

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WASHINGTON, D.C.

IN THE MATTER OF THE ARBITRATION BETWEEN

EMPRESA ELÉCTRICA DEL ECUADOR, INC.  
(Claimant)

AND

REPUBLIC OF ECUADOR  
(Respondent)

ICSID Case No. ARB/05/9

---

**AWARD**

---

*Members of the Tribunal*

Judge Bernardo Sepúlveda, President

Mr. John Rooney, Arbitrator

Prof. Michael Reisman, Arbitrator

*Secretary of the Tribunal*

Mr. Tomás Solís

*For the Claimant:*

Mr. Mark Sparks  
Provost Umphrey, LLP  
490 Park Street  
Beaumont, Texas 77701

Mr. Henry Saint Dahl  
545 Ivy Farm Drive  
Charlottesville, VA 22901

*For the Respondent:*

Dr. Galo García Carrión  
Dr. Alvaro Galindo  
Office of the Attorney General  
Robles 731 y Amazonas  
Quito, Ecuador

Mr. Alberto Wray, Mr. Ernesto Albán,  
Cabezas y Wray Abogados  
Av. Shyris 1240 y Portugal  
Edificio Albatros, oficina 802  
Quito, Ecuador

Mr. Robert Volterra  
Latham & Watkins  
99 Bishopsgate  
London EC2M 3XF  
United Kingdom

*Date of dispatch: June 2, 2009*

**Contents**

I	PROCEDURAL HISTORY	5
II	LEGAL BASIS FOR THE AWARD	11
III	JURISDICTION	21
IV	OBJECTIONS TO THE JURISDICTION OF ICSID AND TO THE COMPETENCE OF THE TRIBUNAL	24
V	STATEMENT OF FACTS CONTAINED IN OBJECTIONS TO THE CLAIM	28
VI	THE FIRST TRUST: PROGRESO RECAPITALIZATION TRUST (PRT I)	29
VII	DEED OF TERMINATION, RECEIPT, AND RELEASE	30
VIII	THE SECOND TRUST: PROGRESO DEPOSITORS TRUST (PDT)	33
XI	THE THIRD TRUST: PROGRESO REPATRIATION TRUST (PRT II)	37
X	DECISION	45
XI	COSTS	46

**Abbreviations used**

<b>AGD</b>	<b>Deposit Guarantee Agency</b> [ <i>Agencia de Garantía de Depósitos AGD</i> ]
<b>CATEG</b>	<i>Corporación para la Administración Temporal Eléctrica de Guayaquil</i>
<b>CENACE</b>	<b>National Energy Control Center</b> [ <i>Centro Nacional de Control de Energía CENACE</i> ]
<b>ICSID</b>	<b>International Centre for Settlement of Investment Disputes</b>
<b>CONELEC</b>	<b>National Electricity Council</b> [ <i>Consejo Nacional de Electricidad</i> ]
<b>EMELEC</b>	<b>Empresa Eléctrica del Ecuador, Inc.</b>
<b>NEPEC</b>	<b>North Eastern Power Energy Co.</b>
<b>PDT</b>	<b>Progreso Depositors Trust</b>
<b>PRT I</b>	<b>Progreso Recapitalization Trust</b>
<b>PRT II</b>	<b>Progreso Repatriation Trust</b>
<b>BIT</b>	<b>Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment of August 1993</b>

## **I. PROCEDURAL HISTORY**

1. On December 13, 2004, the International Centre for Settlement of Investment Disputes (ICSID or the Centre) received a request for arbitration (the request) from Empresa Eléctrica del Ecuador, Inc., (the Claimant or EMELEC), a company incorporated in the United States of America, against the Republic of Ecuador (the Respondent).

2. The Claimant is a company incorporated in the state of Maine, United States of America (the United States).<sup>1</sup> According to the request for arbitration, for the purposes of the present proceeding the Claimant's address is 490 Park Street, Beaumont, Texas. The Claimant's shares are fully owned by North Eastern Power & Energy Corporation (NEPEC), a company incorporated in the Bahamas. The Respondent is the Republic of Ecuador.

3. The request for arbitration was submitted to the Centre on the basis of the dispute settlement provision, Article VI (4) (a) of the Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment of August 1993 (BIT or the Treaty). Both the United States and the Republic of Ecuador are Parties to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Convention). In the case of the United States, the Convention entered into force on October 14, 1966; for the Republic of Ecuador, the Convention entered into force on February 14, 1986.

4. At the Centre's request, and pursuant to Article 25 of the Convention, and the provisions of the BIT, by letters dated March 1, 15, and 21, April 5 and 13; and May 13, all of 2005, the Claimant provided additional information.

5. For its part, by letter dated April 18, 2005, the Republic of Ecuador, through the Attorney General, requested that the Secretary-General of the Centre refuse to register the request. In its letter, the Republic of Ecuador requested this refusal alleging an omission of the requirements set forth in the Rules of Procedure for the Institution of Conciliation and

---

<sup>1</sup> See Certificate of the Department of the Secretary of State, state of Maine. Annex 2 to the request for arbitration.

Arbitration Proceedings (Institution Rules), as well as in Article 25 of the Convention. By letter dated April 29, 2005, the Claimant submitted its observations on the Respondent's request for refusal.

6. On May 26, 2005, the Secretary-General of ICSID registered the request. Pursuant to the provisions of Institution Rule 7(d), in the notice of registration of the request the Secretary-General invited the Parties to proceed, as soon as possible, to constitute an Arbitral Tribunal.

7. By letter dated June 15, 2005, the Claimant proposed Mr. John Rooney, a national of the United States, as sole arbitrator. Alternatively, in the event that the Respondent did not accept this proposal, the Claimant indicated that it would appoint Mr. Rooney as Party-appointed arbitrator.

8. By letter dated July 4, 2005, the Respondent rejected the Claimant's proposal.

9. On September 12, 2005, the Claimant submitted to the Centre a document dated September 9, 2005, entitled "Amendment of Claim to Include New Expropriation Request for the consideration of the Tribunal to be Constituted." In this same document, the Claimant requested that the President of the ICSID Administrative Council appoint the arbitrators not yet appointed, and reiterated its appointment of Mr. Rooney as arbitrator.

10. By letter dated September 19, 2005, the Centre noted that, in accordance with the Arbitration Rules of the Centre, before a request to appoint an arbitrator is made to the President of the ICSID Administrative Council, the number of arbitrators and the method for their appointment must have been previously established.

11. Pursuant to the above letter, the Claimant, by letter dated September 26, 2005, invoked the formula contained in Article 37(2)(b) of the Convention for the constitution of the Tribunal. According to this formula, 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 consent of the parties.

12. By letter dated October 6, 2005 from the Respondent, the Parties informed the Centre that they had reached agreement on the number of arbitrators and the method of their appointment. Under the terms of this agreement, each Party would appoint an arbitrator

and the third, who would be the President of the Tribunal, would be appointed by consent of the Parties. The Parties also stated that, if the Parties had not agreed upon the appointment of the President of the Arbitral Tribunal within 60 days, the appointment should be made by the Secretary-General of ICSID.

13. On the basis of the agreement between the Parties, by letter of October 24, 2005, the Claimant reiterated its appointment of Mr. John Rooney as arbitrator. By letter dated December 5, 2005, the Respondent appointed Professor Michael Reisman, a national of the United States, as arbitrator.

14. By joint letter of December 15, 2005, the Parties requested that the President of the ICSID Administrative Council appoint the President of the Arbitral Tribunal.

15. With the consent of the Parties, the President of the Administrative Council appointed Judge Bernardo Sepúlveda-Amor, a national of Mexico, as President of the Arbitral Tribunal.

16. The Tribunal was constituted on February 28, 2006, as follows: Judge Bernardo Sepúlveda-Amor, President; Mr. John Rooney, Arbitrator; Prof. Michael Reisman, Arbitrator.

17. On June 5, 2006, the Tribunal held its first session by telephone conference, during which the Parties confirmed that the Tribunal had been properly constituted and agreed, among other procedural matters, on the number of written pleadings, their sequence, and the time limits for their submission.

18. In accordance with the procedural timetable agreed to by the Parties, the Claimant would submit its Memorial within 150 days of the date of the first session. The Parties agreed that in the event the Respondent raised objections to jurisdiction the proceedings on the merits would be suspended. The Tribunal would then propose a timetable for written submissions on jurisdiction and a date for a hearing on jurisdiction, after which the Tribunal would decide on the objections to jurisdiction as a preliminary matter.<sup>2</sup>

19. On November 3, 2006, the Centre distributed to the Tribunal and to the Respondent hard copies of the Claimant's Memorial. By letter dated December 4, 2006, the Tribunal

---

<sup>2</sup> Minutes of the First Session, point 15.2.

requested that the Claimant submit the original and copy of a version of its Memorial with numbered paragraphs, together with a proper list of numbered annexes to the Memorial.

20. On December 18, 2006, the Centre distributed to the Tribunal and to the Respondent a copy of the Claimant's Revised Memorial.<sup>3</sup>

21. By letter dated April 2, 2007, the Respondent filed formal objections to the jurisdiction of the Centre and to the competence of the Tribunal. Pursuant to the Convention, the Rules of the Centre, and the agreement of the Parties reached at the first session, the Respondent requested the suspension of the proceedings on the merits.

22. On April 23, 2007, the Tribunal issued Procedural Order No. 1 wherein the Tribunal invited the Parties to reach agreement on the procedural timetable for written submissions on jurisdiction.

23. By letter dated May 10, 2007, the Parties informed the Tribunal of their agreement on the procedural timetable for written submissions on objections to jurisdiction.

24. On July 2, 2007, the Respondent submitted a Memorial supporting its objections to the jurisdiction of ICSID and to the competence of the Tribunal. A disagreement arose between the Parties concerning the Respondent's submission of its Memorial, which was resolved by the Tribunal in its Procedural Order No. 2 of July 12, 2007. In Procedural Order No. 2, the Tribunal accepted the Respondent's statement that, because of technical problems with its server, it had not submitted all the annexes to its Memorial in electronic form. The Tribunal concluded that under the ICSID Convention and Rules this did not constitute grounds for excluding said annexes from the proceedings, as the Claimant had requested.

25. On August 28, 2007, the Claimant filed a Counter-Memorial in response to the Respondent's Memorial on objections to jurisdiction.

26. On September 28, 2007, the Respondent submitted a Reply on jurisdiction in support of its objections to the jurisdiction of the Centre and to the competence of the Tribunal.

27. On November 1, 2007, the Claimant filed a Rejoinder to the Respondent's Reply on objections to the jurisdiction of the Centre and to the competence of the Tribunal.

---

<sup>3</sup> In all references to the Memorial, the Tribunal means the Revised Memorial.

