CÂMARA DE COMÉRCIO INTERNACIONAL. PARTIAL AWARD ON JURISDICTION. UEG ARAUCÁRIA V. COPEL

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Jorge Fontoura Nogueira

Área do Direito: Arbitragem
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INTERNATIONAL COURT OF ARBITRATION – COUR INTERNATIONALE D'ARBITRAGE AWARD[1]

CASE 12656/KGA/CCO (LGL\1850\1)

UEG ARAUCÁRIA LTDA. (Brazil)

vs.

1. COMPANHIA PARANAENSE DE ENERGIA (COPEL) (Brazil)

2. COPEL GERAÇÃO S.A. (Brazil)

ICC Arbitration 12656/KGA: UEG Araucária Ltda. (UEGA) (Brazil) v. 1) Companhia Paranaense de Energia (COPEL) (Brazil) 2) COPEL GENCO S.A. (Brazil)

PARTIAL AWARD ON JURISDICTION

Abbreviations

BAA	"Brazilian Arbitration Act", i.e. Brazilian Law No. 9.307/96 (sometimes referred to as BAL – "Brazilian Arbitration Law")
C I Ap	Claimant's Application for Interim Order of 17 February 2004
C I jur	Claimant's Brief on Jurisdiction of 3 May 2004
C I	Claimant's Request for Arbitration of 1 April 2003
C II Ap	Claimant's Reply regarding Interim Order of 24 May 2004
C II jur	Claimant's Response regarding Jurisdiction of 17 May 2004
C IIa Ap	Claimant's Request of 1 June 2004, for leave of supplement the Application for Interim Order
C-1 et seq.	Claimant's Exhibit (followed by the exhibit's number)
COPEL GENCO	Respondent N. 2
COPEL	Respondent N. 1
ICC Court	International Court of Arbitration at the International Chamber of Commerce
ICC Rules	Rules of Arbitration of the ICC
ICC	International Chamber of Commerce
P	Page
para	Paragraph

PO	Procedural Order
PP	Pages
PPA	"Power Purchase Agreement" (sometimes referred to as "the Agreement", i.e. Contract for the Sale and Purchase of Initial Dependable Capacity and for the Operation and Maintenance of a Combined Cycle Gas Turbine Power Plant at Araucária, Paraná, Brazil (see C Exh. C-1)
R I Ap	Respondents' Answer regarding Interim Order of 10 May 2004
R I CG	COPEL GENCO's Answer of 18 July 2003 to the Request for Arbitration
R I COPEL	COPEL's Answer of 11 July 2003 to the Request for Arbitration
R I jur	Respondents' Challenge of Jurisdiction of 3 May 2004
R II Ap	Respondents' Reply of 6 June 2004 regarding Interim Order
R II jur	Respondents' Reply of 17 May 2004 regarding jurisdiction
R-1 et seq.	Respondents' Exhibit (followed by the exhibit's number)
Curitiba Treasury Court	Third Lower State Treasury Court of the City of Curitiba in the Brazilian State of Paraná
ToR	Terms of Reference
UEGA	Claimant

The Tribunal

3. As communicated by ICC letter of 20 August 2003, the ICC Court confirmed upon nomination of UEGA as Co-Arbitrator (C I jur, para. 21):

Prof. Martin Hunter

Essex Court Chambers

24 Lincoln's Inn Fields

London, WC2A 3 ED

United Kingdom

As communicated by ICC letter of 20 August 2003, the ICC Court confirmed upon nomination by Respondents as Co-Arbitrator:

Prof. Jorge Fontoura Nogueira

SCN- Quadra 1 – Ed. Brasília

Trade Center, Conj. 1111-4

70710 902 Brasília

Brazil

By ICC letter of 14 November 2003, the ICC Court appointed as Chairman of the Tribunal:

Prof. Dr. Karl-Heinz Böckstiegel

Parkstrasse 38

D-51427 Bergisch-Gladbach

Germany

C. Short Identification of the Case

4. Subject to later adjustments which are taken into account in later sections of this award, a short identification of the case from the perspectives of the Parties seems best to be possible by citing the Parties' own wording from the "Summary of the Parties' Claims and Relief Sought" in the Terms of Reference (ToR, Section C):

"(Subject to further submissions and Art. 19 ICC Rules. The language and contents of Chapters C.1 and C.2 have been unilaterally prepared and drafted by the Parties, and do not reflect or contain any expression of acquiescence on the part of the other Parties and the members of the Tribunal)".

C.1 The Claimant summarizes its claims and the relief sought as follows:

(Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Agreement). Respondent is contesting jurisdiction of the ICC.)

C.1.1 Jurisdiction

The parties' dispute arises out of a Contract for the sale and Purchase of Initial Dependable Capacity and for the Operation and Maintenance of a Combined Cycle Gas Turbine Power Plant ["Plant"] at Araucária, Paraná (the "Agreement"). Clause 34.3 of the Agreement sets forth the parties agreement to submit their disputes to arbitration under the International Chamber of Commerce Rules of Arbitration. Under the applicable law, this Tribunal has jurisdiction to decide on its own jurisdiction (Competence/competence). Moreover, the agreement's arbitration clause is valid notwithstanding the termination or alleged invalidity of the Agreement. This Tribunal has jurisdiction to decide the parties' dispute, because, inter alia, (i) COPEL has the capacity to agree to arbitrate its disputes arising out of and in connection with the Agreement; (ii) the disputes before this Tribunal are arbitrable, (iii) until this arbitration was filed, COPEL never once, since the Araucária Project was initiated in 1996, objected to the parties various agreements to arbitrate their disputes; and (iv) the relevant Brazilian regulatory authorities have never questioned the validity of the parties' agreement to arbitrate their disputes.

C.1.2 Application for Interim Order

Claimant submits on Application for Interim Order (the "Application"), requesting the Tribunal to issue an interim order with respect to the parties' rights and obligations in relation to the Plant in light of UEGA's lawful termination of the agreement on April 22, 2003. The Application stems from, inter alia (i) COPEL's refusal to pay to UEGA the termination compensation provided for in the Agreement; (ii) COPEL's continued occupation of the Plant despite UEGA's termination of the Agreement and COPEL's refusal to pay the termination compensation it owes to UEGA; (iii) COPEL's refusal to allow UEGA personnel to access the Plant freely; (iv) COPEL's allegations that the Plant is inoperable; (v) COPEL's lawsuit filed before the courts of its home state alleging that. UEGA is attempting to spoliate technical evidence at the Plant, even thought UEGA cannot access the Plant; (iv) the information suggesting that modifications have been made to the Plant without UEGA's knowledge or permission; and (viii) COPEL's failure to provide any operations and reporting to UEGA.

The Application is made expressly without prejudice to any ultimate finding by the Tribunal on jurisdiction or the merits of the partier's disputes.

C.1.3 Merits

In May 2000, COPEL commissioned the construction of a combined cycle gas turbine power plant in Araucária, Paraná. The construction of the Plant commenced on October 4, 2000. Following extensive technical testing in which COPEL played an active role, based on the Engineer's certification and in accordance with the terms of the Agreement, the Plant was declared commercially operable on September 27, 2002. As required under the Agreement, COPEL assumed all operation and maintenance obligations for the Plant and commenced making its contractual monthly capacity payments to UEGA. In October 2002, in the context of additional testing, COPEL dispatched the Plant and power to the national electricity grid.

In January 2003, at the behest of the newly elected Governor of the State of Paraná, COPEL unilaterally ceased making its monthly capacity payments. Additional actions were also taken by the Governor to interfere with the parties' ongoing contractual relations. COPEL's failure to make its monthly capacity payments pursuant to the terms of the Agreement constituted and gave rise to COPEL Event of Default under Clause 22.2 (b). On about June 9, 2003, a Government Event (defined in the agreement to include a Change in law) had remained in effect for more than 180 days, thus constituting and giving rise to a further COPEL Event of Default under Clause 22.2 (h) of the Agreement.

On March 3, 2003 UEGA delivered to COPEL its notice of Intent to Terminate in respect of COPEL's January payment default (the "NITT"). In the NITT, as required by the Clause 22.3 (b) of the Agreement, UEGA informed COPEL that if the COPEL Event of Default arising out of COPEL's payment default remained uncured upon expiration of a 45-day cure period, UEGA could, in its sole discretion, give notice and terminate the PPA immediately pursuant to Clause 22.3 (c) pursue any and all remedies available to it under the Agreement and Brazilian law. The 45-day cure period expired on April 17, 2003.

By letter date April 22, 2003 ("Termination Notice"), no action having been taken by COPEL to remedy its payment default, UEGA terminated the Agreement. In the Termination Notice, UEGA terminated the Agreement. In the Termination Notice, UEGA advised COPEL that it was exercising its rights pursuant to Section 22.6 (b) to terminate the Agreement and to transfer the Plant to COPEL in exchange for COPEL's payment to UEGA of the Present Value Monthly Payment Amount – the amount of consideration required under the Agreement.

In the light of COPEL's refusal to pay the Monthly Payment and the Governor of State of Paraná's interference in the parties' contractual relations, Claimant commenced this arbitration in accordance with Clause 34 of the Agreement. Notwithstanding Claimant's commencement of this arbitration on April 1, 2003 and COPEL's participation therein, COPEL has filed several lawsuits against UEGA before the Lower State Treasury Court of the City of Curitiba. By commencing litigation proceedings before the local state courts of Paraná in a concerted effort to delay and frustrate the arbitral process, COPEL has breached its obligation to arbitrate under the Agreement.

In addition, COPEL's decision to remain in possession of the Plant notwithstanding the absence of any contractual basis for such presence, has required UEGA to assume COPEL's obligations to maintain and pay for the required insurance for the Plant.

In light of the facts above, UEGA respectfully requests the Tribunal to award it:

1.The amount of R$ 94,491,217.44, corresponding to the obligations of COPEL due and owing to UEGA at the time of the termination of the Agreement effected by the Termination Notice, plus late payment penalty and interest and other adjustments in accordance with Clause 18.2.3 of the Agreement;

2. The Present Value Monthly Payment Amount in an amount in Reais corresponding to Us$ 827,487,527.53, converted at the exchange rate prevailing on the date payment is made, plus late payment is made, plus late payment penalty and interest and other adjustments in accordance with the terms of Clause 18.2.3 of Agreement;

3. Actual damages, plus interest (at a rate to be determined) relating to legal fees and expenses, court costs, expert fees and other incidental costs and expenses that have been or will be incurred in connection with defending COPEL's lawsuits in Brazil;

4. The full amount of required insurance for the Plant paid by UEGA as a result of COPEL's decision to remain in the Plant despite no legal basis for it to do so;

5. All costs associated with this arbitration;

6. All attorneys' fees;

7. Pre-award and post–award interest at the highest lawful rate;

8. Such other relief as the Tribunal may deem appropriate.

C.2 The respondents summarize their response and relief sought as follows:

C.2.1 Jurisdiction

The respondents oppose to and not recognize the jurisdiction of the Tribunal, and request the arbitration clause established in Section 34.3 of the Agreement, to be declared null and void by the Tribunal, for the following main reasons:

The Respondents are not simply challenging the competence of the Arbitral Tribunal to determine whether it has competence to resolve the controversies arising out of the Parties' Agreement. Competence is a limitation to the exercise of Jurisdiction. Only when jurisdiction is present should the jurisdictional authority have the power to define the limits to such jurisdiction (competence). When the arbitration clause is null and void, as in the present case, the Tribunal has no jurisdiction to define the limits to such jurisdiction (competence). The nullity of the arbitration clause should not be determined upon the principle of the competence-competence, but rather upon the validity of the parties' expression of their volition.

The Respondents are mixed capital companies controlled by the State of Paraná, and in such capacity can only enter into valid arbitration agreements after legislative express authorization, which has never been granted in this case;

The relevant Brazilian regulatory (ANEEL) was never expected to question or to examine the validity or nullity of the arbitration clause set forth in the Agreement. The role played by ANEEL is to ensure that regulatory rules of the Brazilian electricity sector are duly respected and complied with by the market players. The relevant Brazilian authority to determine the nullity of the arbitration clause contained in the Agreement as null and void;

The subject matter of this arbitration essentially involves Brazilian public policy issues, which are non-disposable, and therefore not subject to arbitration, under Article 1 of the Brazilian Arbitration Act (Law 9307/96);

Any award to be possibly rendered in this arbitration procedure will not be enforceable in Brazil, place of parties' domicile, assets rights and properties. This honorable Tribunal should be hindered from exercising jurisdiction over a case in which the award will not become enforceable, thus avoiding a costly and useless exercise of jurisdiction at the expenses of the parties;

Alternatively, in the unlikely event The Tribunal decides that it has jurisdiction over the parties; Respondents request the prompt suspension of this arbitration procedure according to the Brazilian Arbitration Act because the matter under dispute encompasses rights, which the parties cannot dispose of. The Tribunal should refer the parties to the Brazilian Courts.

With respect to the participation of Respondent COPEL GENCO in these proceedings, and in addition to all the above, the Respondents summarize their position as follows. Respondent COPEL GENCO must be dismissed from this arbitration procedure since it is not a signatory of the Agreement where the arbitration clause is inserted and has acted only as an intervening party to the first amendment to Agreement, which contains no arbitration clause. Under Brazilian Law, an agent like Respondent COPEL GENCO acts for and on Behalf of the principal (Respondent COPEL), so that this arbitration should proceed only in relation to COPEL (principal).

C.2.2 Application for Interim Order

Claimant's Application for interim Order, ("Application"), should be denied by this Honorable Tribunal because, among other things: (i) the Respondents have never hindered Claimant UEGA was never evicted out of the plant; (iv) the Respondents never intended to have the exclusive and sole possession of the plant; (iv) the Respondents remain at the plant because the Claimant has abandoned the plant, (v) Claimant UEGA never accepted Respondents suggestions that the operation and maintenance of the plant should be delegated to a third, independent party; (iv) all the reports pertaining to the operation and maintenance of the plant have been available for Claimant's UEGA possession and control; (vii) Claimant UEGA is free to access (and preferably to stay) at the plant and to request (and preferable to possess and control) all the reports pertaining to the plant, (viii) the plant was never "modified" by the Respondents, as the Claimant suggests; (ix) the Claimant has full knowledge of the current status of the plant, its deficiencies and the risks stemming from its

operation.

