by the Tax Administration," while section (b) provides that, for any other excessive payment, the applicable rate cannot be lower than the rate published by the Banking Regulatory Authority as the average deposit rate for the market.

¹ Indeed, it was this rate the parties' damages experts utilized in calculating the net present value of DEI's damages as of 15 June 2006 (*see* Marks Decl. Ex. B, ¶ 488), as it was the only rate in effect for that pre-judgment period.

PERU'S DEFICIENT PAYMENT

16. There is no dispute that DEI Egenor's payments were a consequence of the tax assessment issued by SUNAT on November 26, 2001. The Tribunal specifically stated that DEI's loss was "a result of SUNAT's assessment against Egenor."

17. On March 9, 2011, DEI provided Peru the total amount due under the Award as of March 31, 2011, considering that Peru had committed to tender payment on or before March 31st. The total amount due under the Award is US \$23,826,366. This amount was calculated using the actual interest rates stipulated by SUNAT.

18. Peru has disregarded the changes under Peruvian law, and instead applied the old 0.30% rate, which resulted in their lower interest calculation of US \$2,645,407.99. Peru takes this position notwithstanding its acknowledgment that, as of February 1, 2008, the TIM rate applies to refunds by SUNAT as a consequence of tax assessments.

19. On March 30, 2011, DEI reiterated its position. DEI indicated that they expected payment of the undisputed amount of US \$21,086,153.99, and reserved the right to pursue the appropriate legal remedies regarding the remaining balance.

20. On April 4, 2011, DEI received payment of US \$21,086,148. Therefore, the balance that remains unpaid is US \$2,740,218. (*See Marks Decl.*, ¶ 11),

CAUSE OF ACTION

21. Petitioner repeats and realleges the allegations contained in paragraphs 1 through 20 as if fully set forth herein.

22. Awards issued pursuant to the ICSID convention are subject to automatic recognition and enforcement in the United States under Article 54 of the ICSID Convention and pursuant to 22 U.S.C. § 2650(a).

23. The pecuniary obligations of the Award rendered in favor of Petitioner total US \$23,826,366, consisting of \$18,440,746 in principal, plus interest through March 31, 2011 of US \$5,385,620.

24. Peru has paid US \$21,086,148 of the Award but is in default on the remaining US \$2,740,218.

25. Petitioner is entitled to an order confirming the full amount of the Award (giving full credit for the amount paid) pursuant to Article 54 of the ICSID Convention and 22 U.S.C. § 1650(a).

PRAYER FOR RELIEF

WHEREFORE, DEI respectfully asks this Court to enter judgment:

26. Confirming the August 18,2008 Award of the ICSID arbitration tribunal in the amount of US \$23,826,366, through March 31, 2011, in favor of DEI against Peru;

27. Awarding DEI the balance owing on the Award of US \$2,740,218.

28. Awarding DEI its costs in this action including reasonable attorneys' fees and disbursements; and

29. Granting such other and further relief as the Court may deem just and proper.

Dated: September 6, 2011

CROWELL & MORING LLP

By: 

Andrew H. Marks (DC Bar No. 932269)
1001 Pennsylvania Avenue, NW
Washington, DC 20004-2595
Tel. (202) 624-2500

*Counsel for Petitioner Duke Energy
International Peru Investments No. 1 Ltd.*

Of Counsel

John N. Thomas

CROWELL & MORING LLP

590 Madison Avenue, 20th Fl.

New York, New York 10022

Tel. (212) 223-4000