28. After the procedural timetable for written submissions on jurisdiction had been completed, the hearing took place at the seat of the Centre in the offices of the World Bank in Washington D.C., on February 29, 2008. The hearing was conducted by the President Bernardo Sepúlveda; Mr. John Rooney, Arbitrator; and Professor Michael Reisman, Arbitrator. During the hearing, the Parties presented their oral arguments in support of their submissions of fact and law. Present at the hearing were: Mr. Mark Sparks and Mr. Kyle Maciel of Provost Umphrey LLP; Mr. Henry Dahl; and Ms. Tamera Boudreau representing the Claimant, while for the Respondent were H.E. Xavier Garaicoa, then Attorney General of the Republic of Ecuador; Mr. Carlos Venegas, Mr. Diego Romero, Mr. Francisco Paredes, Ms. Claudia Salgado, and Ms. Bárbara Dotti of the Attorney General's Office; Mr. Alberto Wray, Mr. Ernesto Albán Ricaurte, Mr. Eduardo Carmigniani, Ms. Verónica Arroyo, and Ms. Paola Delgado of Cabezas & Wray; and Mr. Robert Volterra of Latham & Watkins. Mr. Michael Quinlan and Mr. Augusto Ramírez Arboleda appeared at the hearing as witnesses for the Claimant.

29. During the hearing, the Tribunal advised the Parties that they might be asked to provide additional information, which could be submitted to the Tribunal in the form of post-hearing briefs.

30. By letter dated March 12, 2008, the Tribunal requested the Parties to submit post-hearing briefs aimed at filling certain information gaps specified by the Tribunal in its letter as well as any other matter deemed relevant by the Parties. The Tribunal also instructed the Parties on the formal requirements for the post-hearing briefs.

31. By letters dated April 1 and 9, 2008, the Claimant requested leave from the Tribunal to submit a new set of documents which, according to the Claimant, had been made known to it only after the hearing on jurisdiction. Therefore, the Claimant argued, special circumstances permitted their late introduction into the proceeding.

32. By letter of April 4, 2008, the Respondent asked the Tribunal to reject the Claimant's request.

33. By letter of April 9, 2008, the Claimant requested that the Tribunal order the Respondent to authorize a third party to the proceedings to release certain documents to the Claimant, which, according to the Claimant, it owned. In order to authorize delivery



thereof, the third party in possession of the documents required the Respondent's authorization as a condition for releasing them to the Claimant.

34. By letter of April 9, 2008, the Respondent stated that it was unable to authorize a third party to release documents which were the property of the Claimant.

35. By letter of April 16, 2008, after considering the Parties' respective positions, the Tribunal rejected the Claimant's request to introduce new documents at a late stage in the proceedings. The Tribunal considered that there were no special circumstances which justified their introduction. In this same decision, the Tribunal ordered the Respondent to submit certain documents, only parts of which had been introduced previously: the *Dictamen Fiscal* and the *Pronunciamiento del Juez*.<sup>4</sup>

36. On April 14 and 15, 2008, the Claimant and the Respondent, respectively, filed their post-hearing briefs. The Respondent's brief complied with the page limit indicated by the Tribunal. However, it did not meet the requirement to use a double-spaced format, since it was single-spaced. In view of the foregoing, the Claimant requested that the Tribunal not accept the Respondent's post-hearing brief or, alternatively, that the Tribunal allow it to submit a supplemental post-hearing brief of the same size as that submitted by the Respondent.

37. By letter of April 21, 2008, the Respondent filed its observations on the Claimant's request.

38. By letter dated May 6, 2009, the Tribunal authorized the Claimant to file a supplemental post-hearing brief, which, in accordance with the Tribunal's instructions, the Claimant submitted on May 29, 2008.

39. Once the procedural timetable for the jurisdictional stage had been completed, the Tribunal convened in The Hague, in the Netherlands, on July 15, 2008 to deliberate. Thereafter, the Tribunal exchanged views on the various aspects of the proceedings submitted for its consideration. The Tribunal has continued its deliberations through extensive telephone conferences which, in the Tribunal's view, have been essential in order to elucidate matters related to the facts and legal issues in the dispute that required detailed examination.

---

<sup>4</sup> See para. 65 infra.

## II. LEGAL BASIS FOR THE AWARD

40. As noted above, the Claimant in this proceeding is Empresa Eléctrica del Ecuador, Inc. (EMELEC), a corporation constituted in 1925 in the state of Maine, United States of America. Since its establishment, the Claimant has remained a legal entity as a company constituted under the laws of that jurisdiction, and all its shares are owned by NEPEC.

41. EMELEC claims that the Government of Ecuador expropriated its premises, bank accounts, and other property located in Ecuadorian territory. The Claimant states that, since 1925 EMELEC owned a concession for the supply of electricity in the city of Guayaquil, Ecuador. It adds that on May 21, 2000 its offices were taken over in a combined military-police operation. According to the Claimant, on March 23, 2000, the company's assets were expropriated *de jure* under Resolution 0034/00,<sup>5</sup> issued by the National Electricity Council (CONELEC), an organ of the Government of Ecuador. At the request of CONELEC, by letter dated May 18, 2000,<sup>6</sup> the Superintendent of Banks transferred bank deposits and accounts registered in the name of EMELEC in financial institutions in Ecuador and in other related institutions abroad to the Council's Administration.

42. Resolution 0034/00 notes that Resolution 0030/00 was "issued in order to deal with the consequences of the illegality and illegitimacy of the operations that were carried out by Empresa Eléctrica del Ecuador Inc. in violation of the provisions of the Ley del Régimen del Sector Eléctrico—that is, outside the time limit set by said Act for the execution of the concession agreement—thereby putting at risk the normal supply of electricity for the city of Guayaquil."

43. Executive Decree 712 of August 8, 2003, signed by the President of the Republic of Ecuador, established the Corporación para la Administración Temporal Eléctrica de Guayaquil (CATEG).<sup>7</sup> According to the Decree, CATEG "shall be in charge of managing the service of electrical energy distribution and marketing in the Guayaquil concession area and generation activities [...] for which purposes it shall use assets, fixtures and other resources subject to public service and that are necessary for the fulfillment of its

---

<sup>5</sup> Document of the Claimant C-19.

<sup>6</sup> Document of the Claimant C-20.

<sup>7</sup> Document of the Claimant C-24.

objective, without detriment to the obligation of acknowledging in favor of the owners, those payments to which they are entitled for the use made of their assets.”<sup>8</sup>

43. In its Memorial, the Claimant contends that the Executive Decree seeks to create an appearance of legality by invoking the “obligation of acknowledging” payment “for the use made of their assets” in violation of the terms of Article III.1 of the United States of America and the Republic of Ecuador Treaty concerning the Encouragement and Reciprocal Protection of Investment (BIT), with respect to compensation for expropriation. EMELEC states further that the announced obligation to acknowledge payments for the use made of their assets has never been met, given that the compensation has never been paid.

44. On January 10, 2005, the Centro Nacional de Control de Energía (CENACE), a governmental entity of Ecuador, sued EMELEC for US\$71,877,480.84.<sup>9</sup> In the lawsuit, CENACE demands from EMELEC the payment of an accumulated debt for the sale of electricity during the period April 1, 1999 to September 30, 2003.

45. As EMELEC states in one section of its Memorial, the company’s accumulated debt with CENACE in the period from April 1, 1999 to May 23, 2000, amounted to a total of US \$47,087,367.08 and not the amount claimed by CENACE in its lawsuit. In a different section of its Memorial, EMELEC argues that, on the contrary, the debt owed to it by the Government of Ecuador as of May 23, 2000 amounted to US\$243,792,638.45.<sup>10</sup>

46. The Tribunal notes that in EMELEC’s Memorial, the debt figures submitted are divergent and have not been reconciled. As stated above, EMELEC indicates in its Memorial that its debt with CENACE was US\$47,087,367.08 as of May 23, 2000, and that the amount owed by Ecuador to the company, as of May 23, 2000, was US\$243,792,638.45.<sup>11</sup> In its own Memorial, however, a few paragraphs after this statement, the following accounting figures are given within the body of text quoted below:

An exact accounting up to May 22, 2000, in United States dollars, is as follows:

Claimant’s Debt to Respondent	143,245,496.71
-------------------------------	----------------

---

<sup>8</sup> Ibid. Article 2.

<sup>9</sup> Document of the Claimant C-29.

<sup>10</sup> Memorial of the Claimant, p. 20.

<sup>11</sup> Ibid.

Respondent's Debt to Claimant	469,823,678.89
Balance in Claimant's favor	326,578,182.18. <sup>12</sup>

In the documentation exhibited by EMELEC, the Tribunal could find no explanation of why the Memorial contained divergent debt figures.

47. The Claimant argues that the lawsuit filed by CENACE alleged that EMELEC was responsible, according to the terms of the complaint, for a debt accumulated from May 23, 2000 to September 2003, a period during which the company had been deprived of its assets and control over them.

48. EMELEC also contends that, in the lawsuit filed by CENACE against the company, the Attorney General of Ecuador prevented the accreditation of the legal representative of EMELEC in the proceedings, despite the latter having been granted a duly executed power of attorney to act in said lawsuit. According to this allegation, the Attorney General had requested that the Superintendent of Companies—the authority in charge of registering powers of attorney which accredit a company's legal representation—refrain from registering the person who had, in EMELEC's view, legal capacity to represent it in the proceedings. The Superintendence of Companies did, in fact, refrain from registering the powers of attorney of the person whom the Claimant wished to accredit as its legal representative, recognizing, instead, Mr. Glenn Martin Goldhagen as the legal representative of EMELEC in Ecuador. EMELEC claims that this decision left it with no defense in the proceedings and that an attorney other than the one it had proposed, and who did not represent its interests, had undertaken the defense of EMELEC after his legal capacity to act in the proceedings was duly recognized by the relevant authorities.

49. The documentation exhibited by the Claimant includes a letter dated June 28, 2005.<sup>13</sup> In this letter, Mr. Michael J. Quinlan, in his capacity as Clerk of EMELEC in Maine, United States, where the company was incorporated, addresses the Superintendent of Companies and the Commissioner of Companies of Ecuador. Mr. Quinlan states that, in a previous letter dated June 14, 2005 he had communicated to the Superintendent his surprise that the Superintendent's Office had approved a Special Power of Attorney granted to Mr. Glenn Goldhagen, who, according to Mr. Quinlan, "did not have then nor

---

<sup>12</sup> Memorial of the Claimant, p. 37.

<sup>13</sup> Document of the Claimant C-38.

has now” an official position in the company. Mr. Quinlan adds further that, according to the corporate records, the company’s Director had granted a power of attorney to Mr. John Duque Carrales, which had been authenticated by the Ecuadorian Consulate. Finally, Mr. Quinlan provided information on the number of EMELEC shareholders and Directors and the names of the shareholders.

50. In another letter also dated June 28, 2005, Mr. Quinlan made the following declaration before a notary public:

The corporate records of EMELEC reflect that EMELEC has only one shareholder, the North Eastern Power Energy Co. (NEPEC).

The corporate records of EMELEC also reflect that EMELEC has only one Director, Mr. Ramiro Ponce Cerda.

The corporate records of EMELEC contain documents further reflecting that Mr. Miguel Lluco Tixe is the trustee of the Progreso Repatriation Trust; that the Progreso Recapitalization Trust was terminated on February 15, 2000; and that the Progreso Depositors Trust is of no effect and substance since it was not created under the instructions of the Grantors of the Progreso Repatriation Trust.