C.2.3 Merits

The relief sought by the Claimant in these proceedings shall be denied in full and, with the exception of facts expressly accepted, all other contentions are disputed. In particular, Respondents deny any and all allegations of breach of contract made by Claimant, and summarize their preposition as follows:

(i) Change in Law

The "Change in Law" alleged by the Claimant has never occurred, as the acts, opinions and announcements made by the Governor of the State of Paraná cannot be deemed to be "adoption, promulgation change in interpretation, implementation, repeal or modification" of any Brazilian Law, and therefore would not give rise to an "Event of Default" as provided for in Sections 22.2 (b), 22.2 (h) and 22.2 (g) of the Agreement.

Both COPEL and COPEL GENCO are legal entities whose existence should not be confounded with the natural person of the Governor of the State of Paraná, his or her opinions, decision or announcements.

ii) Payment of the amount of R$ 94.491.217,44

Respondents do not acknowledge any of the collectable amounts as owed and payable, for the following main reasons:

(a) The Agreements has not been approved by ANEEL, the Brazilian Governmental Agency for the Electricity Sector, as required under the Brazilian Law in order to become effective;

(b) The Plant was not definitely declared commercially operable an September 27, 2002. This date was declared by an expert unilaterally hired by the Claimant through a test developed in "manual" mode rather than in the automatic and continuing way under a normal operation mode;

(c) The Plant has never come into commercial operation due to a myriad of technical problems and numerous failures attributable to Claimant's sole responsibility. Under the well-known principle of "exceptio non adimpleti contractus" provided in the Brazilian Civil Code, in bilateral contracts, none of the contracts, none of the contracting parties can request performance by the other party before it performs its own obligations;

(d) All payments in advance made by the Respondents were made with the express proviso that (i) they should not be constructed as the consent to the amounts unilaterally invoiced by the Claimant; and (ii) an alternative agreement – acceptable for ANEEL – should be further discussed and executed by and between the Parties. In the light of the early termination of the Agreement, Claimant should refund all advanced payments made by the Respondents under the Agreement, plus interest;

(e) Even if any amounts were supposedly deemed to be due, Claimant's calculation should not take into account the exchange fluctuation, which is prohibited by the Brazilian public policy statutory provisions. The formula provided in Section 17 of the Agreement for price readjustment is null and void under Brazilian Law;

ii) Payment of the amount of US$ 827,487,527.53

Section 22.6 (b) of the agreement, which provides for the purchase of the Plant by COPEL in the event of a breach of contract, is not applicable because there is no breach attributable to the Respondents. Even if any such breach were no exist, such provision is null and void due to:

(a) Purchase of the Plant by the Respondents would have to be necessarily justified by public interest and preceded by a public bid regulated by Law 8666/93:

(b) The value to be paid as a penalty cannot be greater than the amount of the main obligation;

(c) Any penalty for breach of contracts related to the electricity sector cannot exceed 10% of the amount of the main obligation;

(d) Even if any amounts were due, Claimant's calculation cannot take into account the exchange fluctuation, which is prohibited by the Brazilian public policy statutory provisions. The formula provided in Section 22.6 (b) of the Agreement for purchases price calculation is null and void.

(iv) Reimbursement of amounts related to Brazilian Court Proceedings

Claimant is not entitled to being reimbursed of any and all expenses incurred or yet to be incurred in Brazil or in any other jurisdiction for the following main reasons:

(i) Any such costs and expenses do not have any causation link with the arbitration provision in the Agreement or the alleged breach thereof, and result from the Claimant's own free will;

(ii) Any possible reimbursement of expenses incurred by the parties to court proceedings in Brazil are governed exclusively by the Brazilian Code of Civil Procedure, and will be limited to the extent expressly provided for in the final award, if any.

v) Other issues

The structure and subject matter of the Agreement and its amendments are incompatible with the Brazilian Electricity Sector Regulations, mainly, but not limited to, the following reasons: (a) the Agreement violates the corporate object established in Claimant's Articles of Association, because the corporate object of the Claimant's is to procedure energy, not to lease facilities for generation of energy and (b) the Agreement violates the terms and conditions of the instrument of authorization as Independent Power Producer granted by ANEEL to the Claimant.

The Respondents never decided to remain in the possession of the Plant. In an attempt to held the Respondents liable for the maintenance and operation of the Plant, the Claimant has abandoned the Plant causing the Respondents to remain in its possession. Moreover, as a Shareholder of Claimant, Respondent COPEL has indirect business interest in the good conditions of maintenance of the Plant.

As a result of their position, Respondents request: (a) the relief sought by the Claimant be denied in full; (b) the Agreement and its amendments be declared null and void; (c) the Claimant be sentenced to refund all advance payment made by the Respondents under the Agreement, plus interest; and (d) the Claimant be sentenced to pay all costs related to this arbitration procedure."

D. Relief Presently Sought by the Parties on the Merits

D.I Relief Presently Sought by the Claimant on the Merits

5. The most recent version of the relief sought by the Claimant on the merits is found in its Brief on Jurisdiction of 3 May 2004. Accordingly, UEGA now seeks the following relief (C I jur, para 3):

"(1) The amount of R$ 94,491,217.44, corresponding to the obligations of COPEL due and owing to UEGA at the times of the termination of the Agreement, plus late payment penalties, interest and other adjustments in accordance with the Clause 18.2.3 of the Agreement;

(2) The Present Value Monthly Payment Amount in an amount in Reais corresponding to U$ 827,487,527.53, converted at the exchange rate prevailing on the date payment is made, plus late payment penalties, interest and other adjustments in accordance with the terms of Clause 18.2.3 of the Agreement;

(3) Actual damages, plus interest (at a rate to be determined) relating to legal fees and expenses, court costs, expert fees and other incidental costs and expenses that have been or will be incurred in connection with defending against COPEL's lawsuits in the local courts of its home state;

(4) The full amount of all required insurance for the power plant in Araucária Paraná (the "Plant") paid by UEGA subsequent to the termination of the Agreement on April 22, 2003;

(5) All costs associated with this arbitration;

(6) All attorneys' fees;

(7) Pre-award and post-award interest at the highest lawful rate; and

(8) Such other relief as the Tribunal may deem appropriate".

D.II Relief Presently Sought by the Respondents on the Merits

6. The most recent version of the relief sought by Respondents on the merits is entailed in theToR as last circulated by the Tribunal on 24 March 2004 (PO n. 2). Respondents request, verbatim (ToR, section C.2.3.):

"The relief sought by the Claimant in these proceedings shall be denied in full and, with the exception of facts expressly accepted, all other contentions are dispute. In particular, Respondents deny any and all allegations of breach of contract made by Claimant, and summarize their position as follows:

i) Change in Law

The "Change in Law" alleged by the Claimant has never occurred, as the acts, opinions and announcements made by the Governor of the State of Paraná cannot be deemed to be "adoption, promulgation change in interpretation, implementation, repeal or modification" of any Brazilian Law, and therefore would not give rise to an "Event of Default" as provided for in Sections 22.2 (b), 22.2 (h), and 22.2 (g) of the Agreement.

Both COPEL and COPEL GENCO are legal entities whose existence should not be confounded with the natural person of the Governor of the State of Paraná, his or her opinions, decision or announcements.

ii) Payment of the amount of R$ 94.491.217,44

Respondents do not acknowledge any of the collectable amounts as owed and payable, for the following main reasons:

(a) The Agreement has not been approved by ANEEL, the Brazilian Governmental Agency for the Electricity Sector, as required under the Brazilian Law in order to become effective;

(b) The Plant was not definitely declared commercially operable on September 27, 2002. This date was declared by an expert unilaterally hired by the Claimant through a test developed in "manual" mode rather than in the automatic and continuing way under a normal operation mode;

(c) The Plant has never come into commercial operation due to a myriad of technical problems and numerous failures attributable to Claimant's sole responsibility. Under the well-known principle of "exception non adimpleti contractus" provided in the Brazilian Civil Code, in bilateral contracts, none of the contracting parties can request performance by the other party before it performs its own obligations;

(d) All payments in advance made by the Respondents were made with the express proviso that (i) they should not be construed as the consent to the amounts unilaterally invoiced by the Claimant; and (ii) an alternative agreement – acceptable for ANEEL – should be further discussed and executed by and between the Parties. In the light of the early termination of the Agreement, Claimant should refund all advanced payments made by the Respondents under the Agreement, plus interest;

(e) Even if any amounts were supposedly deemed to be due, Claimant's calculation should not take into account the exchange fluctuation, which is prohibited by the Brazilian public policy statutory provisions. The formula provided in Section 17 of the Agreement for price readjustments is null and void under Brazilian law:

iii) Payment of the amount of US$ 827,487,527.53

Section 22.6 (b) of the agreement, which provides for the purchase of the Plant by COPEL in the event of a breach of contract, is not applicable because there is no breach attributable to the Respondents. Even if any such breach were to exist, such provision is null and void due to:

(a) Purchase of the Plant by the Respondents would have to be necessarily justified by public interest and preceded by a public bid regulated by Law 8666/93;

(b) The value to be paid as penalty cannot be greater than the amount of the main obligation;

(c) Any penalty for breach of contracts related to the electricity sector cannot exceed 10% of the amount of the main obligation;

(d) Even if any amounts were due, Claimant's calculation cannot take into account the exchange fluctuation, which is prohibited by the Brazilian public policy statutory provisions. The formula provided in Section 22.6 (b) of the Agreement for purchase price calculation is null and void.

iv) Reimbursement of amounts related to Brazilian Court Proceedings.

Claimant is not entitled to being reimbursed of any and all expenses incurred or yet to be incurred in Brazil or in any other jurisdiction for the following main reasons:

(i) Any such costs and expenses do not have any causation link with the arbitration provision in the Agreement or the alleged breach thereof, and result from the Claimant's own free will;

(ii) Any possible reimbursement of expenses incurred by the parties to court proceedings in Brazil are governed exclusively by the Brazilian Code of Civil Procedure, and will be limited to the extent expressly provided for in the final award, if any".

E. Procedural History

7. Arbitral Proceedings against COPEL commenced upon initiation by UEGA pursuant to Clause 34.3 of the PPA (Exh. C-1). UEGA submitted the Request for Arbitration to the ICC Court by letter of 1 April 2003 (C I jur, paras. 1 and 19). By letter of 6 June 2003 UEGA amended the Request for Arbitration in order to include COPEL GENCO as Respondents n. 2 (C I jur, paras. 1 and 23).

8. On 2 June 2003 COPEL filed a lawsuit against UEGA in the *Third Lower State Treasury Court of the City of Curitiba in the Brazilian State of Parana* (the "Curitiba Treasury Court") (C I jur, para. 23; R I jur, para 7; Exh. R. 8). The preliminary injunction of 3 June 2003 issued by this Court ordered UEGA under penalty of fines to refrain from proceedings with this arbitration (C I jur., para. 24; Exh R-1 and Exh R-2). Nevertheless, by letter of 11 June 2003, the ICC Court notified the Parties that the arbitral proceedings would not be suspended (C I jur, para 24).

9. Additionally, COPEL filed an anticipated discovery motion in the State Treasury Court seeking commencement of an expert investigation at the plant. Commencement of the investigation was ordered by the Court by decision of 30 September 2003 (R I jur, paras. 19 ff).

10. On 11 July 2003 Respondents submitted to the ICC Court a Challenge of Jurisdiction (C I jur, para. 4; R I jur para. 1). On 28 July 2003 Claimant submitted its Answer to Respondents' Challenge of Jurisdiction (R I jur, para. 2). By letter of 8 August 2003 the ICC Court rendered an administrative decision that this arbitration should proceed (C I jur. para. 27; R I jur. para. 2). On 20 August 2003 the Curitiba Treasury Court declared the arbitration clause to be null and void. On the same date the Curitiba Treasury Court granted Respondents' request for an interim measure of protection. (Exh. R-3 and Exh. R-4; see R I jur, para. 3, the date given by the Respondents – 20 August 2004 – is assumed to be erroneous).

11. On 15 October 2003 Respondents requested the ICC Court to reconsider its administrative decision that the arbitration could proceed. (R I jur, para 3). On 20 October 2003 the Secretariat of the ICC Court informed the Respondents that the request could not be directed to the ICC Court because the ICC Rules did not allow for such a remedy (R I jur, para. 4). The ICC Secretariat informed the Parties, that "*any decision as to the jurisdiction of the Tribunal shall be taken by the Tribunal itself, who is the only empowered to decide on this issue"* (C I jur, para. 29).

12. UEGA filed an interlocutory appeal before the *Appellate Court of the State of Paraná,* but was denied the requested preliminary suspension order (Exh. R-85 and Exh. R-86). Meanwhile, on 15 March 2004, the Curitiba Treasury Court issued a final ruling maintaining its declaration of nullity of the arbitration clause (Exh. R-87). The interlocutory appeals filed by UEGA on 25 June 2003 and 9 September 2003 were dismissed by the Appellate Court on 30 March 2004 (R I jur, para. 16).

13. The Tribunal was finally constituted when the Chairman of the Tribunal was appointed by ICC letter of 14 November 2003 following the failure of the parties to reach agreement on the presiding arbitrator (ToR, section E.3). The Co-Arbitrators had already been nominated by the Parties in

accordance with the ICC Rules, and subsequently confirmed by the ICC's letter of 20 August 2003 (ToR, sections E.1 and E.2).

14. On 17 February 2004 UEGA submitted to the Tribunal an Application for an Interim Order (C I Ap) for certain declaration and other relief with respect to the rights and obligations in relation to the plant. (C I jur, para. 36).

