

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

LATAM HYDRO LLC AND CH MAMACOCHA S.R.L.

Claimants

and

THE REPUBLIC OF PERU

Respondent

(ICSID Case No. ARB/19/28)

**DISSENTING OPINION OF
PROFESSOR GUIDO SANTIAGO TAWIL**

20 December 2023

1. I concur, in general, with the reasoning and decisions on jurisdiction and admissibility as reflected in the Award.¹
2. On the contrary, I respectfully dissent from the decisions proposed by my colleagues as to the merits of the claim. In this case, my discrepancy is eminently conceptual.
3. The Concession Contract for the Supply of Renewable Energy to the National Interconnected Electric System (“the RER-Contract or the Contract”) is a collaborative administrative contract whereby - through the assumption of relevant commitments by both parties - the private contracting party (in this case, Hidroeléctrica Laguna Azul S.R.L.; now, CH Mamacocha S.R.L. or CHM) undertook significant investment obligations in order to supply the awarded energy in exchange for certain commitments, basic but crucial, for the Contract to succeed. Just as the Contract could not succeed absent CHM’s investments and fulfillment of its obligations, such result would not be possible absent the State contracting party’s due compliance with the obligations undertaken by it.
4. Due compliance with such obligations gives rise to the so-called *financial-economic balance or equation of the contract* under administrative contract law, and failure to discharge such obligations may (depending on the magnitude of the non-compliance) lead to the impossibility to perform and the virtual death of the contract.
5. As reflected by the practice adopted in various countries, the construction of many infrastructure projects requires, for them to be feasible, the introduction of mechanisms guaranteeing a minimum flow of revenue during a long period, to allow an internal rate of return (IRR) sufficient to repay the investment undertaken and adequately compensate for the risk assumed in the context of the project. This occurs in both large infrastructure projects and others, even smaller, where the remuneration generated through ordinary market mechanisms would not suffice to repay the investment and yield the return necessary to encourage private actors to undertake such projects.
6. That is particularly the case of certain “*clean energy*” generation projects (such as those of a hydroelectric nature, like the one at issue here) under which, while machines are mainly called to dispatch in view of their low operating costs, ordinary remuneration systems (generally, based on marginal cost) are not enough to repay the high investment commitments assumed. Thus, many hydroelectric plants are built by States - which, through them, meet, in turn, other objectives (*e.g.*, regulating water flows for consumption or crops downstream, developing marginal or uninhabited areas, or, even, fostering geopolitical interests) - or by means of a robust

¹ Award, ¶¶ 341-568.

subsidy scheme, through either direct (transfer of funds) or indirect (tax relief, guaranteed energy prices, etc.) contributions. When the investment is made by private parties, most of such projects are funded through project finance mechanisms in which resources are obtained from third parties (in general, financial institutions which, in turn, source funds from the markets), who get involved in such funding on the basis of long-term flows of revenue expected and using the income and assets of the project itself as collateral. Hence, such projects are especially sensitive to unexpected changes, regulatory opportunism, etc.

7. In my view, the majority opinion fails to properly assess the relevance of certain key elements of the RER-Contract in such financial-economic balance.
8. By concluding, for instance, that the RER-Contract did not impose on Respondent the obligation to assure the Guaranteed Revenue,² to grant the third extension requested (which was crucial in order to reach precisely the 20-year period of guaranteed revenue contractually provided and necessary to repay the project) in the face of delays not attributable to the concessionaire,³ or to actively assist it before regional authorities in the obtention of permits, the majority decision, in practice, endorses the destruction of the financial-economic balance of the Contract mentioned *supra*.
9. In such context, I cannot agree, *inter alia*, with (i) the decision to validate the rejection of the third request for extension⁴ based on the alleged invalidity of Addenda 1 and 2,⁵ which - expressly

² Term defined in Clause 1.4.26 of the RER-Contract as “the annual revenue that the Concessionaire Company shall receive for the net injections of energy up to the limit of the Awarded Energy paid at the Award Tariff. It will only apply during the Term of Validity” (**Exhibit C-2**, RER-Contract, 18 February 2014). The majority rules on this matter in Award, ¶¶ 711-726. Concerning the operation of the Guaranteed Revenue and the Term of Validity in the RER-Contract, see Benavides Report I, ¶¶ 171-178.