Documents contained in the corporate records of EMELEC additionally indicate that the shares of NEPEC have been contributed as property of the Progreso Repatriation Trust.<sup>14</sup>

51. In the hearing held by the Tribunal with the Parties on February 29, 2008, Mr. Quinlan was introduced as a witness for the Claimant. Counsel for the Respondent asked him the following question: “Is it correct to say that you—your legal opinion as a Maine lawyer—is that EMELEC is controlled by NEPEC, and NEPEC controlled by the trust, (PRT II) and the trust controlled by Mr. Lluco?” Mr. Quinlan replied: “I am comfortable giving the legal opinion that EMELEC is controlled by NEPEC [...] I don’t think I, as a Maine attorney, am qualified to actually legally opine on whether NEPEC is controlled by the Trust and the Trust controlled by Mr. Lluco.”<sup>15</sup> In essence, Mr. Quinlan, in his appearance, limited himself to noting that the corporate records of EMELEC contain documents reflecting sworn statements, copies of trusts, and other elements subject to the laws of the Bahamas, on which matters Mr. Quinlan considered he could not give an opinion.

---

<sup>14</sup> Document attached as Exhibit B to the plea of the Claimant dated September 9, 2005 (Amendment of Claim to Include New Expropriation Request for Tribunal to be Constituted”).

<sup>15</sup> Page 67 of transcription of hearing on jurisdiction.

52. In the lawsuit filed by CENACE, the Ecuadorian authorities did not accept as valid either the arguments or the evidence presented by Mr. Quinlan and decided to reject his statements purporting to accredit a legal representation which, according to these authorities, was not duly proved. The acknowledgment of the duly accredited legal representative of EMELEC by the competent authorities of the Republic of Ecuador was stated in the following terms:

The respondent is Empresa Eléctrica del Ecuador, Inc., legally represented by the attorney of its Ecuadorian branch, Enry Basurto Quinde, Esq., pursuant to the special power of attorney granted by Mr. Glenn Martín Goldhagen, in his capacity as representative of Empresa Eléctrica del Ecuador Inc., on February 28, 2004, recorded in the Mercantile Register of the city of Guayaquil on April 26, 2004, which document is annexed hereto.<sup>16</sup>

53. At the core of this dispute is the existence and validity of a group of trusts that were created in order to satisfy the claims of depositors affected by the collapse of Banco del Progreso, owned by Mr. Fernando Aspiazu Seminario. The first of these was the Progreso Recapitalization Trust. The second was entitled Progreso Depositors Trust, and the third was called Progreso Repatriation Trust. The juridical status of the legal representative of the company and his capacity to act before judicial or arbitral tribunals depend on the determination of the existence and validity of each of these trusts.

54. Reserving for the moment a decision on the Parties' challenges to the existence and validity of the trusts referred to in the previous paragraph, it should be recalled that the Republic of Ecuador raised a series of objections to the jurisdiction of the Centre and to the competence of the Tribunal. In its written submissions on objections, Ecuador argues that EMELEC, being a juridical entity, is not duly represented before ICSID as those persons who have acted on its behalf have not satisfactorily shown their legal accreditation. Ecuador contends: that Mr. Llucó is not authorized to intervene on behalf of EMELEC because he is not its legal representative nor has he been duly authorized to initiate these proceedings; that it is not clear in the proceedings that those who have appeared on behalf of the Claimant have the capacity to represent it; that the alleged authorizations invoked by Mr. Llucó are not supported by corporate records, nor has the Claimant attached corporate documents demonstrating the capacity of those who allegedly have authority over the Claimant's shares; that an arbitration proceeding cannot be sustained on the sole basis of

---

<sup>16</sup> Document of the Claimant C-29.

simple, unilateral statements by interested Parties without corporate records that confirm the Claimant's due legal representation.

55. The Tribunal will have to examine in greater detail, at a later stage of this Award, the issue of the legal capacity of the legal representative of EMELEC in these arbitral proceedings. It is evident that the dispute between EMELEC and the Republic of Ecuador concerning the accreditation of the company's legal representative first arose during the lawsuit filed by CENACE against EMELEC, in which the competent authorities of Ecuador refused to recognize the legal capacity of the person that EMELEC claimed was acting in its defense (see paras. 45-53 above). For now, it suffices to note that the Republic of Ecuador, in its capacity as the Respondent in this arbitration, has raised objections to the jurisdiction of ICSID and to the competence of the Tribunal, arguing, *inter alia*, that the Claimant in these arbitral proceedings—that is, EMELEC—being a juridical person, is not duly accredited before ICSID, since those who purport to act on its behalf and as its representatives do not have the required legal certification.

56. The concession for the supply of electricity granted by the Republic of Ecuador to EMELEC in 1925 was for a term of 60 years and was to expire in 1985. In its Memorial, EMELEC contended that in 1985 the concession was tacitly extended, although no documents were produced in support of this statement.<sup>17</sup> It also noted that electricity continued to be supplied to the concession area without interruption.

57. On January 6, 1999, the Board of CONELEC issued a Concession Certificate<sup>18</sup> to EMELEC enabling it, exclusively, to negotiate a Concession Contract for the distribution of electricity, in accordance with the principles, conditions, and terms to be decided by the Board itself. Should the Concession Contract not be signed within the 40-day period established in the Certificate, CONELEC would start a public bidding process. The Concession Certificate stipulated that the signing of the Concession Contract would be subject to compliance with certain requirements, one of which was that "EMELEC must prove that it has complied with all the obligations related to the previous concession and that there are no pending issues with the national Government and its institutions concerning that concession" (*ibid.*). It should be recalled that in January 2005 CENACE

---

<sup>17</sup> Memorial of the Claimant, p. 32.

<sup>18</sup> Document of the Respondent R – 054.

filed a lawsuit against EMELEC claiming payment of a large debt (see paras. 45-53 above).

58. The 40-day period established was not complied with as CONELEC delivered a draft contract in 120 days, i.e., on April 26, 1999. On April 27, 1999, EMELEC communicated with CONELEC, expressing its agreement to the draft contract prepared by CONELEC, but raising a series of objections and challenges to the content of the draft concession contract delivered to it by CONELEC. One of the amendments that EMELEC wished to introduce into the draft contract concerned the dispute settlement procedure. EMELEC proposed the possibility of resort to international arbitration after the conciliation procedure before a commission created for that purpose had been exhausted. A careful reading of these objections necessarily implies that acceptance by EMELEC was subject to fundamental reservations which violated the substance of the draft contract. Nonetheless, EMELEC alleges that a valid concession contract existed from April 27, 1999.<sup>19</sup>

59. According to EMELEC's Memorial, for about one year the company continued to supply electricity in the Guayaquil area, i.e. until March 21, 2000, the date when its premises were stormed by the Ecuadorian authorities.<sup>20</sup>

60. The Respondent notes that in addition to the essential discrepancies with regard to the text of the draft, as reflected in the objections and challenges raised by EMELEC, the draft contract was never signed, because CONELEC made the granting of the Concession Contract dependent on compliance with certain conditions expressly stipulated in the law and set forth in the Concession Certificate. Thus, the Respondent states that, by law, concession contracts must be executed as an *escritura pública* (a public deed). Concession contracts are formal contracts that are perfected only through performance of certain solemnities, the omission of which results in nullity. EMELEC at no time argued that these formalities had been complied with, nor that a notarized *escritura pública* setting out the terms of the draft contract existed. The Memorial of the Republic of Ecuador objecting to the jurisdiction of ICSID and to the competence of the Tribunal, points out, as an additional argument, that one of the clauses about which there was disagreement—because EMELEC did not accept its content— pertained to dispute settlement. EMELEC insisted

---

<sup>19</sup> Memorial of the Claimant, p. 34.

<sup>20</sup> Ibid.



that international arbitration would be resorted to only after the proceedings before the Conciliation Commission had been exhausted.<sup>21</sup>

61. The Republic of Ecuador contends that there was no valid concession contract, since the draft contract was not perfected as an *escritura pública* —a formality which is legally required in the case of concession contracts—and in light of the obligations and challenges raised by EMELEC. Therefore, according to the Republic of Ecuador no agreement can be invoked in which it is demonstrated that the Respondent gave its consent in writing to submit any disputes arising with EMELEC to the jurisdiction of ICSID. The Respondent also states that it is not true that the contract was performed in practice and that if EMELEC provided services in the city of Guayaquil it was on the basis of the provisions of the Ley del Régimen del Sector Eléctrico, under which EMELEC allegedly continued to operate by a system of provisional permits which it applied after the expiry in 1985 of the time limit for the concession established in the 1925 contract.<sup>22</sup>

62. In its Memorial, EMELEC states that consequent upon the occupation of its premises the Respondent unlawfully took possession of the company's computers. The Claimant argues that the electronic records in its computers during the period from 1995 to 2003 were destroyed. It adds that the deliberate destruction of evidence is an illegal act in any of the legal systems connected to the present case.<sup>23</sup> In its counter-memorial to the Respondent's objections to jurisdiction, EMELEC accuses Mr. Goldhagen of ordering the destruction of the Claimant's computer files and of receiving payments from an entity called The Latin American Finance Group Limited, which had embezzled funds from the Respondent.<sup>24</sup>

63. Commenting on the *Dictamen Fiscal* and *Pronunciamento del Juez*, documents submitted by the Republic of Ecuador to respond to EMELEC's accusations and to provide clarification of the judicial proceedings for fraud and embezzlement, the Claimant argues that the Respondent obstructed the criminal investigation, that the *Dictamen fiscal* confirms the destruction of EMELEC documents, and that the *Pronunciamento del Juez* indicts certain persons for embezzlement.

---

<sup>21</sup> Respondent's Memorial on Jurisdiction, paras. 164 and 165.

<sup>22</sup> Ibid., paras 167 and 168. Reply of the Respondent, para. 94.

<sup>23</sup> Memorial of the Claimant, p. 38.

<sup>24</sup> Claimant's Counter-Memorial to Respondent's objection to jurisdiction, paras. 90 et seq. See also Rejoinder of the Claimant, footnote No.13 (Document of the Claimant C-73).

64. In the document dated May 29, 2008, and entitled Claimant's Comments on the *Dictamen Fiscal* (Dictamen) and the *Pronunciamiento del Juez* (Pronunciamiento) submitted to the Tribunal by the Respondent (Claimant's Comments), EMELEC concedes the following facts:

The *Dictamen* and the *Pronunciamiento* indict Messrs. Heberling and van Diepen for the embezzlement of Claimant's funds. The *Dictamen* drops embezzlement charges against Mr. Goldhagen and the *Pronunciamiento* absolves Mr. Goldhagen of that same crime. (Claimant's Comments, p. 12).

In its Comments, however, EMELEC also expressed reservations on the legal value of the *Dictamen* and the *Pronunciamiento*, noting the following:

The fact that the *Dictamen* and the *Pronunciamiento* do not charge or indict anyone for destruction of documents or for obstructing the criminal investigation should not be taken as evidence in this Tribunal that such crimes did not occur (Claimant's Comments, p. 18).