15. The First Procedural Meeting between the Tribunal and the Parties was held in Paris on 20 February 2004. The results of the meeting were recorded in Procedural Orders n. 1a (PO n. 1a) as follows:

"This Order contains the results of the above meeting.

1. Attendance

For Claimant: Mr. C. Mark Baker, Counsel (Fulbright & Joworski)

Dr. Joao Afonso de Assis, Counsel (Xavier, Bernardes, Bragança)

For Respondents: Mr. Marcelo Antonio Muriel, Counsel (Pinheiro Neto)

Mr. João Afonso da Silveira de Assis, Counsel (Xavier, Bernardes, Bragança)

Mr. Paulo Pimentel, CEO (COPEL)

Mr. Luiz Edson Fachin, Advisor to CEO (COPEL)

Dr. Roberto Requião, Governor of the State of Parana

Mr. Caito Quintana, Chief of Staff of the Governor

Mr. Vanderlei Jensen, Member of Parliament of Paraná

Tribunal: Prof. Martin Hunter

Prof. Jorge Fontoura Nogueira

Prof. Karl-Heinz Bockstiegel

2. Opening Statements

The Respondents requested and were given the opportunity to present an opening statement regarding the Claimant's Application for Interim Order dated February 17, 2004 and its effects on the further procedure.

The Claimant presented an opening statement in reply regarding the same matter.

It was agreed that the Parties would submit the texts of their opening statements in writing after the meeting and that they would become part of the record. The Parties are hereby requested to submit these texts by February 27, 2004.

3. Terms of Reference (ToR)

3.1 The ToR as drafted by the Tribunal and amended after written comments from the Parties and as circulated by the Chairman's mail of February 15, 2004, were agreed to include the following changes:

In C.1.1:

The duplication of the text is deleted.

In C.1.2 5th paragraph:

The first sentence is replaced by the new wording submitted in Claimant's letter of February 17, 2004.

The former Section G.3 is deleted and replaced by the following:

"G.3. In accordance with Clause 35 PPA, the law of the Federative Republic of Brazil is the applicable substantive law in this arbitration. G.4. The Tribunal shall not assume the powers of amiable compositeur nor decide ex aequo et bono (equity)".

The former Section G.4 becomes Section G.5, the former Section G.5. becomes G.6.

The new agreed text of the ToR is attached to this Order, subject to Section 3.2. below.

3.2 Taking into account the above mentioned Opening Statement at the meeting, in view of the Claimant's Application for Interim Order dated February 17, 2004, the Parties shall have the opportunity to reexamine the texts they submitted for Sections C.1 and C.2 respectively and submit revised texts thereof (also by e-mail as attachments in Windows Word to facilitate inserting into the ToR) by March 19, 2004.

3.3 Taking into account such new texts, the Tribunal will thereafter circulate the final text of the ToR which shall be signed by correspondence.

4. Further Procedure and Timetable

4.1 It was agreed, as jurisdiction has been a major object of dispute between the Parties from the very beginning of this arbitral procedure, that it be dealt with separately in a first stage of the procedure, and that the merits be taken up in a later stage, if and in so far as the Tribunal accepts to have jurisdiction.

4.2 By March 19, 2004, the Parties may submit suggestions regarding the further procedure on jurisdiction and regarding the Claimant's Application for interim Order including an indication as to whether they intend to present witness or expert testimony in this regard.

4.3 A further Procedural Meeting will be held in Paris on April 15, 2004, to discuss and hopefully agree on the further procedure and its timetable.

5. The Parties by February 27, 2004, may comment on this Order after having received it if they feel that a result is not correctly recorded. Taking into account such comments, the Tribunal will then examine whether any chances seem appropriate".

16. The final Terms of Reference (ToR) were circulated by the Tribunal on 24 March 2004 (PO n. 2, section 2.1). They were signed by Counsel for Claimant and the members of the Tribunal. However, by letter of 1 April 2004, Respondents gave notice that they had decided not to sign the ToR (C I jur. para. 38). The ToR were subsequently approved by the ICC Court on 8 April 2004 (PO n. 2, section 2.1).

17. The ToR as approved by the ICC Court were distributed by the Chairman at the Second Procedural Meeting in Paris on 15 April 2004.

18. The meeting was again attended by Mr. Baker and Dr. da Silveira de Assis on behalf of Claimant. Respondents were presented by their counsel Mr. Muriel and Mr. Ladeira and Copel's in-house counsel, Mr. Assis Correa as well as Prof. Fachin (PO n. 2, section 1).

19. Apart from the identification of the Parties and their counsel and certain rules on communications the ToR contained the following specific procedural rulings:

"F. Place of arbitration

F.1 In accordance with the arbitration clause upon which the Claimant has based this arbitration, Paris (France) is the place of arbitration.

F.2 This is without prejudice to Hearings and Meetings being held at other places in accordance with ICC Rules 14.2.

G. Other Particulars Regarding the Procedure

G.1 The Procedure shall be in accordance with the ICC Rules of Arbitration in force as from 1 January 1998.

G.2 The language of the arbitral procedure shall be English.

G.3 In accordance with Clause 35 PPA, the law of the Federative Republic of Brazil is the applicable substantive law in this arbitration.

G.4 The Tribunal shall not assume the powers of amiable compositeur nor decide ex aequo et bono (equity).

G.5 Art. 2(9) of Appendix III of the ICC Arbitration Rules provides that the Parties have a duty to pay any possible value added taxes (VAT) and that the respective payment arrangements shall be made directly between the Parties and the Arbitrators. Accordingly, the Parties shall, as the advances due to the ICC under Art. 30 of the Rules, pay at the request of the Tribunal a deposit on the applicable VAT to the trust account of the Chairman of the Tribunal from which the VAT shall be paid once the ICC has set the fees of the Arbitrators, remaining amounts to be reimbursed to the Parties.

G.6 Further details and a timetable shall be established by the Tribunal after consultation with the Parties in accordance with ICC Rules 15 and 18.4.

G.7 Execution of these Terms of Reference by the Respondents should not be construed or interpreted (i) as a waiver by the Respondents of their challenge to the jurisdiction of the Honorable Tribunal; (ii) non-compliance on the part of the Respondents with the judicial decisions rendered by the Brazilian courts declaring the nullity of the arbitration clause and ordering the Claimant to refrain from performing any acts in these arbitration proceedings; and (iii) as an act directly or indirectly incompatible with any relief that the Respondents may seek or obtain from Brazilian judicial courts".

20. The results of the Second Procedural Meeting were recorded in Procedural Order n. 2 (PO n. 2). Its relevant sections are cited hereafter:

"*2. Terms of Reference (ToR)*

2.1 The ToR as last circulated, after written comments from the Parties, by the Tribunal on March 24, as signed by Counsel of Claimant and by the members of the Tribunal, and as approved by the ICC Court on April 8, 2004, were distributed by the Chairman at the Meeting and submitted to the ICC.

2.2 Regarding the further procedure, particular attention is drawn to the following Sections of the ToR and some further clarifications:

"B. Communications

B.1 The Tribunal shall address communications to the above mentioned law firms of all Counsels of the Parties.

B.2 Counsels of the Parties shall address communications directly to each member of the Tribunal either by fax or courier and, in addition, by e-mail, with a copy to the above mentioned law firms of counsels for the other Party. Fax communications shall not exceed 15 pages".

B.2.a. Furthermore, to facilitate citations in the deliberations and later decisions of the Tribunal, the e-mail transmission of the briefs shall be in Windows Word.

"B.3 Copies of all communication shall be sent to the Secretariat of the ICC Court.

B.4 Larger submissions shall be preceded by a Table of Contents.

B.5 Submissions of documents shall be submitted unbound in binders separated from Briefs and proceeded by a list of such documents consecutively numbered with consecutive numbering in later submissions (C-1, C-2 etc., for Claimant; R-1, R-2 etc, for Respondents). As far as possible, in addition, documents shall also be submitted in electronic form (preferably in Windows Word, otherwise in Acrobat)".

B.5.a Furthermore, the term "documents" includes all categories of exhibits a Party wishes to rely on,

including, but not restricted to, correspondence, contracts, texts of legal provisions, cases, legal authorities and other publications.

For certain categories of documents, a Party may create separate consecutive numberings, such as for legal texts, cases, authorities and other documents, to be continued in later submissions.

"F. Place of Arbitration

F.1 In accordance with the arbitration clause upon which the Claimant has based this arbitration, Paris (France) is the place of arbitration.

F.2 This is without prejudice to Hearings and Meeting being held at other places in accordance with the ICC Rules 14.2."

"G. Other Particulars Regarding the Procedure

G.1 The Procedure shall be in accordance with the ICC Rules of arbitration in force as from 1 January 1998.

G.2 The language of the arbitral procedure shall be English".

3. Bifurcation

3.1 Section 4.1 of Procedural Order n. 1a is recalled:

"It was agreed, as jurisdiction is a major object of dispute between the Parties in this arbitral procedure, that it be dealt with separately in a first stage of the procedure, and that the merits be taken up in a later stage, if and in so far as the Tribunal accepts to have jurisdiction".

3.2 There are two major aspects of jurisdiction that have been contested:

a) Validity of the arbitration Clause:

b) Has Respondents n. 2 i.e. COPEL GENCO, submitted to arbitration, even if the arbitration clause were found to be valid regarding Respondents n.1?

Both aspects as well as other aspects of jurisdiction shall be dealt with Interim Order the first stage of the procedure.

3.3 Furthermore, this first stage of the procedure shall also deal with the Claimant's Application for Interim Order as qualified hereafter.

4. Timetable on Jurisdiction

4.1 As the Parties, before the constitution of the Tribunal, have already submitted several and extensive briefs and exhibits regarding jurisdiction and thus are well aware of the major positions, of the other side, in order to proceed with the procedure as efficiently as possible, the simultaneous exchange of briefs seems appropriate. Therefore, the following timetable is suggested by the Tribunal:

4.2 By 3 May 2004, the Parties, simultaneously, submit new consolidated Briefs with all their arguments on Jurisdiction, accompanied by all documents and any legal expert witness statements on which they wish to rely in that respect.

4.3 By 17 May 2004, the Parties, simultaneously, submit Reply Briefs regarding jurisdiction, accompanied by all further documents and any legal expert witness statements on which they wish to rely in rebuttal.

4.4 On 16 June 2004 at 3 p.m. German time, Pre-Hearing Conference by telephone on procedural matters between the Parties and the Tribunal (or its Chairman, if considered sufficient by the Tribunal), unless this is found not to be necessary.

4.5 Soon thereafter, Tribunal issues Procedural Order regarding details of the Hearing on Jurisdiction.

4.6 On 6 and 7 July 2004, Hearing on Jurisdiction.

4.7 By 9 July 2004, Transcript of Hearing is received by Parties and the Tribunal.

4.8 As soon as possible thereafter, the Tribunal issues its decision on jurisdiction.

5. Timetable on Application for Interim Order

5.1 By 10 May 2004, Respondents submit their response to Claimant's Application for Interim Order, accompanied by all documents and any witness or expert witness statements on which they wish to rely in that respect.

5.2 By 24 May 2004, Claimant submits its comments on Respondents above Response to its Application for Interim Order, accompanied by all documents and any witness or expert witness statements on which it whishes to rely in that respect.

5.3 By 9 June 2004, Respondents submit their Reply to Claimant's above comments regarding the Application for Interim Order accompanied by all documents any witness or expert witness statements on which it whishes to rely in that respect.

5.4 Thereafter, the Tribunal intends to rule whether it can decide regarding the Application for Interim Order on the basis of the submissions, by the Parties or whether it considers any further procedure necessary including the option to discuss the matter further at the occasion of the Hearing on Jurisdiction.

5.5 Should the Tribunal rule that such a discussion is to take place, it will take place on 8 July 2004 after and at the same place as the Hearing on Jurisdiction.

6. Evidence and Requests for Disclosure of Documents

6.1 The Tribunal takes is that, for the first stage of the procedure, the Parties will not submit any requests for disclosure of documents from the other side.

6.2 As soon as possible, the Parties will have a discussion and make every effort possible to agree on an exchange of information and documents, and will inform the Tribunal, which encourages such efforts, regarding the results.

6.3 However, should the Parties not agree and such requests for production of documents be submitted to the Tribunal, the Tribunal intends to use, as an additional non-binding guideline, the new "IBA Rules on the Taking of Evidence in International Commercial Arbitration", always subject to changes considered appropriate in this case.

7. Documentary Evidence

7.1 All documents considered relevant by Parties shall be submitted with their Briefs in the manner established in Sections 2.B.5 and 2.B.5 a and at the times set in the Timetables.

7.2 The Tribunal has taken note of the sets of documents so far submitted by the Parties before the constitution of the Tribunal. For obvious reasons, these documents were not yet submitted in accordance with the rulings in Section B.5 of the Terms of Reference (cited above under Section 2). In order to enable all concerned to make the most efficient use of all documents on which the Parties wish to rely regarding jurisdiction, with their Briefs due under Section 4.2. above, the Parties are requested to submit documents as follows:

By 3 May 2004, Claimant is requested to re-submit its documents numbered 1 to 20, plus any further documents, unbound in tworing binders, each document marked by a divider, numbered C1, C2, C3 etc, all preceded by a list of the documents;

By 3 May 2004, Respondents are requested to re-submit their documents submitted with COPEL's Answer to the Request for Arbitration numbered 1 to 77, and both Respondents' Challenge of Jurisdiction numbered again 1 to 25, plus any further documents, in two-ring binders, each document marked by a divider, in one consecutive numbering R1, R2, R3 etc, all preceded by a list of the documents.

In later submissions, the numbering shall be continued and the lists of documents updated.

7.3 New factual allegations or evidence shall not be any more permitted after the respective dates indicated in the above Timetables.