³ Award, ¶¶ 727-843.

⁴ **Exhibit C-30/MQ-26/CLC-38**, Official Letter No. 2312-2018-MEM/DGE issued by the MINEM, 31 December 2018, attaching Report No. 511-2018-MEM/DGE, 31 December 2018. The third request for extension was submitted on 5 February 2018 and denied on 31 December 2018, almost eleven months after it had been filed and exactly on the same date as -were the extension not to be granted- the Contract would terminate. In such regard, see Quiñones Report I, ¶ 6; and Quiñones Report II, ¶ 95, where it is observed that, in accordance with Articles 106 and 142 of the Peruvian Law of Administrative Procedures, the Conceding Authority should have answered the request within the general term of thirty business days.

⁵ **Exhibit C-8**, Addendum No. 1 to the Concession Contract, 22 July 2015, and **Exhibit C-9**, Addendum No. 2 to the Concession Agreement, 3 January 2017, which agreed to modify the Works Execution Schedule of the Concession Contract and extend the term for the POC by 705 and 462 calendar days, respectively. Addendum 1 provided in its Clause Sixth: “Inasmuch as the aforementioned delays in the administrative procedures made it impossible to achieve Financial Closing for the project, entailing the failure to comply with the terms of the Milestones of the Works Execution Schedule of the Concession Agreement—having failed to conclude with the process of financing the project—the conclusion must be reached that said events of non-compliance do not fall within the scope of the Concessionaire’s liability, applying article 1314 of the Civil Code which establishes that a party acting in ordinary due diligence cannot be held responsible for failure to execute its obligations or for the partial, late, or defective compliance with said obligations. In this sense, via Official Document No. 504-2015-MEM/DGE, the General Directorate of Electricity approved the extension of the term requested due to delays that could be attributed to the State, pursuant to the provisions of Legal Report No. 005-2015-EM-DGE.”

recognizing the existence of the events of non-compliance of the Peruvian State, modified work execution schedules and the date of Commercial Operation Start-up (POC, for its Spanish acronym)⁶ - were never declared null and void and remain valid as of the date of this decision;⁷ (ii) the decision to validate Respondent's failure to consider the Sosa Report of 22 November 2016⁸ or the reports prepared by Estudio Ehecopar of 5 April and 17 April 2018,⁹ which - despite having been requested by the MINEM itself - were neither assessed nor mentioned when the third request for extension was rejected; (iii) the failure to duly consider Respondent's change of attitude as from late December 2018, who - deviating from the position adopted from the commencement of the Contract and until November 2018 whereby CHM was not to bear the consequences of State interference¹⁰ - abruptly modified the criterion adopted, denied the third extension only a month later,¹¹ and - unsuccessfully - attempted to seek the declaration of nullity

⁶ In such context, Ministry Resolution No. 559-2016-MEM/DM of 29 December 2016 attached to Addendum No. 2 pointed out in its ninth consideration: "That, by extending the CCO term four hundred and sixty-two (462) calendar days, the new date for this milestone would be March 14, 2020, exceeding the deadline of December 31, 2018 contained in number 8.4 of Clause Eight of the RER Agreement, the same which stipulates that said date cannot be exceeded *for any reason*, which must be understood, excluding the scope of responsibility of the Concessionaire, non-performance or late or defective performance, directly caused by acts of the contracting Public Administration..." (emphasis added).

⁷ The majority rules in connection with this matter in Award, ¶¶ 819, 823 and 826.

⁸ **Exhibit C-12**, Report No. 166-2016-EM-DGE, 6 October 2016, adopted by the then-Director General of Electricity (Carla Sosa Vela), which, under paragraph 2.2.5., stated that the expression for "any reason" in Article 8.4 of the RER-Contract authorizing automatic termination of the Contract and enforcement of the Performance Bond does not allow inferring the Concessionaire's contractual liability for acts of God, force majeure or acts of prince (including action attributable to the Public Administration).