The Tribunal observes that it cannot ignore the content of documents such as the *Dictamen* and the *Pronunciamiento*, which are of probative value and have not been refuted. Sufficient evidence would have to be submitted to establish the contrary.

65. In response to the Claimant's accusations, the Republic of Ecuador indicates, in its post-hearing brief, that in this case "the Claimant submitted part of an expert report prepared during the first stage of the pre-trial investigation, for this reason it was initially confidential, as are all documents during that phase."<sup>25</sup> According to Ecuador, this document is one of the pieces of evidence gathered in an investigation to determine whether a crime had been committed. Under Ecuadorian law, if the Attorney General considers that sufficient evidence exists to charge a person for participating in unlawful activities, he will initiate the preliminary investigation. The Respondent states that "the preliminary investigation in this case concluded with an accusation against Mr. Heberling and Mr. van Diepen for the crime of embezzlement, an accusation by the Attorney General which led a judge to issue a warrant for the arrest of these two persons. The trial was not held because, when an accused person has fled, the proceedings are suspended."<sup>26</sup>

66. The Republic of Ecuador notes that it is important to hear an explanation of why EMELEC submitted to the Tribunal only a small part of the expert report. Ecuador argues

---

<sup>25</sup> Post-hearing brief of the Respondent, para. 71.

<sup>26</sup> Ibid.

that the first reason was probably that the complete expert report did not support the Claimant's line of argument. In fact, the Respondent, in its post-hearing brief, rejects the view of EMELEC that "the expert report showed that Mr. Goldhagen had ordered the destruction of EMELEC documents, making it impossible for Mr. Lluco to prove the activities of EMELEC in the United States."<sup>27</sup> Ecuador contends that the falseness for this statement is demonstrated by the fact that "the Attorney General's Office issued an indictment only against Mr. Van Diepen and Mr. Heberling, not against Mr. Goldhagen, and for the crime of embezzlement, not for the destruction of accounting documents."<sup>28</sup>

67. The Respondent also notes, as a second reason, that the report concludes "that accounting documents were not destroyed, but some electronic files demonstrating that EMELEC made payments to the company known as Latin American Finance Group for US\$1,400,000 and US\$425,000 were altered, with no justification for so doing. Therefore, it is not true that there were no accounting records. In fact, the expert was able to determine which files had been deleted by examining the hard drive containing the electronic records. As a result, the Attorney General's Office can support its accusation of embezzlement. It would have been impossible to prove embezzlement without the accounting records."<sup>29</sup> The Respondent adds, as a third reason, that if the Claimant had presented the complete expert report, it would have "been obliged also to submit the complete file of the Attorney General's investigation, and this would not have suited the Claimant because Mr. Lluco not only knew of the existence of that lawsuit, but personally participated in the investigation. Further, it appears from the file that three additional charges had been brought against Mr. Goldhagen, which were discontinued by the Attorney General's Office after the investigation."<sup>30</sup>

### **III. JURISDICTION**

68. In order to establish the jurisdiction of ICSID in this arbitral proceeding, EMELEC invokes the terms of the BIT, specifically Article VI, which provides as follows:

1. For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment

---

<sup>27</sup> Ibid., para. 76.

<sup>28</sup> Ibid., para. 77.

<sup>29</sup> Ibid., para. 79.

<sup>30</sup> Ibid. 80.

authorization granted by that Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute, under one of the following alternatives, for resolution: (a) to the courts or administrative tribunals of the Party that is a party to the dispute; or (b) in accordance with any applicable, previously agreed dispute-settlement procedures; or (c) in accordance with the terms of paragraph 3.

3.

(a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:

i. to the International Centre for Settlement of Investment Disputes ("Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 ("ICSID Convention"), provided that the Party is a party to such Convention; or

[...]

(b) once the national or company concerned has so consented, either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent.

4. Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3. Such consent, together with the written consent of the national or company when given under paragraph 3, shall satisfy the requirement for:

(a) written consent of the parties to the dispute for purposes of Chapter II of the ICSID Convention (Jurisdiction of the Centre) and for purposes of the Additional Facility Rules; and (b) an "agreement in writing" for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 ("New York Convention").

[...]

6. Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Party undertakes to carry out without delay the provisions of any such award and to provide in its territory for its enforcement.<sup>31</sup>

---

<sup>31</sup> English version of the BIT available at [http://www.unctad.org/sections/dite/ia/docs/bits/us\\_ecuador.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/us_ecuador.pdf) .

70 EMELEC claims that, even if the Treaty is not applicable, the Claimant has the right to invoke ICSID jurisdiction on the basis of the arbitration clause contained in the draft concession contract proposed by CONELEC and accepted by EMELEC. In order to come to a timely resolution of arguments that deserve an immediate response, the Tribunal holds that the draft concession contract could not be invoked as grounds for ICSID's jurisdiction in this arbitration proceeding. The draft concession contract does not exist, in legal terms since the document was a simple rough draft which was to serve as the basis for agreement, and which would require the Parties' unequivocal expression of consent to give rise to reciprocal rights and obligations in a final concession contract, mutually agreed upon by the Parties. This would exclude challenges, reservations, or objections that were not clearly and manifestly accepted by the other Party to the contract. Moreover, this contract was never executed in accordance with the formalities required by Ecuadorian law.<sup>32</sup> Given that a concession contract is considered a formal contract, it is an essential condition that the contract be executed as an *escritura pública* in order for it to be legally valid. For the foregoing reasons it is obvious that the invocation of the draft concession contract as a source of jurisdiction cannot be sustained.

71 The Claimant invokes additional grounds on which to found ICSID's jurisdiction. It claims that the Respondent recognized ICSID jurisdiction because, at the first session of the Tribunal held on June 5, 2006, Ecuador invoked a reservation under the Treaty contained in Article I (2) of the BIT, which would deny the benefits of arbitration to EMELEC and by invoking said reservation, the Claimant argues, the Respondent has recognized ICSID jurisdiction.<sup>33</sup> The Claimant also argues that jurisdiction exists by the very fact that, since 1925, the Claimant has always been treated as a United States company. The Tribunal considers these jurisdictional arguments inadmissible because they

---

<sup>32</sup> The Respondent makes the following observation in its Memorial on Jurisdiction referring to the draft contract: "That document was never more than a draft[...] the contract was never signed, among other reasons because EMELEC itself was not in agreement with the draft text approved by CONELEC. This is demonstrated by the documents attached by the Claimant." It is clear, from the document identified as C-14 and R-053, which is a letter signed by Mr. Fernando Aspiazu Seminario in which EMELEC makes observations on 20 clauses of the draft contract, that the parties never arrived at a final agreement on this draft, despite the fact that the Claimant identifies this document as "the consent of the Claimant." Likewise, it should be noted that the arbitration request was submitted, and thus registered by ICSID, solely based on the Claimant's alleged consent under the BIT. This is not only clear from a simple reading of the request for arbitration but is also confirmed by a letter dated May 13, 2005 which the Claimant sent to ICSID, in which the Claimant explains to ICSID that "[t]he present claim is based on the BIT between the United States and the Respondent."

<sup>33</sup> BIT Art. I (2). Each Party reserves the right to deny to any company the advantages of this Treaty if nationals of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party or is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations.

have no legal substance. It is inaccurate to say that Ecuador introduced a reservation to the terms of the Treaty in the sense of the Vienna Convention on the Law of Treaties and in accordance with the legal term “reservation,” as defined therein. This is an argument erroneously put forward by EMELEC. What Ecuador did was to invoke a clause in the Treaty, by which both the United States and Ecuador reserved “the right to deny to any company the advantages” of the Treaty “if nationals of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party or is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations” (Art. I (2) of the BIT). Since EMELEC is a “company of the other Party,” Ecuador has the power to deny it the advantages of the BIT if the company has no substantial business activities in the United States. The Tribunal considers that Ecuador announced the denial of benefits to EMELEC at the proper stage of the proceedings, i.e. upon raising its objections on jurisdiction. If the Tribunal should agree to hear the merits of the present case, only then would it be appropriate to examine the substantive requirements for the denial of benefits, i.e. the determination of whether EMELEC has substantial business activities in the territory of the United States.

#### **IV. OBJECTIONS TO THE JURISDICTION OF ICSID AND TO THE COMPETENCE OF THE TRIBUNAL**

72. As it stated at the first session of the Tribunal with the Parties on June 5, 2006, the Republic of Ecuador raised objections to the jurisdiction of ICSID and to the competence of the Arbitral Tribunal on April 2, 2007.<sup>34</sup>

73. The Republic of Ecuador put forward the following objections to the jurisdiction of ICSID and to the competence of the Tribunal:

---

<sup>34</sup> Point 15.2 of the Minutes of the First Session of the Tribunal: Counsel for the Respondent noted that Ecuador was denying the benefits of the BIT to the Claimant pursuant to Article 1 (2) of the BIT and may raise objections to jurisdiction on the basis of this denial. Counsel for the Claimant objected to the Respondent’s denial. The President of the Tribunal stated that the Tribunal had taken note of the Parties’ statements and noted that, according to the ICSID Arbitration Rules, the Respondent has the right to raise any objections to jurisdiction no later than the expiration of the time limit fixed for the filing of its counter-memorial. The parties agreed that, in the event the Respondent raised objections to jurisdiction, the proceeding on the merits shall be suspended; the Tribunal shall propose a timetable for the written pleadings on objections to jurisdiction and a date for a hearing on jurisdiction, after which the Tribunal shall rule on the objections to jurisdictions as a preliminary matter.

a) EMELEC, being a juridical person, is not accredited with the Centre, since the persons who have acted on its behalf do not have the proper certification.

b) Even on the assumption that EMELEC were to be duly represented in this proceeding, given that it is composed, analysis, of Ecuadorian capital only, the dispute which it seeks to submit to the Tribunal for settlement falls outside the scope of the ICSID Convention;

c) Even on the assumption that the requirement of nationality *rationae personae* were to be deemed fulfilled, EMELEC cannot invoke the BIT in its favor because under Article I (2) of the Treaty the advantages thereof were denied to it; and

d) In any case, Ecuador has not given its consent to the submission of its disputes with Mr. Luco or with EMELEC to the jurisdiction of ICSID.<sup>35</sup>

74. The Tribunal considers that if it determines that the first of the four objections to ICSID jurisdiction filed by the Republic of Ecuador is well-founded, the remaining three objections will no longer need to be examined by the Tribunal. This decision is taken for reasons of procedural economy and the logical conclusion that if evidence shows that a person lacks the legal capacity to be a valid representative of EMELEC this fact will necessarily create an impediment to the continuation of the proceedings. Therefore, even if EMELEC manages to establish that it is a company domiciled in the United States of America; even if it proves that it is a company which has substantial business activities in the United States, as required by Article I (2) of the Treaty concerning the Encouragement and Reciprocal Protection of Investment; even if EMELEC demonstrates that ICSID jurisdiction exists on the basis of the draft concession contract; even so, the Tribunal would be deprived of grounds to hear the case, insofar as Mr. Miguel Luco Tixe failed to provide the evidence required to support his accreditation as legal representative of EMELEC. For the foregoing reasons, the Tribunal will have to consider, in the first instance, his legal capacity to act in these proceedings on behalf of the company.