7.4 Documents in a language other than English shall be accompanied by a translation into English.

8. Factual Witness Evidence

8.1. The tribunal takes in that, in the procedure on jurisdiction, the Parties do not intend to submit factual witness testimony.

8.2. However, if and in so far as the Parties wish to present witness testimony regarding jurisdiction, and in the procedure regarding the Application for Interim Order, written Witness Statements of all witnesses shall be submitted together with their Briefs mentioned above by the time limits established in the Timetables.

8.3. Should Section 8.2. become applicable, in order to make most efficient use of time at the Hearing, written Witness Statements shall generally be used in lieu of direct oral examination though exceptions may be admitted by the Tribunal. Therefore, insofar as, at the Hearing, such witnesses are invited by the presenting Party or asked to attend at the request of the other Party, the available hearing time should mostly be reserved for cross-examination and redirect examination, as well as for questions by the Arbitrators.

9. Expert Evidence

9.1. Statements of experts may be submitted as provided in the Timetables above.

9.2. Should the Parties wish to present factual expert testimony, the same procedure would apply as for factual witnesses.

10. Hearing on Jurisdiction

Subject to changes in view of the further procedure up to the Hearing:

10.1 Two days are considered as sufficient for a Hearing on Jurisdiction.

10.2 Dates: 6 and 7 July 2004 (see timetable)

10.3Place of the Hearing:

Hotel Raphael

Salon La Bibliotheque

(…)17, Avenue Kléber

F-75116 Paris

Tel. 0033-1-5364 3200

Fax 0033-1-5364 3201

Reservation@raphael-hotel.com

www.raphael-hotel.com

10.4 Short opening statements by the Parties of not more than one hour each.

10.5 No new documents may be presented at the Hearing. But demonstrative exhibits may be shown using documents submitted earlier in accordance with the Timetable.

10.6 Taking into account the time available during the period provided for the Hearing in the Timetable, the Tribunal intends to establish equal maximum time periods both for the Claimants and for the Respondent which the Parties shall have available. Changes to that principle may be applied

for at the latest at the time of the Pre-Hearing Telephone Conference.

10.7 A transcript shall be made of the Hearing and sent to the Parties and the Arbitrators as provided in the Timetable. The Parties shall try to agree on and make the necessary arrangements in this regard and shall inform the Tribunal accordingly not later than 4 weeks before the Hearing, i.e. by 11 June 2004.

10.8 Should the Parties be presenting a witness or expert requiring interpretation, they are expected to provide the interpreter unless agreed otherwise.

10.9 Should more than two persons (as experts or witnesses) be heard at the Hearing who cannot testify in English, simultaneous interpretation shall be used. In such case, the Parties shall try to agree on and make the necessary arrangements in this regard and inform the Tribunal not later than 4 weeks before the Hearing, i.e. by 11 June 2004.

11. Post Hearing Briefs

Should witnesses or experts be examined at the Hearing, Post Hearing Briefs shall be submitted within one month after the Hearing.

12. Extensions of Deadlines and Other Procedural Decisions

12.1 Short extensions may be agreed between the Parties as long as they do not affect later dates in the Timetable and the Tribunal is informed before the original date due.

12.2 Extension of deadlines shall only be granted by the Tribunal on exceptional grounds and provided that a request is submitted immediately after an event has occurred which prevents a Party from complying with the deadline.

12.3 The Tribunal indicated to the Parties, and the parties took note thereof, that in view of travels and other commitments of the Arbitrators, it might sometimes take a certain period for the Tribunal to respond to submissions of the Parties and decide on them.

12.4 Procedural decisions will be issued by the chairman of the Tribunal after consultation with his co-arbitrators or, in cases of urgency or if a co-arbitrator cannot be reached, by him alone.

13. Results of this Meeting

The Parties, within one week after receiving this Order, may comment on it, if they feel that a result is not correctly recorded. Taking into account such comments, the Tribunal will then examine whether any changes seem appropriate."

21. On 3 May 2004, in accordance with the timetable established, the Parties submitted their briefs on jurisdiction (C I jur and R I jur).

22. On 17 May 2004 the Parties submitted their Reply Briefs (C II jur and R II jur) regarding jurisdiction.

23. On 15 June 2004 Claimant submitted a decision dated June 5, 2004, rendered by Mr. Ruy Fernando de Oliveira as the Reporting Justice of the Appellate Court of State of Paraná, which reversed the ruling of the Curitiba Treasury Court declaring the nullity of the arbitration clause and the associated injunctive relief previously granted to COPEL, and directing that this arbitration should be permitted to proceed unimpeded.

24. A Pre-Hearing Conference on procedural matters was held by telephone on 16 June 2004.

25. On 19 June 2004 the Tribunal issued Procedural Order No. 5 (PO No. 5) containing the results of the Pre-Hearing Conference as follows:

"1. Introduction

1.1. This Order takes into account the submissions by the Parties and, particularly, the results of the Pre-Hearing Conference by telephone on June 16, 2004. In this context, it is noted that Co-Arbitrator

Prof. Fontoura could not be reached under the telephone number he had indicated for that telephone conference, but that in view of the fact that all issues for this conference had been thoroughly pre-discussed between all three members of the Tribunal the Parties agreed with the remaining members of the Tribunal that, nevertheless, the telephone conference should proceed. The following results have been discussed with Prof. Fontoura and he agrees as well.

1.2. Furthermore, the Parties are invited to carefully take into account all earlier rulings in Orders of the tribunal and letters of its Chairman, unless they have been changed by later rulings or rulings in this Order.

1.3. Particular attention is drawn to Section 10 of Procedural Order No. 2.

2. Changes or Additions to the Agreed Procedure and Timetable

2.1 Regarding Claimant's letter of June 1, 2004, asking for leave to supplement its Application for Interim Order:

Claimant may submit such a supplement by June 23, 2004 of up to 6 pages.

Respondents may submit a reply thereto by June 30, 2004 of up to 6 pages.

2.2 Parallel thereto, in view of Claimant's letters of June 15, 2004, to Respondents and the Tribunal, the Parties are invited to bilaterally try to agree on issues dealt with in the Application for Interim Order.

2.3 Using the option provided in Section 5.4. of the Procedural Order No. 2, the Tribunal has decided that it would be helpful to have a further discussion regarding the Claimant's Application for Interim Order and that this discussion shall take place after the Hearing on Jurisdiction in Paris as "Hearing II". At that time, the Parties shall also report on the results of their bilateral consultations regarding possible agreements under Section 2.2. above.

2.4 The Tribunal has taken note of the many and voluminous exhibits submitted by the Parties together with their briefs. As only few of these exhibits will be used in the limited time available at the Hearings, to avoid that all exhibits have to be transported to Paris, the members of the Tribunal intend to bring to the Hearings all of the Parties' briefs (without exhibits) as well as the major legal documents (Contracts, Brazilian and French Arbitration Laws etc), but invite the Parties to prepare and provide at the Hearings to each member of the Tribunal and to the other Party a "Hearing Binder" containing copies of those further exhibits or parts of exhibits to which they intend to refer in their oral presentations at the Hearings. If possible, the contents of the Hearing Binder shall also be handed over on a CD.

3. Time and Place of Hearings

The Hearings shall be held at the Hotel Raphael as indicated in more detail in Section 10 of Order No. 2.

Hearing I on Jurisdiction:

Starting Tuesday July 6, 2004 at 9:30

Ending at a time set after consultation with the Parties,

At the latest, in the afternoon of July 7, 2004.

Hearing II on Application for Interim Order

Starting after the end of Hearing I at a time set in consultation with the Parties during Hearing I

Ending, at the latest, in the afternoon of Thursday July 8, 2004.

4. Intention and Scope of the Hearings

4.1 In view of the many and voluminous submissions and documents filed by the Parties before the Hearing, there is no need to repeat their contents at the Hearing.

4.2 Insofar as the Parties have submitted opinions of legal experts, the Tribunal does not consider it necessary to have oral examination at the Hearings. In so far as a Party wishes to further confirm or object to such legal opinions, it may do so in its oral pleadings by Counsel or Co-Counsel of its choice during the Hearings (which will be later available by transcript) and may submit a written and electronic summary of its respective pleading at the Hearing.

5. Agenda of Hearings

5.1 Agenda for Hearing I (on Jurisdiction):

The Tribunal notes that neither Party has submitted statements of witnesses or experts on facts regarding jurisdiction. Taking this into account, the following Agenda is established:

1. Introduction by the Chairman of the Tribunal.

2. 1st Round Statements by the Parties of not more than two hours each: in the morning by the Respondents (together) and in the afternoon by the Claimant.

3. Further Questions by the Arbitrators (who, however, may raise questions at any time during the presentations by the Parties)

4. In the morning of the second day 2nd Round Statements by the Parties of not more than one hour each for first the Respondents (together) and then the Claimant, but each only in rebuttal to the statement by the other side.

5. Further Questions by the Arbitrators, if any.

5.2 Agenda for Hearing II (on Application for Interim Order):

In so far as the Parties have submitted witness statements of fact regarding this Application, the Tribunal does not consider it necessary to have oral examination at the Hearing. In so far as a Party wishes to further confirm or object to such factual testimony, it may do so in its oral pleadings during the Hearings (which will be later available by transcript) and may submit a written and electronic summary of its respective pleading at the Hearing. Taking this into account, the following Agenda is established:

1. Introduction by the Chairman of the Tribunal.

2. Opening Statements by the Parties of not more than 60 minutes each for first the Claimant and then the Respondents (together).

3. Remaining Questions by the members of the Tribunal who, however, may raise questions at any time during the statements by the Parties.

5.3 Daily Timing

To give sufficient time to the Parties and the Arbitrators to prepare for evaluate each part of the Hearings, the daily sessions shall not go beyond the period between 9:30 a.m. and 5:30 p.m. However, the Tribunal, in consultation with the Parties, may change the timing during the course of the Hearings.

6. Others Matters

6.1 In order to let the members of the Tribunal concentrate on the procedural and substantive aspects of the Hearing it is considered necessary to have a support person available to deal with logistics shortly before and during the Hearing. As the Parties, by their letters of June 14, 2004, have agreed to the participation of Prof. Hunter's research assistant in the Hearing, the Tribunal intends and the Parties have agreed to appoint Mr. Gui Conde e Silva for that function in consultation with the ICC. This will be the most cost effective solution, as Prof. Hunter has agreed that he will still bear the related travel and accommodation costs and that only an hourly rate of US$ 50.00 will have to be paid for Mr. Conde as expenses of arbitration in this case.

6.2 Section 10.7 of Order No. 2 is recalled, recording the agreement of the Parties on commonly

retaining a court reporting service for the Hearing. In accordance with Section 10.7, the Claimant has informed the Tribunal in this regard by its letter of June 10, 2004 that it has retained the SBW court reporting service. By letter of June 14, 2004, Respondents have agreed thereto.

6.3 Sections 10.8 and 10.9 of Order No. 2 are recalled regarding witnesses and experts requiring interpretation to and from English. In accordance with Section 10.9, the Claimant has informed the Tribunal in this regard by its letter of June 11, 2004, that it proposes Mr. Eneas Theodoro as interpreter. Respondents, by letter of June 14, 2004, have agreed thereto. However, as it was agreed that neither fact witnesses nor legal experts shall be examined at the Hearings, no interpretation service is needed at the Hearings.

6.4 The Parties shall coordinate with the court reporting service, the support person of the Tribunal and the service of the Hotel Raphael in advance of the Hearing to assure that the services are available and ready to start at the beginning of the Hearing. This shall include that microphones are set up for all those speaking in the Hearing room to assure easy understanding over a loud speaker.

6.5 The Tribunal may change any of the rulings in this order, after consultation with the Parties, if considered appropriate under the circumstances".

26. On 24 June 2004 Claimant submitted its Surrebuttal concerning its Application for Interim Order. The Reply to the Surrebuttal was submitted by Respondents on 1 July 2004. Thereby Respondents requested dismissal of the Application for Interim Order in the entirety.

27. On 6 and 7 July a Hearing on Jurisdiction took place in Paris in accordance with Procedural Order No. 5. The hearing was attended by the members of the Tribunal. Counsel for Claimant were Mr. Mark Baker together with his colleagues from the Fulbright & Jaworski law firm Mr. Arif Ali and Mr. Baiju Vasani as well as lead counsel from the co-counsel law firm Xavier, Bernardes, Bragança, Mr. João Afonso de Assis and his colleagues Mr. Marcio Cordeiro and Mr. Sergio Laclau. Counsel for Respondents were Mr. Marcelo Antonio Muriel from Pinheiro Neto Advogados appeared together with his colleagues Mr. Fernando Medici Junior and Mr. Marcos Chaves Ladeira. They were joined by Prof. Luis Edisson Fachim, special consultant for COPEL.

28. Before the parties' counsel started their arguments on the jurisdiction issue, counsel for Respondents requested, and was granted, permission of the Tribunal to submit a decision rendered ex parte during the Brazilian judicial holidays by the Chief Justice of the Appellate Court of the State of Paraná, Mr. Otto Luiz Sponholz, at the request of COPEL in a writ of mandamus against the previous decision of the Appellate Court of the State of Paraná (see Transcript pages 8 to 12 and Portuguese original and English translations in file). This decision overruled the earlier decision of the Appellate Court of the State Court of Paraná, referred to above, directing that the arbitration should proceed unimpeded, and reinstated the injunction and other relief granted to COPEL by the Curitiba Treasury Court. However, this decision was suspended by a new decision rendered by the Chief Justice, Mr. Ruy Fernando de Oliveira, dated August 5, 2004, suspending once again the decision taken by the Lower Court of Curitiba (submitted by Claimant's letter of August 6, 2004, with original and English translation of decision). The records do not reveal that any appeal has yet been decided by the Appellate Court of the State of Parana so that it seems that for the time being the decision of the Lower Court of Curitiba remains suspended.