⁹ **Exhibit C-235**, Legal Report of Estudio Ehecopar, 5 April 2018; and **Exhibit C-236**, Legal Report of Estudio Ehecopar, 17 April 2018. The first report of Estudio Ehecopar (dated 5 April 2018) concluded that "1. *The MEM must extend the COS term beyond two (2) years after the Actual Date set forth in the Tender Requirements and change the Termination Date of the RER Concession Contract in order to recognize the Guaranteed Premium for twenty 20 years as initially contemplated* where RER Awardees show that the COS delay is not attributable to them but rather to unavoidable force majeure events, such as the Administration's delay in granting the required permits. *This extension must be agreed upon in an Addendum to the RER Concession Contract signed by both parties*" and "4. In view of the foregoing, we believe that *it is not possible to terminate the RER Concession Contract by way of penalty where the RER Awardee shows that the COS delay was due to a force majeure event, i.e., the administration's delay in the issuance of the authorizations; moreover, in that case, the Performance Bond posted for the State should not be enforced*" (emphasis added). At the hearing, witness Ísmodes Mezzano (former Minister of the MINEM) was questioned about the first report of Estudio Ehecopar (Exhibit C-235) and said that he was not aware of it. Tr. (Day 3), 9 March 2022, 575:2-578:17. Particularly noteworthy is the fact that both reports of Estudio Ehecopar were not mentioned or discussed in the decision rejecting the third request for extension (**Exhibit C-30**, Official Letter No. 2312-2018-MEM/DGE, 31 December 2018), where the rejection was determined by the Director General of Electricity himself, Eng. Víctor T. Estrella, to whom both reports were addressed. The majority discusses the relevance of these reports in Award, ¶¶ 650, 794-795.

¹⁰ On the basis of which Respondent defended the concessionaire's actions in court within the framework of the *amparo* action, executed Addenda Nos. 1, 2, 3, 4, 5 and 6, and made the regulatory proposal of 11 November 2018 (**Exhibit C-18**, Statement of Reasons of the Ministry of Energy and Mines, 11 November 2018).

¹¹ To such effect, it ignored the Addenda signed and decided to attribute Claimants the risk of State interference. In such regard, Respondent's change of view evidenced between November and December 2018 is noteworthy. See, in that regard, Benavides Report I, ¶¶ 197-201; and Quiñones Report I, ¶¶ 6, 201-202 and 226; as well as the references made by witness Ísmodes Mezzano in the course of the hearing (Tr. (Day 3), 9 March 2022, 618:8-621:20) to the opposition of one of the main gas producers in Peru. Given the abrupt change of attitude observed, it is difficult to justify the failure to produce more contemporaneous documentary evidence in support of the decisions adopted. In these circumstances, I also disagree with the majority decision to reject the request for

of Addendas 1 and 2 for the first time by instituting the Lima Arbitration on 27 December 2018;¹² or (iv) the decision to declare the RER-Contract *automatically* terminated for not reaching the POC on the specified date, and without any right to compensation whatsoever for CHM, even though CHM had not caused the termination and had made millionaire investments as from the execution of the RER-Contract in February 2014.

10. Respondent's actions in dispute entail, in my view, a clear breach of Clauses 1.4.26, 1.4.37 and 6.3 of the RER-Contract,¹³ as well as arbitrary conduct on the part of Respondent in violation of the duty to accord fair and equitable treatment to Claimants' investments assumed by the Republic of Peru under Article 10.5 of the Treaty.
11. Given the terms in which the majority of the Tribunal has ruled, no decision is to be adopted regarding the damages claimed.

negative interference in connection with document production requests Nos. 1, 2 and 22. Award, ¶¶ 252 (i), (ii) and (vii), and 253.

¹² **Exhibit C-96**, Official Letter No. 2300-2018-MEM/DGE, 31 December 2018, attaching the request for arbitration filed before the Lima Chamber of Commerce.

¹³ See, likewise, Benavides Report I, ¶¶ 15, 17, 19, 87, 204, 205 and 266; and Quiñones Report II, ¶ 6.

[Signed]

Guido Santiago Tawil
Arbitrator
Date: [December 20, 2023]