75. The first objection is, in fact, twofold. The first is related to the question of whether the Claimant has demonstrated that the Progreso Repatriation Trust (PRT II), of which Mr. Luco is the sole fiduciary, is the legitimate substitute and successor, in legal terms, of the trust previously established by Mr. and Mrs. Aspiazu, the Progreso Recapitalization Trust (PRT I) and therefore whether, the PRT II is the owner of the assets of EMELEC and represents the company. But even if that is sufficiently demonstrated the Claimant must

---

<sup>35</sup> Respondent's Memorial on objections to jurisdiction, para. 5.

also establish that the terms stipulated in the incorporation documents of the PRT II include the legal capacity to file a claim before ICSID.

76. If the Claimant is unable to establish that, as a matter of law, the PRT II legally replaces the previous trust, i.e. PRT I, and thus fails to prove the legal capacity of Mr. Llucó to act on behalf of EMELEC, there is no need for the Tribunal to examine the second part of the first objection. Nonetheless, if the Claimant succeeds in demonstrating that PRT II legally replaces, and therefore is the recognized successor of the previous trust and that, consequently, Mr. Llucó is competent to represent EMELEC, then the objection raised by Ecuador to ICSID jurisdiction could still go forward if it is established that the terms of PRT II do not include a general power of attorney to file and pursue an arbitration proceeding before ICSID.

77. The list of exhibits submitted to the Tribunal contains a letter dated April 9, 2007, addressed to ICSID by Mr. Quinlan, Clerk of EMELEC, Inc.,<sup>36</sup> at the request of Mr. Dahl, counsel for the Claimant in this proceeding. In this letter, Mr. Quinlan notes, inter alia, that:

- a) EMELEC has only one shareholder, the North Eastern Power and Energy Corporation (NEPEC);
- b) The shares of NEPEC have been contributed as property of the PRT II by Mr. and Mrs. Aspiazú;
- c) Mr. Llucó is the trustee of PRT II;
- d) Mr. Llucó, as the sole shareholder of PRT II, had authorized the filing of this arbitration claim before ICSID;
- e) Under the law of the state of Maine, EMELEC has only one shareholder, NEPEC, and the shares of NEPEC are the property of PRT II;
- f) The Progreso Recapitalization Trust (PRT I) was terminated on February 15, 2000; the terms and conditions of the Progreso Depositors Trust (PDT) are of no effect and substance because the Trust was not created under the instructions of Grantors of the Progreso Repatriation Trust (PRT II).

78. However, during the hearing held by the Tribunal with the Parties on February 29, 2008, Mr. Quinlan acknowledged that he was not expressing any opinion on the validity of the document which confirms the creation of PRT II.<sup>37</sup> During his examination at the

---

<sup>36</sup> Document of the Claimant C-65.

<sup>37</sup> Transcription of hearing on jurisdiction, p. 54.



hearing, it was made clear that the regularization of the corporate operations of EMELEC with the competent authorities of Maine was made at the initiative of Mr. Dahl. Mr. Dahl is one of the Claimant's attorneys in the present case. Also, the documents confirming the validity of the trust and the authorization to file this arbitration claim were all provided by Mr. Lluco, Mr. Dahl, and, at a later stage, Mr. Maynard, the legal representative of NEPEC in the Bahamas.<sup>38</sup>

79. According to Mr. Quinlan's testimony provided at the hearing held in Washington, D.C. on February 29, 2008, in the summer of 2004 Mr. Dahl, EMELEC's attorney in this arbitration proceeding, asked him to assist in getting EMELEC back into good standing with the state of Maine by presenting the annual reports of the company. At the hearing, Mr. Quinlan, after being questioned by the Respondent's counsel, said that the previous clerk of the company, Mr. Champoux, did not wish to continue in that role because Mr. Champoux "suggested he was busy on other affairs and was somewhat frustrated that he was not getting the information or, I believe, payment that he needed to carry out his obligations as Clerk." In view of this situation, Mr. Quinlan took over the position of clerk, having been appointed by Mr. Lluco—the sole trustee of PRT II established in the Bahamas—under the assumption that Mr. Lluco was the owner of the shares of North Eastern Power Energy Company (NEPEC), a company constituted in the Bahamas, which controlled all the shares of EMELEC. Of course, Mr. Quinlan noted at the hearing that his oral or written statements did not reflect his legal opinion; they only reflected the contents of the corporate records, rather than an evaluation of the legal merits of the documents.<sup>39</sup>

80. The Tribunal considers that any evidence accrediting Mr. Lluco as the legal representative of EMELEC cannot be based on the testimony provided by Mr. Quinlan, in light of the provisos expressed by Mr. Quinlan himself, consistent with his function as Clerk of EMELEC. Whether or not Mr. Lluco is a legal representative will have to be determined by the Tribunal in its comprehensive examination of the complete history of the various trusts which have administered the registered capital of EMELEC. The Tribunal will therefore recapitulate this history.

---

<sup>38</sup> Ibid., pp. 57-69.

<sup>39</sup> Ibid.

**V. STATEMENT OF FACTS CONTAINED IN THE OBJECTIONS TO THE CLAIM<sup>40</sup>**

81. EMELEC, a company established in Maine, United States of America in 1925, opened a branch in Ecuador that same year, signing a concession contract for the production, transmission, and distribution of electricity in Guayaquil. The duration of the contract was fixed at 60 years. In 1985, the term expired and the concession ended, although in the following years EMELEC continued to supply electricity on the basis of provisional permits.

82. In January 1993, Mr. Fernando Aspiazu Seminario, an Ecuadorian national, notified the President of Ecuador that he had acquired shareholder control and ownership of EMELEC, indicating in his letter his interest in initiating, as soon as possible, “negotiations leading to the renewal of the electricity supply concession for the city of Guayaquil”.<sup>41</sup> Mr. Aspiazu’s equity control over EMELEC was exercised through NEPEC, a corporation constituted and domiciled in the Bahamas. Mr. Aspiazu was also the owner of Banco del Progreso S.A., an Ecuadorian bank.

83. In its Memorial on objections to ICSID jurisdiction, the Respondent states that in 1999 “Banco del Progreso was taken over and entered into a restructuring process under the control of the Deposit Guarantee Agency (AGD), a State agency which was required by law to refund 100% of the deposits made by the bank’s customers.”<sup>42</sup>

84. The Respondent notes that, due to Mr. Aspiazu’s relationship with Banco del Progreso, he was arrested under an order of preventive detention and was subjected to criminal and civil prosecution by both AGD and the Bank’s depositors. He received eight convictions and was sentenced to imprisonment for the crime of embezzlement; his arrest occurred on July 12, 1999, he was sentenced on March 25, 2002, and he completed his sentence on December 21, 2006.<sup>43</sup>

85. To cover the debt owed to the depositors of Banco del Progreso and to AGD—the figure mentioned in Ecuador’s Memorial on objections is US\$892,997,554.09—Mr. Aspiazu created a trust in the Bahamas, governed by Bahamian law, named Progreso Repatriation Trust (PRT I), to which he transferred all his interests in NEPEC and,

---

<sup>40</sup> Respondent’s Memorial on objections to jurisdiction, paras. 7 et seq.

<sup>41</sup> Document of the Respondent R-009.

<sup>42</sup> Respondent’s Memorial on objections to jurisdiction, para. 15.

<sup>43</sup> *Ibid.*, para. 16.

consequently, in EMELEC. This is the first in a series of three trusts to which were transferred, at various stages and with different characteristics, the same property ( i.e. the shares of NEPEC, a company constituted in the Bahamas, and those of EMELEC, a company incorporated in Maine but whose shares were controlled by an Ecuadorian citizen, Mr. Aspiazu). To provide a better understanding of the case, the Tribunal will now examine the distinctive features of these trusts.

86. Before beginning the analysis of the three trusts involved in these arbitration proceedings, however, the Tribunal wishes to clarify that it considers the legal concept of *fideicomiso*, as used by the Parties to this dispute, to be the legal equivalent of the term “trust” in the common law system. Thus, for the purposes of the present case, a trust is a contract by which a natural or juridical person transfers ownership of a given portion of its assets to a trustee, so that the trustee can use these assets to carry out a lawful purpose, which must be expressly set forth in the contract by the person setting up the trust. The beneficiary of the trust is the person who receives the benefit from the trust.

#### **VI. THE FIRST TRUST: PROGRESO RECAPITALIZATION TRUST (PRT I)**

87. On May 1, 1999, some months before he was apprehended, Mr. Aspiazu and his wife created the Progreso Recapitalization Trust (PRT I, as designated by the Parties, a title which the Tribunal has adopted) subject to Bahamian law. Mr. and Mrs. Aspiazu transferred the following assets to this first trust:

The Grantors’ equity and other interests in North Eastern Power and Energy Corporation, a Bahamian corporation (“North Eastern”), represented by two (2) shares of common stock, \$1.00 par value, which directly controls all of the stock of Electroecuador, Inc., a Bahamian corporation (“Electroecuador”), and indirectly controls all of the stock of Empresa Eléctrica del Ecuador, Inc., a Maine corporation (“EMELEC”), which operates electric utilities in Ecuador.<sup>44</sup>

88. The first trustee of PRT I was Mr. Hernán Pérez Loose, who was appointed by Mr. Aspiazu when the trust was created. Although it is true that, through the creation of the trust, the shares of NEPEC and the control of EMELEC were transferred to PRT I, the Grantors of the trust, Mr. and Mrs. Aspiazu, by precise stipulation, retained the right, under the terms of Article 1 of the trust, to direct the trustee with respect to the transactions into which he was authorized to enter. In addition, the Grantors reserved the right to revoke the

---

<sup>44</sup> Document of the Claimant C-12; Document of the Respondent R-018.

trust under Article IX, in which case the property forming part of the trust would be conveyed to the Grantors.

89. One consequence of the creation of PRT I is that the assets, which had until then belonged to Mr. and Mrs. Aspiazu, were transferred from what was originally their property to a legally different entity—i.e., a trust created and governed by Bahamian law—but without depriving Mr. and Mrs. Aspiazu of their power to control the administration of the assets or the right to revoke the trust and recover full ownership of all assets which had, in principle, been transferred to the trust. It should be pointed out that Article I (c) (11) of the PRT I includes, as part of the general powers of the trustee, the right to “submit to arbitration obligations or claims, including claims in respect of taxes, in favor of or against the Trust.”