29. The Hearing on Jurisdiction was recorded and a transcript was to be made available to the Parties upon receipt of the respective payment (the Chairman, hearing on jurisdiction, 7 July 2004, transcript, p. 89). The Tribunal determined that post hearing briefs were neither foreseen by any procedural order nor was there any need for them (the Chairman, hearing on jurisdiction, 7 July 2004, pp. 85 ff). A decision on the jurisdiction issue would be issued by the Tribunal as soon as possible, pursuant to Procedural Order No. 2.

30. The Hearing on Jurisdiction was immediately followed on 7 July 2004 by a Hearing on the Claimant's Application for Interim Order. The relief requested was defined by Claimant as "to issue an order authorizing us, permitting us, to conduct a baseline evaluation of the plant". (Mr. Ali, hearing on application for interim order, 7 July 2004, transcript, p. 11). The Parties indicated that they would attempt to reach a procedural agreement on the subject matter, and the application for interim order was suspended until further notice as proposed by Claimant (Statement of Mr. Baker, hearing on application for interim order, 7 July 2004, transcript, p. 67).

F. Relief Sought by the Parties regarding Jurisdiction

F.I Relief Sought by Respondents regarding jurisdiction

31. As identified in Sections 208, 210 and 211 of Respondents' Challenge of Jurisdiction (R I jur), Respondents' request the Tribunal:

"208. – In light of all the above, the Respondent COPEL GENCO hereby requests this Honorable Tribunal to render an award recognizing the inexistence of any arbitration commitment between Claimant and COPEL GENCO. In the event no such determination is accepted by this Honorable Tribunal, Respondent COPEL GENCO hereby reaffirms and confirms all the allegations herein regarding the nullity of the arbitration clause.

210. – As a consequence, the Respondents hereby request that this Honorable Tribunal fully grant this Challenge of Jurisdiction, based on any of the reasons expounded above, therefore dismissing this case in its entirety and ordering the Claimant to reimburse to the Respondents all the amounts incurred by them with the processing of this present arbitration proceeding, including but not limited to lawyers' fees and travel expenses.

211. – Alternatively, in the event that this Honorable Tribunal declares the arbitration clause valid, effective and binding upon both the Respondents, which is herein mentioned for the sake of the argument only, the Respondents further request that this Honorable Tribunal should determine which of the subjects disputed in this arbitration are considered to be arbitrable, so that the limits of the jurisdiction to be eventually exercised by this Honorable Arbitral be determined".

F.II Relief Sought by Claimant regarding Jurisdiction

32. As most recently identified in Section IX of the Claimant's Response regarding Jurisdiction (C II jur), the Claimant seeks the following relief regarding jurisdiction:

"(1) Determine that the arbitration agreement between the parties is valid and binding and that this Tribunal has jurisdiction to decide the parties' disputes and dismiss COPEL's jurisdictional objections in their entirety;

(2) Find that COPEL has breached the Agreement's arbitration clause by commencing actions in the local state courts of Paraná, and, accordingly,

(a) award UEGA damages equal to the amounts incurred in defending against the state court actions;

(b) order COPEL to indemnify UEGA for any further costs, fines or expenses that UEGA must pay as a result of or in connection with COPEL's local litigation;

(3) Order COPEL to pay UEGA's attorneys' fees and costs in connection with defending against COPEL's jurisdictional objections before this Tribunal;

(4) Require COPEL to pay its share of the advance on costs, and to the extent that it does not, prohibit COPEL from asserting any counterclaims in this arbitration".

G. Short Summary of Contentions regarding Jurisdiction

G.I Short Summary of Contentions by Respondents

33. The Respondents challenge the Tribunal's jurisdiction and assert that the arbitration clause in the PPA should be declared null and void on the following grounds:

• The arbitration is a domestic arbitration, not an international arbitration, because all parties are of Brazilian nationality, they have their principal places of business in Brazil, the subject matter of the PPA is in Brazil and there are no cross-border elements in the transaction.

• Mixed-capital companies under state control, such as the Respondents, require express legislative authorization to enter into arbitration agreements. Respondents were not been granted such permission to enter into an arbitration agreement. Clause 34.3 of the PPA is therefore invalid.

• The principle of *Kompetenz-Kompetenz* cannot be applied in the determination of the Tribunal's jurisdiction as the scope of this principle is limited to cases where jurisdiction is already validly conferred and only the limits of jurisdiction are in question.

• The Brazilian Court is the only competent authority to scrutinize the validly of the arbitration clause. The Court has already held that the arbitration clause is null and void.

• The competence of the Brazilian Regulatory Authority (ANEEL) was limited to the field of enforcement of regulatory rules only.

• The subject-matter of the dispute is non-arbitrable according to Art. 1 BAA as public policy issues are involved.

• Arbitration proceedings should not take place because any award would not be enforceable in Brazil.

Respondent n. 2, COPEL GENCO, was not a signatory to the arbitration agreement but merely an agent acting for and on behalf of the principal, i.e. Respondent n. 1, COPEL.

G.II Short Summary of Contentions by Claimant

34. The Claimants' response to the Respondents' challenge to the Tribunal's jurisdiction may be summarized as follows:

• The arbitration is an international arbitration because it is located in Paris under the ICC Rules and because the underlying transaction involves international interests.

• UEGA contends that the principle of *Kompetenz-Kompetenz* is applicable in the present case and that the Tribunal therefore has power to rule on its own jurisdiction.

• Brazilian law requires mixed-capital companies to be treated in the same manner as private companies, and Respondents therefore had capacity to enter into the arbitration agreement,

• The subject-matter of the dispute is arbitrable under the BAA.

• COPEL GENCO signed the "First Amendment" to the PPA both of which form an indivisible economic whole. The "First Amendment" by its title implies that the PPA is at its foundation and that it cannot have a separate and independent existence on its own. Thus, COPEL GENCO is a proper party to the arbitration.

H. Considerations and Conclusions of the Tribunal regarding Jurisdiction

35. The Tribunal has carefully examined all of the many and voluminous submissions by the Parties. Hereafter, its considerations present those aspects which the Tribunal considers as the most relevant in the respective context.

H.I Preliminary Considerations

36. The separability of the arbitration agreement as an agreement independent of the transaction contract in which it is contained is an internationally accepted principle. Thereby the fate of the arbitration clause is dissociated from the fate of the PPA in which it is contained. The principle has been expressly adopted both in French international arbitration law (*rf.* Fouchard, Gaillard, Goldman on International Arbitration, 1999, para. 391) and jurisprudence (*e.g.* Établissements Gosset v. Maison Frères Carapelli, Court de Cassation 1e Ch. Civ., No. 246, 7 May 1963, pp. 208 f). Furthermore, it is expressly recognized by the BAA, which provides in Art. 8:

"The arbitration clause is autonomous from the contract in which it is included, meaning that the nullity of the latter does not necessarily imply the nullity of the arbitration clause". […]

37. The ICC Arbitration Rules adopted the principle of separability as expressed in Art. 6(4):

"Unless otherwise agreed, the Tribunal shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is non-existent provided that the Tribunal upholds the

validity of the arbitration agreement. The Tribunal shall continue to have jurisdiction to determine the respective rights of the parties and to adjudicate their claims and pleas even through the contract itself may be nonexistent or null and void".

38. The principle of separability as described above is not challenged by either party. In that regard Respondents clarified their position as follows (R II jur p. 11 paras 31 and 32):

"31. – The Respondents, however, never argued nor suggested that the nullity of the arbitration clause contained in the PPA derived exclusively from the ineffectiveness and/or nullity of the PPA. The Respondents are well aware of the principle of separability, so that no additional comments will be necessary.

32. – If and when this case will ever reach a point of being examined on its merits, this Honorable Arbitral Tribunal will indeed share Respondents' position that the PPA is entirely null and void, because some of its most essential provisions are indeed null and void. For now, it suffices to stress that the nullity of the arbitration clause contained in the PPA derives from reasons directly linked to arbitration clause itself, not necessarily to the PPA as a whole".

39. By applying the Principle of separability it follows that issues concerning the alleged invalidity of the PPA itself are substantive issues to be determined in the arbitration at a later stage if the Tribunal indeed has jurisdiction. These matters do not affect the validity of separate arbitration agreement. Equally, any decision regarding the validity of the arbitration agreement does not prejudge what the Tribunal might decide regarding the validity of the PPA in general in a procedure on the merits of this case.

40. It might be noted that, in cases where the validity of an arbitration clause without any obvious defects and indisputedly signed by both parties is nevertheless challenged by a party, the burden of establishing the invalidity of the clause shifts to the challenging party.

H.II International Character of the Contractual Relationship and of this Arbitration

1. Arguments by Respondents

41. Respondents' view is that the character of both the contract and the arbitration is purely domestic (R I jur, paras. 49 et seq. and 59 et seq.).

The criteria used to establish the notion of the domestic nature are the following:

(i) the domicile of both parties in Brazil,

(ii) both parties are of Brazilian nationality,

(iii) both parties have their principal place of business in Brazil and

(iv) execution and performance of the PPA is limited to Brazilian territory.

(R I jur, para. 56)

Additionally, from an economic point of view it is observed that:

(i) no transactions under the PPA have an economic impact in any other State than Brazil,

(ii) there are no cross-border transfers of money,

(iii) no international commercial interests are at stake and

(iv) there are no repercussions on the reserves of different states.

(R I jur, para. 57)

42. According to the Respondents' assessment the same criteria used for the characterization of the contract should apply to the characterization of the nature of the arbitration. This contention is based on the perception that the BAA does not distinguish between domestic and international arbitration but only between domestic and foreign awards as in Art. 34 of the BAA (R I jur, para. 61). The latter

distinction, however, has no impact on the nature of the arbitration itself as evidenced in Brazilian scholarly writings (R I, para. 65).

43. Respondents emphasize that their perception regarding the domestic nature of the arbitration is in line with international treaties and foreign legal regimes (R I jur, paras. 68 e seq.): According to Art. 1492 of the French Civil Code of Procedure *"[e]st international l'arbitrage qui met en cause des intérêst du commerce"*. Thus, the French Law resorts to the economic criterion alone to assess the character of an arbitration. This concept also underlies the European Convention on International Arbitration as expressed its Art. 1. The 1923 Geneva Protocol on Arbitration Clauses considers an arbitration to be international if one of the parties is subject to the jurisdiction of a foreign state. Furthermore, Respondents emphasize that Art. 1(3)(b)(i) of the UNCITRAL Model Law on Arbitration must not be interpreted in a way that the foreign venue of an arbitration is sufficient to characterize it as international as such an interpretation opens space for fraud. This reasoning is as well recognized by international scholars (R I jur, paras. 74-77).

44. There is no indication in the present dispute that international commercial interests are affected. In fact, the only international element of this arbitration is its venue, i.e. Paris, France. However, this is not sufficient to constitute the international nature of the arbitration (R I jur, para. 66). The venue is often chosen by the parties as a matter of convenience or even determined by an arbitration institution and is not correlated to the dispute. In the same manner, the place where an arbitral award is rendered is only relevant in later enforcement proceedings when confirmation of the award by the Federal Supreme Court might be necessary. Besides, the fact that an award is characterized as foreign does not necessarily mean that the arbitration is international (Statement of Mr. Muriel, hearing on jurisdiction, 6 July 2004, p. 22).

45. Hence, due to the lack of a sufficient connection with a State other than Brazil, the nature of this arbitration is purely domestic.

2. Arguments by Claimant

46. UEGA maintains the position that the PPA is a private law contract. Reliance on the concepts of domicile and nationality in this context is not only a formalistic approach but also a position rejected by the ICC. Instead, UEGA provides various interpretations of the term "international" regarding the nature of the contract and the arbitration. These interpretations have in common that "international" is understood in a broad and extensive manner, either as *"[…] ultimately to exclude only those situations […] where all relevant elements of the contract in question are connected with one country only"* (UNIDROIT, International Institute for the Unification of Private Law, *Principles of International Commercial Contracts*, Rome 1994; *see* C II jur, pp. 9 f and C-120).

47. UEGA invokes international and Brazilian Laws to elaborate the international character of the arbitration (C II jur, pp. 10 ff):

(i) According to Art. 1(3) of the UNCITRAL Model Law on International Commercial Arbitration (Cl. Exh. C-122) an arbitration is international if the place of arbitration is situated outside the State in which the parties have their places of business.

(ii) The BAA stipulates in Chapter 6, Art. 34, that "a foreign award is considered to be one that has been rendered outside the national territory (C-46)". As such a later award rendered by the Tribunal seated in Paris would be subject to a special homologation regime under the BAA.

(iii) Art. 1492 of the French New Civil Procedure Code provides that an arbitration is international "if it implicates international commercial interests (C-124)".

48. UEGA emphasizes that indeed international commercial interests are of concern in the present arbitration. The reason is the involvement of a foreign investor in the dispute as UEGA is ultimately controlled by a company organized under U.S. laws (C II jur, pp. 12 f). UEGA is a special purpose company formed on 28 April 1998 by a conversion of a consortium of then three Brazilian companies. The purpose is the development of thermal power generation projects. COPEL and Petroleo Brasileiro S.A. – Petrobras –, the Brazilian national oil company, each hold 20% of the equity capital of UEGA. The remaining 60% are held by El Paso Empreendimentos e Participações Ltda. (El Paso Brasil) which itself is owned by an entity – El Paso Corp. – incorporated in the United States of America (R I jur, paras. 141-145; C I jur, para. 9). The main share of the total cash contribution to the

plant, over USD 180,000,000, was funded by El Paso Corp., a stock exchange traded US Fortune 500 company. Thus, the project was financed by foreign investment. Besides, the Araucária Project was to be financed by other multilateral sources including the United States Export-Import Bank and the Overseas Private Investment Corporation as well. Therefore, the project was built in accordance with various international standards and offshore arrangements in order to meet the needs of those sourcing the required funds from outside Brazil. Likewise, payments were indexed to the US Dollar and Paris was chosen as the place of any arbitral proceedings (Mr. Baker, hearing on jurisdiction, 6 July 2004, transcript, pp. 105 ff).