## **VII. DEED OF TERMINATION, RECEIPT AND RELEASE**

90. PRT I was legally terminated through a document signed in Guayaquil. The copy of the Deed delivered to the Tribunal bears a heading indicating that it is annex 5; the seal of Dr. Carlos Quiñones Velázquez, First Notary Public, Guayaquil, Ecuador appears on all the pages of the document. The document is written in English and is entitled “Deed of Termination, Receipt and Release”. In the heading on the first page the legend, “Commonwealth of the Bahamas. New Providence” appears. The title in Spanish is translated as “*Escritura de Terminación, Recibo y Liberación (Escritura de Terminación)*”. It is dated February 2000, and was signed by Peter Heberling as Trustee, on the one hand, and Fernando Aspiazu and Anabelle Nebel de Aspiazu, on the other, as Grantors.<sup>45</sup>

91. The precise date of the signing of the Deed of Termination is unknown, since the Deed does not state on which day in February 2000 it was concluded. It should be noted that neither the Claimant nor the Respondent has questioned the authenticity or validity of the Deed. Despite this lacuna, extrinsic evidence exists which indicates that the Deed was signed prior to February 17, 2000, and probably before February 15, 2000. This assumption is based on the fact that Mr. Pérez Loose, the trustee of PRT I, by a document dated February 15, 2000, transferred the assets originally allocated to PRT I to a new trust,

---

<sup>45</sup> Document of the Respondent R-019.

the Progreso Depositors Trust, in which Mr. Peter Heberling was designated as sole trustee, following the resignation of Mr. Pérez Loose.<sup>46</sup>

92. Under Article V of PRT I, the resignation of Mr. Pérez Loose as trustee would only become effective upon the appointment and consent to act of a successor trustee. This title of successor trustee fell on Mr. Peter Heberling. The preamble to the Deed of Termination, in paragraph (B), states that, by a Deed of Resignation and Appointment, the original trustee had resigned and had appointed a successor trustee to fulfill those functions. The paragraph reads as follows: “(B) By a Deed of Resignation and Appointment the Original Trustee resigned as Trustee of the Trust and appointed the Trustee to be the Successor Trustee thereof.” The Tribunal did not have available to it this document, known in Spanish as “*Escritura de Renuncia y Designación*.” But it can be assumed that Mr. Pérez Loose could not have transferred the assets vested in the trust on February 17, 2000, referring to the new trust, the Progreso Depositors Trust (PDT), unless the Deed of Resignation and Appointment, first, and later the Deed of Termination, had already been signed and Mr. Pérez Loose had known about them. It should be pointed out that the instrument creating the PDT is dated February 15, 2000.

93. The purpose of the Deed of Termination was not to set up the new trust known as Progreso Depositors Trust (PDT). It was aimed at announcing the intention of terminating PRT I and, in fact, liquidating it by this instrument.

94. In the substantive part of the Deed of Termination, the following elements stand out:

- a) Mr. Pérez Loose (the original trustee) states that it is impossible for him to perform or complete the transactions referred to in PRT I;
- b) Taking into account the events that have occurred (it is not established what events are referred to), the trustee, Mr. Pérez Loose, declares that PRT I has been liquidated;
- c) The Grantors, Mr. and Mrs. Aspiazu, state that they have been informed by the trustee of his intention to terminate PRT I, and they confirm that they have directed the trustee to transfer the assets and liabilities of PRT I to the new trustee

---

<sup>46</sup> Document of the Respondent R-023.

(the successor trustee), as described in the notarized document itself, so that the new trustee, Mr. Heberling, can establish a new trust with the same trust property;

- d) The new trustee acknowledges receipt of the assets described in the notarized instrument;
- e) The new trustee releases his predecessor of all responsibility in relation to PRT I; the Grantors do the same.
- f) The assets of the trust, with its liabilities, are described in the Deed of Termination and include ten shares of NEPEC, representing 100% of the existing shares.

95. The Deed of Termination is signed, in their own handwriting, by Mr. Peter Heberling, Mr. Fernando Aspiazu, and Mrs. Anabelle Nebel de Aspiazu. It contains the signature of a witness, which is illegible. The seal of Dr. Carlos Quiñones Velásquez, First Notary Public, Guayaquil, Ecuador, is stamped on all pages of the Deed.

96. It is therefore evident that, as a consequence of the Deed of Termination, Mr. Heberling had been the successor trustee of PRT I since February 2000, and this becomes clear from reading an additional, undated document, which contains notarial seals and was signed by Mr. and Mrs. Aspiazu in their own handwriting. This document is a letter. The Letter (as the Tribunal refers to this document), addressed to Mr. Heberling, contains the following terms:

We hereby note that you intend to terminate the Progreso Recapitalization Trust. As the Grantors under such Trust, we hereby direct you to transfer all the Trust property held under the Trust to a new trust to be established by you with yourself as the new trustee for the purpose of administering such trust and otherwise effecting certain sales transactions for the benefit of the depositors of Banco del Progreso Ltd., a Cayman corporation, and secondly the depositors of Banco del Progreso S.A., an Ecuadorian corporation, and lastly ourselves in default of all such depositors.

To avoid any doubt, we intend that you shall vest the Trust property directly in yourself as trustee of the new trust, and in the event of any uncertainty, you are to follow the provisions of such new trust. You may arrange the preparation of any formal document that you would wish us to sign to formalize our directions stated herein.<sup>47</sup>

---

<sup>47</sup> Document of the Respondent R-020.

It is on the basis of the directions stipulated in the Letter that Mr. Heberling proceeded to terminate PRT I and create a new trust, to which he transferred all the property previously held under PRT I.

### **VIII. THE SECOND TRUST: PROGRESO DEPOSITORS TRUST (PDT).**

97. In the Deed known as The Progreso Depositors Trust (PDT A),<sup>48</sup> dated February 15, 2000, Mr. Peter Heberling created the new trust, PDT, appointing himself as trustee, as he had been directed to do in the Deed of Termination and the Letter containing the instructions of Mr. and Mrs. Aspiazu.

98. As with the terminated trust (PRT I), the law of the Bahamas is the law applicable to PDT A, and exclusive jurisdiction is given to the courts of the Bahamas for the “interpretation of any actions or claims arising herefrom.” The chapter on Definitions included in the document names the beneficiaries of the trust, as follows:

“Primary Beneficiaries” means the depositors of Banco del Progreso S.A., a financial institution organized under the laws of Ecuador, and the depositors of Banco del Progreso Ltd., a financial institution organized under the laws of the Cayman Islands, who, on such date or dates, had deposits which constituted obligations of Banco del Progreso S.A. or Banco del Progreso Ltd., as the case may be, which did not exceed US\$4,000 in the aggregate.

“Secondary Beneficiaries” means the depositors of Banco del Progreso S.A., and the depositors of Banco del Progreso Ltd., who, on such date or dates, had deposits which constituted obligations of Banco del Progreso S.A. or Banco del Progreso Ltd., as the case may be, which exceeded US\$4,000 in the aggregate.

99. It should be pointed out that, in PDT A neither Mr. Aspiazu nor Mrs. Aspiazu is designated a beneficiary, be it in residual or tertiary form. It is also noteworthy that PDT A is irrevocable for a period of six years, in contrast to PRT I, which was revocable. Under PDT A, the trustee could be removed by a Board of Protectors, composed of Mr. William A. van Diepen and Mr. Glenn M. Goldhagen. PDT A is signed by Mr. Heberling and one witness, Mr. van Diepen. The PDT was valid for six years, expiring on February 14, 2006, after the present arbitration commenced.

100. Under the document establishing PDT A, the trustee is obliged to enter into transactions for “the sale of all or any part of the capital stock and assets of North Eastern,

---

<sup>48</sup> Document of the Respondent R-023; Document of the Claimant C-15. The Tribunal has identified this PDT as “A,” because of the existence of two versions of the PDT in the file. The other version of the PDT, document of the Claimant C-16, will hereinafter be identified as PDT B.

EMELEC and Electroecuador [...], which transaction or transactions shall in the view of the Trustee best serve the interests firstly of the Primary Beneficiaries and secondly of the Secondary Beneficiaries.”

101. A second version of the PDT exists, known as PDT B, also dated February 15, 2000, which does not have a cover page and which contains on all its pages, except one, a seal reading “Copia Conelec” (“CONELEC copy”). The document is signed by Mr. Heberling, and it contains an illegible signature as well. This illegible signature seems to be identical to the signature of the witness who signed the notarized Deed of Termination, Receipt and Release, which terminated PRT I.

102. The second version of the PDT, known as PDT B, differs in some respects from PDT A, as will be seen below. In the two versions of the trust, Mr. Heberling appears to be establishing the trusts, in principle, pursuant to the instructions contained in the Deed of Termination and the Letter from Mr. and Mrs. Aspiazu. Both PDTs are irrevocable trusts for a period of six years. The first two articles and the first paragraph of Article III are identical in the two versions. But PDT B incorporates, with some exceptions, the general powers that had been granted to the trustee in PRT I. One exception is that PDT B does not contain Article I (c), subsections (4), (12), and (16). Another exception is that PDT A establishes that the trustee’s compensation will be paid as agreed between the trustee and the Board of Protectors, while PDT B stipulates the amounts of an initial payment and monthly payments. In addition, PDT A refers to a Board of Protectors, while PDT B does not. Under PDT A, if any part of the trust fund remains undistributed after the depositors are paid, this remainder is to be distributed to “charitable organizations,” in contrast, under PDT B, the remainder is to be distributed to Mr. and Mrs. Aspiazu.

103. The Tribunal notes that, under the terms of both PDT A and PDT B, the laws of the Bahamas are applicable, and that the courts of the Bahamas have exclusive jurisdiction in case of a dispute. It is noteworthy that the Claimant did not resort to those courts to settle the question of the validity of PDT A and PDT B, despite the systematic objections it has raised with regard to this matter. As will be examined in further detail later, the shares of NEPEC, which controls EMELEC, remain under the authority of the PDT, whose trustee has not recognized the claims to those shares under PRT II and certainly has not authorized this arbitration proceeding against the Republic of Ecuador. Without those shares, Mr. Lluco does not control EMELEC. Given that the documents establishing the various trusts



contain express provisions on the applicable law, i.e., the law of the Bahamas, and the competent jurisdiction, i.e., the Bahamian courts, in any case it is for that jurisdiction to determine the Parties' rights in dispute. In the event that judicial remedies are sought in that jurisdiction with success, the courts in the Bahamas would have to determine what powers were granted in the PRT II to exercise control over EMELEC and, if a favorable decision is obtained, recover the relevant share certificates.

104. The Tribunal has described the alternative versions, PDT A and PDT B, as documents with "differences" or "discrepancies." It has not called them contradictory, since there is no conflict between the provisions of the two texts. In no case is there a mutual cancellation of substantive content. In addition, the information available to the Tribunal indicates that no claims were submitted or challenges addressed to the competent authorities on the validity or operation of the PDT from its creation in 2000 until 2003. It is important to note that according to the evidence provided in the letter from attorney Loumiet—which will be examined later—Mr. Aspiazu acted in such a manner that his own conduct confirmed the validity of the PDT.

105. It is not essential for the Tribunal to choose between the two versions of the PDT, since, as noted above, the differences between the two texts are not so significant that they affect the central issues at stake in the jurisdictional phase of this case.

106. Outside of the differences between PDT A and PDT B, the legal situation which existed on February 15, 2000 was that the Grantors in the first trust (PRT I), i.e., Mr. and Mrs. Aspiazu, had exercised, through specific provisions in the Deed bearing the notarial seals of PDT A, the power of revocation expressly set forth in PRT I and had authorized Mr. Heberling, acting in his capacity as successor trustee of PRT I and as trustee of the new trust, to create this new trust. The property of PRT I, i.e., share certificate No. 8, representing the ten shares of NEPEC, the sole owner of EMELEC, had been transferred to the new trust, named PDT, in such a way that PDT was the operative trust. In legal terms, these are the substantive issues which require granting to PDT A a sufficient legal basis, together with the necessary consequences and effects which the Tribunal must ascribe to it.

107. Although there is some controversy over the question, even in the extreme case that Mr. Aspiazu was detained at the time (February 15, 2000) and subject to an order of preventive detention, there is every reason to assume that the revocation of PRT I and the

authorization to create the PDT, under Ecuadorian law, would have been valid legal acts as a consequence of Mrs. Aspiazu's legal capacity to dispose of the matrimonial property, a juridical assumption which, as will be analyzed below, was made both by Mr. Aspiazu and by Mrs. Aspiazu in 2003. Mr. Aspiazu was convicted of embezzlement on March 25, 2002, more than a month after the creation of the PDT, and was not, therefore, deprived of his capacity to dispose of his property, under the law of Ecuador.

108. For a better understanding of the facts of this case, it will be useful to discuss some information which affects the PDT, although the Tribunal considers this irrelevant for the purposes of determining the Tribunal's jurisdiction at this stage in the arbitration. On April 23, 2003, the Board of Protectors removed Mr. Heberling as trustee of PDT and, that same day, appointed Mr. Richard D. Bruns as trustee. Mr. Bruns, in turn, resigned on July 9, 2003, and his successor was Mr. Glenn Goldhagen. On July 14, 2003, Mr. Goldhagen, in his capacity as PDT trustee, removed all the directors of NEPEC and appointed himself sole director of NEPEC. On the same date, Mr. Goldhagen, as sole shareholder of EMELEC, removed all the directors of that company and appointed himself sole director.

109. The Tribunal has examined a document containing a statement by Mr. Aspiazu, the importance of which lies in the expression of consent to, and acceptance of, facts which, at a later stage, Mr. Aspiazu would deny. Although the Declaration of Intention of Mr. Fernando Aspiazu, issued before a notary public on August 1, 2002, may be subject to legal challenge with regard to its effects on property, given that Mr. Aspiazu was convicted of embezzlement and was therefore substantially limited in his legal capacity, the existence of this Declaration cannot be ignored as the expression of an act of will, in which Mr. Aspiazu states that he:

[...] established an international trust to which he transferred his entire estate, which is represented in securities and stocks of [foreign companies] with the sole purpose that such properties may be used to guarantee and pay any potential deficiencies that could arise in the performance of the obligations undertaken by Banco del Progreso S.A. and Banco del Progreso Ltd. to their clients, depositors and investors and to the Ecuadorian State for certain obligations, the payment of which it had assumed or which were owed to it [...]<sup>49</sup>

Given Mr. Aspiazu's circumstances at the time, Ecuadorian law deprived him of the capacity of disposing of the property of the trust of his own free will, but the law did not

---

<sup>49</sup> Document of the Respondent R-021.

prevent him from stating a point of view or expressing an opinion reaffirming events that had occurred and that were still valid.

110. This first Declaration of Intention of August 1, 2002, was made before a notary located in Quito. The second Declaration of Intention, made before a notary in Guayaquil, is dated October 25, 2002,<sup>50</sup> and in it Mr. Aspiazu states that it is his intention to direct that Mr. Heberling, “Trustee of the Progreso Depositors Trust (PDT), fulfill the purpose of the trust.” Mr. Aspiazu also states that, “given that I am the person who established the trust referred to above, in that capacity I hereby expressly order that Peter Heberling, the Trustee, assign and transfer to an Ecuadorian trust, for it to assume the rights and obligations of the PDT trust.” Although the Tribunal does not have any evidence available to it concerning the constitution of a trust in Ecuador, as mentioned in the Declaration, what is relevant is Mr. Aspiazu’s acknowledgment, in the two Declarations of Intention, both notarized, that the PDT existed and that he himself established it.

#### **IX. THE THIRD TRUST: PROGESO REPATRIATION TRUST (PRT II).**

111. On May 30, 2003, Mr. and Mrs. Aspiazu created a new trust, Progreso Repatriation Trust (PRT II), by a Deed of Declaration and Instruction, a document that was not notarized. The document was signed by three witnesses.<sup>51</sup>

112. Since the document containing the Deed establishing PRT II is particularly important in determining the Claimant’s legal capacity in this arbitration proceeding, and in relation to the scope of the first objection on jurisdiction formulated by the Respondent, the Tribunal must examine its content very carefully.

113. The first object of study will be the preamble of PRT II. The preambular chapter of the new trust is composed of five paragraphs. The first of these states that, on February 15, 2000, “one of the Grantors herein lawfully terminated the Progreso Recapitalization Trust” (PRT I). It is interesting that the document specifies that only “one of the Grantors [...] terminated PRT I”, since both Mr. and Mrs. Aspiazu signed the Deed of Termination and the Letter in February 2000. It will be recalled that the Deed terminates PRT I and the Letter directs Mr. Heberling to establish the PDT.

---

<sup>50</sup> Document of the Respondent R-022.

<sup>51</sup> Document of the Claimant C-22.

114. The terms of this first preambular paragraph of PRT II appears to accept that Mr. Aspiazu could have been subject to interdiction, given his legal situation, which means, under Ecuadorian law a civil incapacity to dispose of one's property. This explains why the specific provision contained in the first preambular paragraph implies that, if this was the case, Mrs. Aspiazu was empowered and had the legal capacity to dispose of the marital property. This legal assumption is basic for the determination of the validity of the termination of PRT I, as well as for specifying the legal basis of the establishment of PRT II. This assumption also has inevitable consequences for the validity of PDT A and/or PDT B, as will be seen below.

115. On the basis of the legal assumption announced in the first preambular paragraph of PRT II, the content of the third preambular paragraph of PRT II is incorrect when it states that:

The purported trust, termed the Progreso Depositors Trust, was not created under the instructions of the Grantors and its terms and conditions are of no effect and substance.

As will be recalled (see paras. 87 to 93), the Deed of Termination and the Letter not only terminated PRT I but also authorized the establishment of the PDT. This means, obviously and evidently, that the PDT was established "under the instructions of the Grantors." Another important matter should be highlighted. If Mr. and Mrs. Aspiazu recognize in the Deed of Termination the validity of the termination of PRT I (even if only through the acts of Mrs. Aspiazu, according to the legal assumption proposed in paragraph 107), it is insuperably difficult to accept that Mr. and Mrs. Aspiazu could declare that the terms and conditions of the PDT "are of no effect and substance," given that, in the Deed of Termination itself, they approved the establishment of the PDT.

116. The contents of the first and third preambular paragraphs of PRT II are logically inconsistent with the second preambular paragraph. This second paragraph states that, pursuant to the provisions of the dissolved PRT I, which governed the possibility of non-compliance with the objectives of PRT I, the property that remained vested in the trustee, Peter Heberling, at the time of the dissolution, was held in a passive trust for the Grantors, in other words, Mr. and Mrs. Aspiazu. The problem is that there are no provisions in PRT I that regulate the destination of the property in case of non-compliance with the objectives of the trust. One possible interpretation of what is meant by this second preambular

paragraph is that Mr. Heberling was authorized to terminate PRT I, although he was not empowered to create the PDT. However, as noted above in this Award, the Letter instructed Mr. Heberling to create “a new trust,” and, furthermore, designated as beneficiaries in the new trust, firstly, the “depositors of Banco del Progreso Ltd.”; secondly, the depositors of Banco del Progreso S.A.; and, lastly, Mr. and Mrs. Aspiazu “in the absence of all such depositors.”

117. The fourth preambular paragraph of PRT II states that the Grantors are desirous of creating a new trust, to be termed Progreso Repatriation Trust, i.e., PRT II, whose sole purpose would be “administering and effecting certain sales of certain assets to benefit the Depositors of Banco del Progreso Ltd. and the Depositors of Banco del Progreso S.A. and Fernando Aspiazu and Anabelle Nebel De Aspiazu in default of all such Depositors.” The part within quotation marks, which appears in the preamble to this document and which defines the sole purpose of the new trust, also appears within quotation marks, for some unspecified reason, in the operative part of the document establishing PRT II.

118. The fifth and last preambular paragraph of PRT II states that the Grantors appoint as trustee Mr. Miguel Ángel Llucó Tixe and directs Messrs. Peter D. W. Heberling, William A. Van Diepen, and Glenn M. Goldhagen, “who are vested with the trust fund,” to transfer the property to Mr. Llucó. It is clear from the provisions of the preamble to PRT II that it is recognized that another trust existed which held property and that a series of individuals are identified by name as having been trustees of PRT I and PDT or members of the Board of Protectors of PDT. Like PRT I, PRT II is revocable under the provisions of Article 4 (1), in which case the trust fund would be conveyed to Mr. and Mrs. Aspiazu. In contrast, PDT is an irrevocable trust, at least for a period of six years. It has already been pointed out that the text of PRT II was not duly notarized; it contains only the signatures of three witnesses and is also signed by Mr. and Mrs. Aspiazu as Grantors and Mr. Llucó as Trustee.

119. The evidence available to the Tribunal indicates that the persons who appear as Grantors in PRT II—Mr. and Mrs. Aspiazu—did not have in their power the share certificates of NEPEC establishing ownership of EMELEC, among other assets held by the trust. These share certificates had been conveyed to the trustees of PDT. This was implicitly acknowledged in the very text of the preamble to PRT II. In fact, as already noted, the fifth preambular paragraph purports to give instructions to the trustees of PDT to

transfer the share certificates to Mr. Lluco. But there is every indication that this did not happen and no proof was produced that it did happen.

120. The Deed of Declaration and Instruction, as the document is known, whose purpose was to create PRT II, is dated May 30, 2003. Apparently as a consequence of an obvious fact, i.e. not having the aforementioned share certificates, seven days later, on June 6, 2003, Stephanie Wells, an attorney representing Mr. and Mrs. Aspiazu, wrote a letter to Messrs. Goldhagen and Bruns stating the following:<sup>52</sup>

- a) Mr. and Mrs. Aspiazu are no longer desirous of having you serve in the capacity as Trustee;
- b) Based upon information received, it appears that, acting in concert with Mr. Heberling, you and others have wrongfully depleted funds, which were held on trust by yourselves for Mr. and Mrs. Aspiazu, by way of several unauthorized bank transfers, by overcompensating yourselves, and further, by not working towards any Trust objectives;
- c) Attached hereto please find a duly executed Trust Deed between Mr. and Mrs. Aspiazu and a newly designated Trustee, Mr. Lluco;
- d) My clients urge you to transfer the Trust property to the new Trustee; failure to do so will result in legal action against you.