3. The Tribunal

49. As a consequence of the prevailing concept of separability, for the validity of the arbitration agreement, the juridical character of the arbitration alone is decisive.

50. So far as the arbitration is concerned, the Parties agreed to resolve disputes by ICC Arbitration to be held in Paris. This is, therefore, a classical "international arbitration" in the sense that the seat of the arbitration chosen by the parties has no connection with either Party, or either owners. The arbitration is also to some extent a "French" arbitration in the sense that the choice of Paris as the juridical seat means that the lex ârbitri (the law governing the arbitration itself) is French law. All awards (preliminary, partial, final, etc) will be "French awards" for the purposes of the New York Convention and other conventions; and the French courts will have the supervisory jurisdiction over the proceedings and over awards that are rendered by the Tribunal.

51. Under French law (Art. 1492 of the Code of Civil Procedure) "an arbitration is international when it involves the interests of international trade". The term "international trade" is considered *"as meaning all exchanges of property, services or assets involving the economies of at least two countries"* (Fouchard, Gaillard, Goldman on International Arbitration, 1999, para. 102). Therefore, *"any transaction involving movement of […] funds across national boundaries, or concerning the economies or currencies of at least two countries, necessarily involves the interests of international trade"* (Fouchard, Gaillard, Goldman on International Arbitration, 1999, para. 115). Taking these criteria into account, the present arbitration must thus be regarded as international due to the Araucaria project being financed to a large extent by foreign funds, put in by the US based parent company of El Paso Brazil Ltda., the controlling quotaholder of UEGA, and other non-Brazilian investors. Furthermore, under the PPA, the price is pegged to foreign currency. Thus, funds moved cross-border and different currencies were concerned.

52. Through the BAA does not differentiate between domestic and international arbitrations, under Brazilian law this award is deemed to be "foreign" as it is rendered in Paris. Art. 34 of the BAA reads:

"[…] A foreign arbitral award is an award made outside the national territory".

53. The transaction is contained in a contract between two Brazilian companies and is expressly governed by Brazilian law. To this extent it is a domestic transaction, in the sense that it is not a transaction like a contract for the international sale of goods. Nevertheless, the transaction involves several international elements, including the provision of foreign capital in order to realize the project. It cannot be considered as a purely internal domestic transaction. In view of the principle of separability, the issue, however, does not need to be decided, as the juridical character of the transaction itself under Brazilian law is irrelevant to the question whether this arbitration is international.

H.III The Law Applicable regarding Jurisdiction

1. Arguments by Respondents

54. Respondents contend that the issue of jurisdiction is governed solely by the substantive law chosen by the parties in the PPA, i.e. Brazilian Law (R I jur, para. 80; R II jur, para. 10). This finding is derived from the assertion that the issues to be discussed in the evaluation of the Tribunal's jurisdiction are all of substantive nature, *i.e.* the question of the Respondents' capacity to enter an arbitration agreement and the involvement of non-arbitrable rights (R II jur, paras. 7-9). Respondents argue that even if the arbitration was deemed international the substantive laws applicable to the contract remained the laws of Brazil (Mr. Muriel, at the hearing on jurisdiction, 6 July 2004, transcript, pp. 82 f).

55. Furthermore, Respondents point out that due to the domestic nature of the arbitration and the necessity to seek enforcement of a possible award in Brazil the *lex loci arbitri*, i.e., French Law, is as well irrelevant for the determination of the issue of jurisdiction (R II jur, para. 10).

56. As such, international laws, treaties and any "international public policy" as well as international arbitration precedents may not be applied on the jurisdiction issue. Moreover, reference to "the relevant trade usages" in Art. 17(2) of the ICC Rules may not be confused with a reference to the lex mercatoria as UEGA seems to purport (R II jur, para. 13). To support their distinction between the expressions "trade usages" and lex mercatoria, Respondents resort to the scholarly writing of Yves Derains and E. Schwartz. (R II jur, para. 14).

2. Arguments by Claimant

57. UEGA contests the domestic nature of the arbitration which is the premise for Respondents' contention that only Brazilian Law was applicable for the determination of jurisdiction. Contrarily, UEGA contends that the Tribunal may apply in addition to Brazilian Law as the law of the contract (Clause 35 PPA):

(i) the ICC Arbitration Rules, as the rules of arbitration agreed upon by the parties (Art. 5 BAA in connection with Clause 34.3 of the PPA),

(ii) French Law, as the lex loci arbitri,

(iii) international arbitral jurisprudence and

(iv) principles of international public policy

(*see* C I jur, para. 42)

58. In particular, UEGA invokes the following as what it contends to be internationally recognized concepts which it requests to be given due consideration by the Tribunal:

(i) A party may not be given the possibility to seek shelter from an arbitration it has agreed to in the first place, by resorting to its local courts;

(ii) The presumption of contractual and arbitral competence in international trade;

(iii) The presumption of the effectiveness and validity of the arbitration agreement;

(iv) The principles of *pacta sunt servanda* and *non concedit venire contra factum proprium*.

(*see* C II jur, p. 14)

59. Additionally, the law applicable to the evaluation of jurisdictional issues is by no means necessarily the substantive law governing the contract (C II jur, pp. 8 f). To support this contention UEGA invokes the ruling of the Tribunal in the Manaus case:

"[W]hen deciding about the validity and efficacy of the arbitration provision, and, in particular, the provisions that call for International Arbitration Rules, such as those of the ICC, the Arbitrators must not rely on the law at the parties have chosen to be applied to the merits of the dispute, but rather relay on the principles of international commercial law and in the Arbitration Rules the parties have referred to in their arbitration clause".

(Text submitted by Claimant: ICC Case No. 11559/KGA, at para. 71; *see* C II, p. 9 and C-119)

3. The Tribunal

60. The relevant provisions of the law applicable to each specific issue and sub-issue must be taken into account separately. Brazilian substantive law will govern the evaluation of all issues regarding the merits as chosen by the Parties in Clause 35 of the PPA. The international character of the arbitration, in the absence of any express choice of law by the parties regarding the applicable arbitration law, due to the express choice of Paris as the seat of arbitration, gives rise to the applicability of the French arbitration law and arbitral jurisprudence as the lex loci arbitri to issues of

jurisdiction. Furthermore, the ICC Arbitration Rules are applicable to these questions as the arbitration rules chosen by the parties according to Clause 34.3 of the PPA in connection with Art. 5 of the BAA which stipulates: *"If the parties, in the arbitration clause, select the rules of an arbitral institution or specialized entity, the arbitral proceedings shall be commenced and conducted pursuant to such rules […]"*.

61. The Award on Jurisdiction will be a "French Award" and as such subject to review in the French courts. Hence, the validity of the award will be assessed under French law. Determining jurisdictional matters in accordance with French law therefore reduces the risk of the award being susceptible to a later setting aside in its country of origin, France. Whether the ensuing unenforceability in other countries including Brazil is relevant as well, will be examined in a later chapter of this Award.

62. Furthermore, general principles of international arbitration and "relevant trade usages" (*rf.* Art. 17(3) of the ICC Rules) might be pertinent, although they are cautiously applied and are not relevant for the question of jurisdiction. However, they may only become relevant, if this procedure continues on the merits of the case.

63. Additionally, Brazilian law might apply to certain jurisdictional matters as the "personal law" governing the issue of the Parties' capacity in general and particularly the Parties' subjective arbitrability permitting a party to submit to arbitration (as will be discussed later in this Award) and as the law chosen by the Parties to govern the interpretation of the PPA including the arbitration clause contained therein.

H.IV Competence of this Tribunal to Decide on its Jurisdiction

1. Arguments by Respondents

64. The Respondents contend *"that no Tribunal under the ICC Rules or under any other rules of arbitration has jurisdiction (i) to decide whether or not it has jurisdiction over the Parties; and (ii) to decide the disputes arising out of the PPA […]"* (R I jur, para. 35).

65. This contention is premised on the two assumptions that (i) the arbitration clause contained in the PPA is null and void (*see, e.g.*, R I jur, para. 1) and (ii) the principle of *Kompetenz-Kompetenz* is therefore overridden in the present case (R I jur, para. 36).

66. The latter contention results from a restrictive understanding of the principle of *Kompetenz-Kompetenz*, i.e. that it does not accord to the Tribunal the authority to rule on its own jurisdiction but merely the power to determine the scope of an otherwise valid arbitration agreement. The Respondents point out that the principle of *Kompetenz-Kompetenz* cannot create jurisdiction where no such jurisdiction exists (*ex nihilo nihil fit*). (R I jur, paras. 41-46; R II jur, para. 17). This interpretation is based on the distinction between "jurisdiction" as the power to hear a case and the notion of "competence" as the position to define the limits under which "jurisdiction" can be exercised (R I jur, para. 39). Thus, even if the arbitration clause was, for the sake of argument, valid, the scope of the arbitration clause does not comprise adjudication of the jurisdiction issue (R II jur, para. 18).

2. Arguments by Claimant

67. UEGA is of the view that the Respondents' understanding of the principle of *Kompetenz-Kompetenz* as being limited to the determination of the scope of arbitration agreement but not its validity is unsustainable (C II jur, p. 7). The principle of *Kompetenz-Kompetenz* is well recognized by all legal regimes applicable to the determination of the jurisdiction issue, *i.e.* Art. 1466 of the French New Code of Civil Procedure, Art. 6(2) of the ICC Arbitration Rules and Art. 8 of the BAA (C I jur, paras. 48-51).

68. Jurisdiction to decide on its own competence is at this stage of the proceedings exclusively conferred on the Tribunal. This is evidence by Art. 267 of the Brazilian Code of Civil Procedure which stipulates that judicial actions have to be dismissed in the presence of an agreement to arbitrate (C I jur, para. 52). The possibility of parallel state court proceedings bears the risk of abuse by recalcitrant respondents and should therefore be avoided (C I, para. 53). Claimant refers to the teaching of Reisman, Craig, Park and Paulsson to substantiate its view on this issue (see the scholars' writing: International Commercial Arbitration: Cases, Materials and Notes on the Resolution of International Disputes, 1997, p. 646 as set forth in C-54; see also C-136b).

3. The Tribunal

69. The principle of Kompetenz-Kompetenz is recognized by both French law (*rf.* Art. 1466 of the New Code of Civil Procedure) and Brazilian law (*rf.* Art. 8 of the BAA) as awarding the Tribunal the power to determine its own jurisdiction. Respondents' distinction between jurisdiction and competence as well as its particular understanding of the concept of Kompetenz-Kompetenz could not be verified. Art. 8 of the BAA provides:

"[…] The arbitrator is competent to decide, ex officio or at the parties' request, on issues concerning the existence, validity and effectiveness of the arbitration agreement, as well as of the contract containing the arbitration clause".

Article 1466 of the French New Code of Civil Procedure stipulates:

"Where, before the arbitrator, one of the parties challenges the principle or the scope of the arbitrator's jurisdictional authority, the arbitrator himself shall rule on the validity or scope of his jurisdiction".

70. The Tribunal therefore possesses the competence to proceed with the arbitration although the validity of the arbitration agreement has been challenged by Respondents and is vested with the authority to rule on its jurisdiction. The Tribunal's decision on jurisdiction is subject to later review by the state courts at either the seat of arbitration or the place where enforcement under the 1958 New York Convention is sought.

71. This understanding of the principle of Kompetenz-Kompetenz is uniquely accepted all over the world and reflected by the ICC Arbitration Rules in Art. 6(2):

"If the Respondent does not file an Answer, as provided by Article 5, or if any party raises one or more pleas concerning the existence, validity or scope of the arbitration agreement, the Court may decide, without prejudice to the admissibility or merits on the plea or pleas, that the arbitration shall proceed if it is prima facie satisfied that an arbitration agreement under the Rules may exist. In such a case, any decision as to the jurisdiction of the Tribunal shall be taken by the Tribunal itself".

Respondents' contention that *"the principle of kompetenz-kompetenz does not create jurisdiction where no such jurisdiction exists"* is too narrow. The principle of Kompetenz-Kompetenz is indeed not intended to overcome the non-existence of a valid arbitration agreement in general, but to empower the tribunal to determine its jurisdiction if prima facie a valid arbitration agreement exists. More precisely, the principle of Kompetenz-Kompetenz enables the Tribunal to deny its jurisdiction without at the same time losing the basis for making such a decision.

72. In the present case, therefore, the Tribunal has no doubt that it has competence to decide on its jurisdiction.

H.V The Relevance of the Decisions of the Brazilian Courts

1. Arguments by the Respondents

73. Respondents had filed a lawsuit against UEGA before the Third Lower State Treasury Court of Curitiba in the Brazilian State of Paraná. When UEGA raised the defense of an existing arbitration clause the Court analyzed its validity and concluded that it was null and void (*see* final sentence of 15 March 2004; R-87). Thus, the case was not dismissed pursuant to Art. 267 of the Brazilian Code of Civil Procedure (R II jur, para. 27). The state court thereby excised its power to decide on the existence, validity and enforceability of the agreement to arbitrate even prior to a review of that issue by the Tribunal (R II jur, para. 24). Respondents request the Tribunal to consider the following points regarding the proceedings before the Brazilian state courts (R I jur, para. 24):

(i) The arbitration clause in the Power Purchase Agreement ("PPA") has been declared null and void by the Brazilian Courts as a matter of Brazilian public policy statutory provisions;

(ii) Claimant UEGA has not complied with the court order determining the suspension of this arbitration proceedings, and is therefore in contempt of court; and

(iii) the Courts of Brazil are effectively exercising their jurisdiction over the controversy between the

parties insofar as the motion for anticipated discovery is being processed.

74. The final word on the validity issue is necessarily given to the courts of Brazil, where an arbitral award has to be judicially confirmed by the Brazilian Federal Supreme Court in order to be effective and enforceable in Brazil (R II jur, para. 22). Indeed, the jurisdiction of the Brazilian state courts regarding the validity of the arbitration clause is by no means subsidiary to the one of the Tribunal as asserted by UEGA (R II jur, paras. 23 ff). Thus, Art. 8 of the BAA stipulates that arbitrators have competence to decide on jurisdiction. According to the wording of this provision, however, the arbitrator's competence is by no means "exclusive" or "the first" (Mr. Muriel, hearing on jurisdiction, 7 July 2004, transcript, p. 6). In this context Respondents emphasize that any Brazilian court having jurisdiction over regular cases has competence to evaluate the validity of arbitration clauses. This competence is not exclusively vested with the Federal Supreme Court (Statement of Mr. Muriel, hearing on jurisdiction, 6 July 2004, p. 21).

2. Arguments by the Claimant

75. UEGA asserts that it was Respondents' submission *"that this Tribunal cannot have competence to decide on its own competence in view of the alleged final ruling of the Brazilian courts regarding the invalidity of the Agreement's arbitration clause"* by referring the R I jur, paras. 35 to 47 (see C II jur, p. 4).

76. UEGA, however, contends that the ruling of the Brazil state court has no bearing on the Tribunal's competence to decide on the jurisdiction issue. The Tribunal is not bound by the finding of the court of first instance in the Paraná State. To the contrary, the Tribunal should not yield up its authority to evaluate the validity of the arbitration clause in order to meet the parties' expectations of justice (C II jur, p. 5). Claimant invokes the ruling of the Tribunal in ICC final award Case No. 10623 (see C-116) determining that *"in the event that the Tribunal considers that to follow a decision of a court would conflict fundamentally with the tribunal's understanding of its duty to the parties, derived from the parties' arbitration agreement, the tribunal must follow its own judgment, even if that requires noncompliance with a court order"* . (citation by Mr. Baker, hearing on jurisdiction, 7 July 2004, transcript, p. 53).

77. UEGA refers to an ICC Case were the sole arbitrator ruled in the final award that a state party could not *"unilaterally set aside the access of the order party to the system envisaged by the parties in their agreement for the settlement of disputes"*. (Ad hoc preliminary award, 14 January 1982, Elf Aquitaine Iran v. NIOC, XI Y. B. Com. Arb. 97 (1986); para. 24; see C II jur, p. 5 and C-117).

78. It is a consequence of the prevailing principle of *Kompetenz-Kompetenz* that control of Tribunal's decision on jurisdiction matters is only subsequent (C I jur, para. 52). In this spirit, the principle of *Kompetenz-Kompetenz* is in fact regarded as a "rule of chronological priority" (Fouchard, Gaillard and Goldman on International Commercial Arbitration, 1999, p. 401; see C-118 and C-136b). The subsidiary jurisdiction on the Brazilian courts is furthermore clarified by the provision of Art. 20 of the BAA (see C-136b).

79. Regarding the newly rendered decision concerning the writ of mandamus Claimant contends that, on the one hand the Chief Justice probably acted under political pressure and that, on the other hand, he is neither the natural judge of the case, nor a superior judge vested with jurisdiction over his colleagues who were at the time being on judicial vacation. Claimant further emphasized that it had not yet been officially served with the decision, which is therefore not effective.

3. The Tribunal

80. As the Parties have agreed that this Tribunal has its judicial seat in Paris and therefore is subject to French arbitration law, any decision of a Brazilian court or any other court as to the validity of the arbitration agreement is not binding on the Tribunal. Under French law as the lex loci arbitri, it is for the Tribunal to decide on the validity of the arbitration clause in the first instance. This decision may be reviewed by state courts only after an award has been rendered (rf. Lew, Mistelis, Kröll, Comparative International Commercial Arbitration, para. 15-22).

81. One of the consequences of the prevailing principle of Kompetenz-Kompetenz

"is to allow the arbitrators not to be the sole judges, but the first judges of their jurisdiction. In other

words, it is to allow them to come to a decision on their jurisdiction prior to any court or other judicial authority, and thereby to limit the role of the courts to the review of the award. […] the competence-competence principle can be defined as the rule whereby arbitrators must have the first opportunity to hear challenges relating to their jurisdiction, subject to subsequent review by the courts". (Fouchard, Gaillard, Goldman on International Commercial Arbitration, 1999, para. 660).

82. Under Brazilian law the procedure is outlined in Art. 20 of the BAA:

"§ 1 […] if the lack of jurisdiction of the arbitrator or of the Tribunal; as well as the nullity, invalidity or ineffectiveness of the arbitration agreement is confirmed, the parties shall have recourse to the State Court competent to decide the dispute. § 2 If such motion is not granted, the arbitral proceedings shall proceed normally, regardless of the possibility that such decision may be reviewed by the competent State Court, if an action as provided for in Article 33 of this Law is brought".

83. Brazil's commitment to modern international arbitration as expressed in the BAA and the subsequent approval by the Brazilian Supreme Court must be honored. The decisions by the lower state court in the state of Parana do not necessarily reflect federal policy regarding arbitration but rather seem to contradict it. Brazil has emerged from behind the protectionist veil of the "Calvo doctrine" in order to participate more fully on the world of international commerce and along with this change came the adoption and recognition of international arbitration as the appropriate dispute settlement mechanism. This change has to be seen in the light of the fact that *"Brazil has traditionally been viewed as the black sheep of Latin American arbitration"* (Blackaby, Lindsey, Spinillo (eds.), International Arbitration in Latin America, 2002, p. 9). This change is illustrated by the fact that Brazil has enacted a new arbitration law, the BAA, which came into force on 23 November 1996, that the Supreme Court of Brazil confirmed the validity of the BAA, and that Brazil has finally signed the 1958 New York Convention and the 1975 Panama Convention. It is understandable that the lower state courts may be slow to adopt new laws and policies introduced at federal level in Brazil. However, the Supreme Court's decision represents Brazilian Federal policy in accepting the consequences of Brazil having joined the family of the New York Convention countries, in particular its treaty obligation to enforce arbitration agreements pursuant to Art. II.

H.VI Subjective Arbitrability

1. Arguments by Respondents

84. Respondents claim that the arbitration clause in the PPA is null and void as a matter of Brazilian public policy for the lack of the necessary legislative authorization to submit to arbitration (R I jur, para. I).

85. Respondents acknowledge that they have general capacity to enter into juridical agreements. However, the notion of general capacity is distinct from the concept of special capacity or legitimacy as the power to contract a specific object, *e.g.*, arbitration (R I jur, paras. 118 – 121 and R II jur, para. 35). As public utilities (*see* R I jur, para. 93) the Respondents' legitimacy is restricted to the extent of what previous and express legal authorization commands them to do (R I jur, paras. 97 and 101). Due to the absence of such statutory authorization the Respondents lack legal capacity to enter into an arbitration agreement (R I jur, para. 102). Consequently, the arbitration clause in the PPA is null and void (R II jur, para. 36).

86. Respondents rely on the distinction between two different types of mixed-capital companies: mixed-capital companies engaged in economic activities and those providing public utilities (R I jur, paras. 88-94). Whereas the former are subject to a hybrid legal system of private and public law, the latter are subject to the administrative public law regime (R I jur, para. 89 and R II jur, para. 52). As such they are subject to the constitutional principles of public administration established in Art. 37 of the Brazilian Constitution such as the principle of Strict Lawfulness (R I jur, paras. 96 ff). Respondents' understanding of the principle of strict lawfulness is that a party may only perform those acts it has expressly been authorized for by law (R I jur, para. 97). As a consequence, entities of public administration may only submit their disputes to arbitration when there is express legal authorization to do so. Lacking such authorization, arbitration is inadmissible in administrative contracts. This view is backed by rulings of Brazilian courts on this matter (R I jur, para. 101). Respondents criticize the position of Claimant's expert Dra. Lemes on this matter, who had noted that mixed capital companies do not require prior authorization to submit to arbitration. To Respondents'

contention this view disregards the existence of eleven legal statutes in Brazil that provide for authorization for public companies to submit to arbitration (Statement of Mr. Muriel, hearing on jurisdiction, 6 July 2004, transcript, p. 22). The aforementioned statutes are (see presentation by Mr. Muriel at the hearing on jurisdiction, 6 July 2004, transcript, pp. 53 ff; PowerPoint presentation, pp. 21 ff):

1. Article 4 Decree Law No. 9.521/46 (Lage Case);

2. Article 11 Decree Law No. 1.312/1974 (National Treasury);

3. Article 23 Section XV Law No. 8.987/1995 (Concession Law);

4. Article 93 Section XV Law No. 9.472/1997 (Telecommunications General Law);

5. Article 27 and Article 43 Section X Law No. 9.478/1997 (Petroleum Law);

6. Article 35 Section XVI Law No. 10.233/2001 (Water and Land Transportation Law);

7. Article 3 paras. 3 and 4 Law No. 10.433/2002 (Energy Wholesale Market Law);

8. Article 4 para. 5 Section V and para. 6 Law No. 10.438/2002 (National Energy Policy Law);

9. Article 10 III lit. e Bill 2.546/03 (Federal Public-Private Partnership);

10. Article 13 State Law 14.689/04 (Minas Gerais) and

11. Article 11 State Law 11.688/04 (São Paulo).

87. In support of their position Respondents refer to the expert opinion provided by Prof. De Mello who found that COPEL is a mixed-capital company and as such an entity of the indirect public administration subject to the mandatory principle of legality as set forth in Art. 37 of the Brazilian Constitution (Prof. Dr. Celso Antonio Bandeira de Mello, as cited by Respondents in their PowerPoint presentation at the hearing on jurisdiction, 6 July 2004, p. 10).

88. Respondents argue that the necessity of legislative authorization to submit to arbitration is not unique to the Brazilian legal system. Similar provisions can be found in Portuguese (Art. 1 para. 4 of the Arbitration Law, i.e. Law 31 of 1986) and in Belgian laws (Art. 1676.2 of the Law of 19 May 1998). (*see* Respondents' PowerPoint presentation at hearing on jurisdiction, 6 July 2004, pp. 34 f).

89. Respondents in particular refer to the case of *Petrobras* (R I jur, para. 108) as an example of a mixed-capital company agreeing to arbitrate after having been expressly authorized to do so by law (*see* Art. 43, X Law 9.478/97).

90. The scope of Art. 173 of the Brazilian Constitution, which constitutes an exception to the rule of the principle of Strict Lawfulness, is limited to mixed-capital companies engaged in the exploitation of economic activities. Hence, it does not apply to Respondents, which are mixed-capital companies providing public power utility services under Federal Government concession pursuant to Art. 21, XII (b) of the Brazilian Constitution (R II jur, paras. 41 ff). Instead, Respondents are, due to their nature as entities of the indirect public administration, subject to all principles of public administration as provided for in Art. 37 of the Brazilian Constitution. It follows that their legitimacy is limited (R II jur, para. 69). This reasoning applies irrespective of the legal regime – private or public law – governing the PPA.

91. Respondents point out that the situation is still the same in the light of Art. 25, § 2 of the Brazilian Concession Law (Law No. 8.987/95) which stipulates:

"Contracts entered into by the concession corporation and the third parties referred to in the preceding paragraph shall be governed by private law, no legal relationship whatsoever between said third parties and the concession authority being established."

Although, Art. 25 thereby determines that contracts between the – usually private – concessionary corporation and third private parties are generally governed by private law, the case is different with public or mixed-capital concessionaires and third parties like in the present situation. In such cases

the contracts have a hybrid nature. Art. 25 is intended to determine that the third party may not invoke the privileges pertaining to entities of the public administration (R II jur, paras. 58 ff).

92. Claimant's understanding of the Brazilian Bidding Law (also referred to as the Tender Law), in particular Art. 55, is considered to be erroneous. The provision applies to all contracts entered into by entities of the public administration like the Respondents irrespective of any bidding procedures. Art. 55 constitutes that:

"[a]greement signed by the Public Administration with individuals and legal entities, including those domiciled abroad, must bear a clause electing the courts with jurisdiction over the Administration headquarters".

The provision is not meant simply geographically but encompasses the notion that the Brazilian Federal Courts shall be established to hear and resolve all contractual disputes, thus excluding the possibility of dispute settlement by arbitration (R II jur, para. 84). This general rule can only be circumvented by express juridical authorization to agree to arbitrate (R II jur, para. 85). The Tender Law did in fact apply to the PPA by way of regulating that the latter did not have to be preceded by a public tender. Thus, the position of Claimant's expert Dra. Lemes who found that the Tender Law may logically not bar arbitration since it did not apply to the PPA at the time of its execution is rejected (Statement of Mr. Muriel, hearing on jurisdiction, 6 July 2004, pp. 24 f). Instead, Respondents refer to their expert Prof. de Mello who noted that the virtue of the Brazilian Bidding Law "the agreement could not provide for the settlement of disputes by arbitration, let alone by arbitration procedures carried out in Paris" (Prof. Dr. Celso Antonio Bandeira de Mello, as cited by Respondents in their PowerPoint presentation at the hearing on jurisdiction, 6 July 2004, p. 10).

93. Furthermore, Claimant may not derive any conclusions from the fact that the Brazilian National Agency of Electric Energy (ANEEL) nor the Brazilian Ministry of Mines and Energy have never questioned Respondents' legitimacy to arbitrate, as the issue of arbitrability does not fall into the area of responsibility of these bodies. In particular, ANEEL's authority is with the field of operational and technical aspects of the electricity sector. The Agency does not have the specialized knowledge necessary to evaluate the arbitrability issue (R II jur, paras. 90 and 92).

94. Respondents refer to the deposition of Mrs. Hortência Tardelli explaining verbatim that *"[t]here is no legal impediment to even the Republic itself to submit to arbitration tribunal, which it has done repeatedly in the last twenty years"* (R II jur, para. 96). Respondents emphasize that this deposition refers to loan agreements for which the Brazilian Treasury had been expressly authorized by law to enter into arbitration agreements (R II jur, para. 99).