121. On June 23, 2003, Mr. Carlos Loumiet, an attorney who identified himself as being a member of a law firm representing the Progreso Depositors Trust (PDT) and its Trustee, Richard Bruns, replied to Ms. Wells's letter as follows:<sup>53</sup>

- a) The PDT is an irrevocable trust, which was set up through a Declaration of Trust dated February 15, 2000, by Mr. Heberling, then the Trustee of the PRT I;
- b) On that same day, Mr. Aspiazu and his wife both signed a Deed terminating PRT I and "pouring over" the assets of PRT I into the new PDT. Nothing in the terms of the PDT allows Mr. and Mrs. Aspiazu to terminate that Trust, or to change their minds as to the trust assets;

---

<sup>52</sup> Document of the Respondent R-040.

<sup>53</sup> Document of the Respondent R-041.

- c) All of this was done with the intervention of at least two major United States law firms and a prominent Bahamian firm;
- d) On August 1, 2002 and October 25, 2002, Mr. Aspiazu signed notarized documents cancelling the PDT and approving the possible transfer of its assets to the “Agencia de Garantía de Depósitos” in Ecuador, or to an Ecuadorian trust to perform the trusts entrusted to the Trustee under the PDT, respectively;
- e) Now, three years after the PDT was first established, and disregarding all of the foregoing, Mr. and Mrs. Aspiazu attack the PDT’s validity, and attempt to establish a new trust to hold the same assets already held by the PDT;
- f) In sharp contrast with the PDT, the new trust is revocable. As a result, Mr. and Mrs. Aspiazu, if this effort succeeded, could conveniently terminate the new trust and revest the trust assets in themselves at any time in their sole discretion;
- g) As your letters acknowledge, the assets of the trust are already held by the Trustee of the PDT, who intends to perform the trusts entrusted to him under the PDT.

122. Attorney Wells replied to this letter on July 1, 2003, as follows:<sup>54</sup>

- a) After the termination of the PRT I, Mr. Heberling was never given instructions to hold the Trust property in the PDT;
- b) We are instructed that Mr. Heberling has committed flagrant breaches in relation to the Trust property, including the transfer of large sums of money into the account of his wife;
- c) Throughout the three-year period since the termination of the PRT I, the Trust property which had been vested in Mr. Heberling has not been distributed in accordance with the instructions of the Aspiazus to pay the creditors of Banco del Progreso Ltd. and Banco del Progreso S.A.;
- d) We are awaiting instructions as to the commencement of legal action against all persons who have been involved in the unauthorized distribution of Trust property

---

<sup>54</sup> Document of the Respondent R-042.

with the aim of recovering this property and facilitating the transfer of the same to PRT II and its Trustee, Mr. Lluco.

123. The correspondence available to the Tribunal concludes with a letter from Attorney Loumiet to Attorney Wells, dated July 10, 2003, stating the following:<sup>55</sup>

- a) Attorney Wells attempts no response to the two notarized documents signed by Mr. Aspiazu in 2002, recognizing the validity of the PDT and approving the transfer by that trust of its assets to the Ecuadorian Agencia de Garantía de Depósitos (AGD) and to an Ecuadorian trust established to carry out the functions of the PDT;
- b) Attorney Wells has also omitted any reference to Mr. Aspiazu's situation at the time, having been sentenced to prison for committing massive fraud. Being in that legal situation, Mr. Aspiazu has no legal capacity to dispose of any property, through the creation of a trust or otherwise. Any pretended disposition of those assets is void *ab initio*, under current law;
- c) A trust cannot be invalidated simply because a contributor of assets announces it to be so. Bahamian law has legal procedures for the invalidation of trusts, which must be followed in order to invalidate the PDT;
- d) Over the past three years, the PDT has been actively seeking to sell its assets to use the proceeds to pay back the depositors of Banco del Progreso. Adverse circumstances had made it impossible to close those sales. But AGD has paid approximately 90% of the debts of Banco del Progreso to the depositors. The PDT is engaged in negotiations to sell its assets to AGD or to an Ecuadorian trust, with the aim of paying the remaining unpaid depositors and reimbursing AGD for the depositors it has paid;
- e) The trust that has been invalidly established is a revocable trust. Were this trust not void, and were the assets at issue not already owned by the PDT, it would be very convenient for Mr. Aspiazu to be able to terminate the new trust and regain its assets for himself;

---

<sup>55</sup> Document of the Respondent R-043.



- f) The PDT is an irrevocable trust, which cannot be arbitrarily dissolved by Mr. Aspiazu;
- g) With regard to possible legal action, by virtue of his being an incarcerated criminal offender, Mr. Aspiazu does not, under Ecuadorian law, have the right to commence any such action, nor will he have that right until the nine years of his full sentence have elapsed, independently of whether he might actually be released before the nine years have elapsed;
- h) The withdrawal by Mr. Lluco, with Attorney Wells's assistance, of the corporate records for NEPEC from Higgs and Johnson, by means of an intentionally misleading letter is a known fact. That withdrawal does not affect legal title to that corporation (NEPEC), since corporate books may be duplicated, and possession of them is not synonymous with ownership. Unless those corporate records are promptly returned to Higgs and Johnson, those involved will be sued for wrongfully taking the PDT's property.

124. Although Attorney Wells threatened legal action to recover the share certificates safeguarded by the PDT, no evidence has been presented to the Tribunal that such action has been instituted.

125. Even assuming that it could be argued (i) that the provisions of the PRT II include the granting of authority to file and pursue this arbitration; (ii) that EMELEC is a United States company; and (iii) that EMELEC has substantial business activities in the United States, the Tribunal concludes that the attorneys of Mr. Lluco, the putative trustee of PRT II in this arbitration, have not met the burden of proving to the Tribunal's satisfaction that the control and power to represent EMELEC were transferred to PRT II. Mr. Lluco's attorneys have not demonstrated that the terms and conditions stipulated in the PDT are "of no effect and substance," to quote the words of the preamble to PRT II. If it is acknowledged that Mr. and Mrs. Aspiazu were legally competent to terminate PRT I then simple logic would dictate, on the basis of this same legal competency set forth in the Deed of Termination, that Mr. and Mrs. Aspiazu (or Mrs. Aspiazu) would have the legal capacity to authorize the establishment of the PDT, a trust which, according to its own provisions, is irrevocable.

126. The Tribunal has determined that, in accordance with the evidence submitted by the Parties for its consideration, Mr. and Mrs. Aspiazu, or Mrs. Aspiazu, had the

unquestionable legal capacity to authorize the establishment of the trust entitled The Progreso Depositors Trust (PDT). Under its provisions the trust is irrevocable.

127. However, Mr. Lluco's legal representative argues that Mr. Lluco has valid qualifications to institute a legal action in defense of the interests of EMELEC. These qualifications are allegedly based on the fact that Mr. Lluco appears as trustee of the so-called Progreso Repatriation Trust (PRT II), which would be, according to the Claimant's pleadings, the sole owner of all the shares of North Eastern Power Energy Co. (NEPEC), a Bahamian company, which in turn owns all the shares of EMELEC.

128. The instrument establishing PRT II is purportedly the legal basis that attributes to Mr. Lluco, in his capacity as sole shareholder of NEPEC and hence of EMELEC, the legal capacity to institute legal actions on behalf of the company. Nevertheless, the Tribunal has clearly established the existence and validity of a previous trust, Progreso Depositors Trust (PDT), whose irrevocable nature cannot be eliminated by an attempt to establish another subsequent trust, whose validity has been duly and conclusively nullified by the evidence available to the Tribunal.

129. The Tribunal has concluded that no real and effective transfer to Mr. Lluco, to NEPEC, or to PRT II, of voting shares in EMELEC took place. This is so because these shares had previously been deposited in another trust, the PDT, whose legal validity has been confirmed. These shares are now in safe-keeping. In fact, there is proof that the PDT trust turned over share certificate No. 8 for safe-keeping to the law firm of Hunton and Williams, located in the city of Miami, United States of America. This firm issued a certificate verifying that it is keeping this document in its possession, and it has been so recorded by an Inspection Certificate submitted as evidence by the Respondent; this Certificate was signed by duly recognized and authorized persons.<sup>56</sup>

130. Based on the foregoing circumstances, the Parties' submissions, and the law, the Tribunal has concluded that the Claimant has not demonstrated to its satisfaction that it is accredited with the Centre, given that, as the Respondent contends, the persons who acted on behalf of EMELEC do not have the required legal capacity.

131. In view of the fact that PRT II lacks the necessary legal basis which would allow it to exist as a legally constituted trust, Mr. Lluco is not authorized to be a trustee of PRT II.

---

<sup>56</sup> Document of the Respondent R-026

Given the impossibility of demonstrating the legal existence of this trust, EMELEC's counsel cannot attribute to PRT II the ownership of all shares of NEPEC, and consequently, cannot claim that PRT II owns all the shares of EMELEC.

132. Because he does not have the legal capacity to represent NEPEC, Mr. Lluco was not authorized to appoint Mr. Quinlan as Clerk of EMELEC. For the same reasons, Mr. Quinlan could not verify the appointment of Mr. Lluco as the sole shareholder of EMELEC or certify that Mr. Lluco was the sole shareholder of NEPEC. The circumstances that make the accreditation of Mr. Lluco as a representative of EMELEC invalid have led the Tribunal to conclude that Mr. Lluco does not possess the required legal capacity to institute this arbitration proceeding.

## **X. DECISION**

133. The legal representative of Mr. Lluco in this arbitration proceeding has not demonstrated, to the Tribunal's satisfaction, sufficient evidence to invalidate or contradict the instructions issued by Mr. and Mrs. Aspiazu in the Deed of Termination or in the Letter to Mr. Heberling.<sup>57</sup> Moreover, Mr. Lluco's legal representative has not provided sufficient evidence to serve as a basis, in the appropriate forum, to request the annulment of the PDT.

134. Nor has Mr. Lluco's legal representative submitted evidence of an objection to, a protest against, or an attitude of dissatisfaction with, the operation of the PDT during the three years between the establishment of the PDT in 2000 and the establishment of PRT II in 2003. On the contrary, there is convincing evidence—and the Letter described in this Award is only one example thereof—that Mr. and Mrs. Aspiazu acknowledged and confirmed the validity of the PDT.

135. In conclusion, the Tribunal finds that Mr. Lluco's legal counsel has not met the burden of proving that Mr. Lluco has the legal capacity to represent EMELEC.

136. The Tribunal holds that the first objection to the jurisdiction of ICSID and to the competence of the Tribunal raised by the Respondent is duly sustained, and that therefore the other objections do not require an examination or decision on the part of the Tribunal. In view of the foregoing, the Tribunal finds that it does not have competence to hear the case.

---

<sup>57</sup> See paras. 82-88 supra.

## **XI. COSTS**

137. In accordance with Article 61(2) of the Convention and Rule 28 of the Arbitration Rules, the Tribunal decides that, in view of the particular circumstances of the present case, each Party shall pay an equal portion of the costs and expenses incurred in this arbitration proceeding related to the competence of the Tribunal. Likewise, each Party shall assume its own costs and expenses of representation during this arbitration proceeding.

/s/

Judge Bernardo Sepúlveda

President

Date: May 22, 2009

/s/

Mr. John Rooney

Arbitrator

Date: June 1, 2009

/s/

Prof. Michael Reisman

Arbitrator

Date: May 22, 2009

*The Spanish text of the Award being the authentic version.*