95. The same was true for mixed-capital companies like Petrobras and Compagás. Besides, Compagás is a mixed-capital company exploiting economic activities and as such indeed subject to Art. 173 of the Brazilian Constitution (R II jur, paras. 105 ff). Thus, the Compagás Case cited by Claimant bears no similarity with the present arbitration. In addition, unlike COPEL Compagas does not engage in public utility activities.

96. Due to the lack of above stated requirements in the present case, Respondents remain bound by Art. 55 of the Brazilian Bidding Law and may thus not validly enter into an arbitration agreement.

97. Respondents further state in regard to the expert opinion of Dr. Martins that Art. 1 of the BAA which stipulates that all persons entering into contracts may resort to arbitration does not constitute the specific authorization required in the present case (Statement of Mr. Muriel, hearing on jurisdiction, 6 July 2004, p. 18).

98. The precedent relied upon by Claimant in this context, ICC case 11559, is deemed by Respondent not to bear resemblance with the present case as it concerned a contract on the mere purchase and sale of energy which is a day to day commercial transaction that does not require approval by ANEEL nor a public bid. COPEL, however, is a concessionary of a public utility service producing and distributing energy as opposed to merely buying and selling it. Hence, public interests are affected and must prevail (Mr. Muriel, hearing on jurisdiction, 7 July 2004, transcript, pp. 10 ff).

2. Arguments by Claimant

99. Claimant asserts that Respondents have fully capacity to submit their contractual disputes to

arbitration. Art. 1 of the BAA expressly authorizes public law entities to agree to arbitration. (*see* C-46; C I jur, para. 73):

"Persons capable of entering into contracts will be able to avail themselves of arbitration in order to resolve disputes relating to freely transferable property rights."

It is understood that COPEL is a so called mixed-capital company. Although, the state of Paraná owns 31.1 per cent of the company's shares, it retains 58.6 per cent of the voting shares and thereby controls COPEL (C I jur, para. 6; see also C-39 and C-41). UEGA considers the distinction between two types of mixed-capital companies as advocated by the Respondents to be artificial and without a sufficient basis in Brazilian law and legal writing. Instead, UEGA cites legal scholars that disagree with the Respondents' view. (C II jur, pp. 14 ff). The proposed distinction is not recognized by the Brazilian Federal Constitution, in particular by Art. 173, para. 1 (C-63) nor by Decree-Law No. 200/67 (C-67) which introduced the concept of mixed-capital companies into Brazilian law either. Instead, the purpose of Art. 173 of the Constitution is to subject mixed-capital companies to the same legal regime as applicable to private companies (C II jur, pp. 17 f). This is confirmed by Decree-Law No. 200/67 (C I jur, para. 84). The same position is adopted by Art. 147 of the Constitution of the State of Paraná (Mr. Baker, hearing on jurisdiction, 6 July 2004, transcript, p. 119). Thus, albeit the Respondents are mixed-capital companies they are subject to the private laws in the same manner as a private company and therefore able to submit disputes to arbitration (C I jur, para. 79).

100. In support of its position Claimant refers to its expert Dr. Martins who notes that the message sent by the Brazilian Supreme Court by recognizing the constitutionality of the BAA may not yet have been received by all local judges in the country. He states that "Brazilian law rejects any concept of privileges for the state entity, including any claim of immunity from arbitral jurisdiction" (Mr. Baker, hearing on jurisdiction, 6 July 2004, transcript, pp. 159 ff). In addition, Claimant invokes the opinion put forward by its second expert Prof. Lemes. She held that "[a]ll mixed-capital companies, no matter what activities they are engaged in, exploit an economic activity and adopt the above-mentioned rules of private law". Regarding the principle of good faith she noted that "it must be honored by the public administration and even with greater reason by the public administration". (Mr. Baker, hearing on jurisdiction, 6 July 2004, transcript, pp. 165 ff)

101.Regarding the express authorizations to mixed-capital companies to submit to arbitration cited by Respondent it is understood that several of those law and decrees were passed before the BAA. Others, like the Concession Law and the Telecommunications Act, give permission to the government to enter into arbitration agreements with its concessionaire and do not prohibit the latter to enter into such agreement with its third party, like in the present case (Mr. Baker, hearing on jurisdiction, 7 July 2004, transcript, pp. 43 ff).

102.Furthermore, UEGA contests the interpretation of the principle of strict legality given by the Respondents. This principle does not mean that the state and the companies it controls may only act under the command of express statutory authorization, but rather that they must act in accordance with the rule of law (C I jur, para. 76).

103.Claimant suggests that Art. 25 of the Concession Law (Law No. 8.987/95; *see* C-70) applies to the Respondents as to any entity acting as concessionaire of public services and thus submitting it to the regime of private law irrespectively of the nature of its shareholding, *i.e.* private or state (C I jur, paras. 81-83).

104.Claimant further notes that Respondents are controlled by the State of Paraná whereas the electricity utility sector falls within the competence of the Union. Power utility service may therefore only be performed by the State of Paraná through incorporation of a private company for competence matters (C II jur, p. 18).

105.Claimant contends that Art. 55 of the Brazilian Bidding Law does not preclude the Respondents from submitting to arbitration. The Respondents are barred from relying on the Bidding Law as they have represented and warranted in the PPA that they had fully complied with any laws and regulations related to bidding (C I jur, para. 89). Apart from that, the Bidding Law is not applicable to the Respondents under the regime of private law established by Art. 173, § 1, II of the Brazilian Constitution. Mix-capital companies are not bound by the Bidding Law (C I jur, para. 92). Even if relevance of the Bidding Law is assumed, nothing in Art. 55 is incompatible with arbitration (C I jur,

paras. 90 and 94).

106.Although it reviewed the PPA, the Brazilian federal regulator of the electricity sector, ANEEL, never questioned Respondents' capacity to submit to arbitration (C I jur, para. 95). To the contrary, ANEEL confirmed the validity of the PPA with the only exception of Clause 17 which is a payment clause (C I jur, para. 96). The Brazilian Ministry of Energy even issued guidelines for power purchase agreements recommending the inclusion of arbitration clauses:

"Dispute resolution should generally provide for good faith negotiations followed by arbitration in a third-party country, according to internationally accepted rules".

(Art. 14 of the model contractual provisions; *see* C-86; C I jur, paras. 99 f)

107.UEGA relies on the sworn testimony of Mrs. Hortênsia Tardelli, Respondents' in-house counsel during the negotiation of the PPA, who confirmed that the Respondents' capacity to arbitrate was never questioned during the negotiations of the PPA (C I jur, para. 101). UEGA cites from the sworn testimony of Mrs. Tardelli to support its position:

"And there I have a history of more than twenty-three billion dollars in loans to Brazilian state-owned companies, with guarantees from the National Treasury. And in these contracts of which state-owned companies or States and the Federative Republic of Brazil were then parties to, there was a provision for an Arbitration Tribunal, outside of Brazil – in the United States or in Paris, at the American Chamber of Commerce or at the ICC. These are arbitration entities with long-time tradition of more than fifty years in the area of commercial or financial relations between countries or between state-owned companies. There is no legal impediment to even the Republic itself to submit to arbitration tribunal, which it has done repeatedly in the last twenty years… The reason is exactly the tradition of the ICC as a mediator in arbitration contracts" (Testimony of Dra. Hortênsia Tardelli, at 7; *see* C-87).

108. Claimant resorts to arbitral precedence like ICC case award number 11559 (text of Award submitted by Claimant) where the Tribunal in a similar situation and faced with the arguments now advanced by COPEL determined that the principle of strict legality did not apply and that the parties' agreement was subject to the regime of private law.

109.Furthermore, UEGA invokes the ruling of the Paraná State Court of Appeals (*Tribunal de Alçada do Estado do Paraná*) in the Compagas Case (Civil Appeal n. 247.646-0; C-76), where the justices found that

"the company is a mixed-capital company and its corporate entity is of private law […]. Hence, it is evident that the contracts executed by plaintiff and defendant are regulated by private law and there is nothing preventing conflicts from being resolved by arbitration in the manner foreseen in our legal system". The Court further concluded that "the subject matter does not involve indisposible rights since the dispute between the parties refers to the economic-financial disequilibrium of a contract for services and nothing prevents plaintiff, in its capacity as a mixed-capital company, with a corporate entity of private law, to enter a transaction or resolve its conflicts by means of an arbitration agreement. The interest is simply economic. There is no public interest whatsoever involved, in the true sense of the term" (C I jur, para. 105).

The line of argument used by Compagas, a company majority owned by COPEL, in the cited case resembles the one Respondents rely on in the present dispute. The only slight difference between the Compagas Case and the present arbitration is that Compagas is chartered under a different provision of the Brazilian Constitution whereby gas concessions are delegated to the states as opposed to electricity concessions as being federal concessions (Mr. Baker, hearing on jurisdiction, 6 July 2004, transcript, p. 127).

110.Claimant notes that Brazilian law creates mixed-capital companies like COPEL as entrepreneurial profit making entities active in the public markets of the world. They are intended to compete with private parties and are therefore subject to the same legal regime (Mr. Baker, hearing on jurisdiction, 6 July 2004, transcript, pp. 119 f). In the same vein, Claimant cites a Brazilian scholars: "Since administrators of state companies and of mixed-capital companies operate in the world of commerce, the dominant rule is of autonomy of intent, whereby they may perform all acts not prohibited by law. The principle of strict administrative legality would paralyze the companies of the State". (citation by

Mr. Baker, hearing on jurisdiction, 6 July 2004, transcript, p. 144; see C-64) COPEL is described by Claimant as a "large international financial player", in fact the fifth largest company in Brazil with its shares traded on the Brazilian and New York stock exchanges (Mr. Baker, hearing on jurisdiction, 6 July 2004, p. 109).

3. The Tribunal

111. This is an issue currently to be determined by the Tribunal on which it was not able to reach a unanimous decision. It was the subject of considerable debate during the deliberations phase. Ultimately, the majority was unable to accept the thoughtful and elegantly expressed views of our distinguished Co-Arbitrator Prof. Jorge Fontoura Nogueira, who comes to a different conclusion concerning subjective arbitrability of COPEL to agree to arbitrate disputes arising out of the PPA. This process explains to some extent the time that has been taken in conveying this award to the ICC's Court, and to the Parties. On the other hand, if one compares the various considerations in his Opinion and in the following section, one will notice that there remains still a considerable agreement on many details in this context.

112.The issue of subjective arbitrability concerns the question whether the Parties are entitled to opt for arbitration as a dispute settlement mechanism in the present circumstances. The notion of "subjective arbitrability" is often used synonymously for the term "capacity" although these terms should be differentiated in their strict sense. Whereas any restrictions of a party's capacity to enter into arbitration agreements are intended to protect that party, limitations regarding arbitrability are founded on considerations of public policy. The *"requirement for prior state authorization […] cannot be one of capacity, where capacity is defined as a party's ability to act in its own interest […] this is indeed a question of arbitrability"* (Fouchard, Gaillard, Goldman on International Commercial Arbitration, 1999, para. 540). To avoid misunderstanding, it seems therefore preferable to maintain the term "subjective arbitrability" regarding the latter.

113.Respondents acknowledge that they have *"general capacity to enter into juridical agreement"*. What they claim as missing is the *"special capacity"* or *"legitimacy"* to submit disputes to arbitration, and that is what needs to be evaluated under the issue of subjective arbitrability.

114.It is common ground between the Parties and the Tribunal that the issue of the Parties' subjective arbitrability is governed by Brazilian law, as the personal law of the two entities both of which are incorporated under Brazilian law. In so far as subjective arbitrability is subject to public policy as seen above, one has to be aware that, in modern international arbitration, a differentiation is made between national public policy and international public policy. Even if a provision were found to be against national public policy, it could thus still be valid under international public policy. However, the Tribunal would only have to enter into that kind of an examination if it would find that, in the present case, COPEL's submission to arbitration is in breach of Brazilian national public policy. The Tribunal, therefore, first enters into an examination of COPEL's subjective arbitrability under Brazilian law and, particularly, public policy.

115.UEGA's subjective arbitrability permitting it to enter into an arbitration agreement remains uncontested. The issue in question is whether COPEL was able to enter into a lawfully binding obligation to submit disputes arising under the PPA to arbitration.

116.The Tribunal is well aware that it is not uncommon for state-owned or state-controlled entities, like COPEL, to be restricted under law applicable to them from referring certain types of disputes to arbitration. However, this feature is not commonly seen where the corporations concerned are not effectively organs of the state, but are substantially privately owned – even though the state may hold a "golden share", which gives it voting control.

117.This form of "mixed-capital company" is mostly understood to be a corporate entity controlled by the state though holding, not the majority of the share capital, but the majority of the voting shares. COPEL is a mixed-capital company in this sense, as the State of Paraná, although it retains only 31.1 per cent of the equity capital, is in control by holding 58.6 per cent of the voting shares.

118.It is also common ground between the Parties and the members of the Tribunal that the point of departure must be whether Brazil's constitution, as the supreme body of law of the country, provides any guidance regarding the status of COPEL and its subjective arbitrability.

Art. 173 (§ 1) provides:

"The law establish the legal system of public companies, joint-stock companies and their subsidiary companies engaged in economic activities connected with the production or trading of goods, or with the rendering of services, providing upon: I – […]; II – compliance with the specific legal system governing private companies, including civil, commercial, labour, and tax rights and liabilities; […]".

119.Thus, the Brazilian Constitution does not contain any express provision precluding mixed-capital companies from submitting to arbitration but remains neutral on this issues. Art. 173(§ 1) of the Constitution rather constitutes a level playing filed in regard to the treatment of mixed-capital and private companies by subjecting both to the same legal regime.

120.The members of the Tribunal agree that the explicit wording of a provision should be given priority before getting into further interpretation. Following that principle, the words "compliance with the specific legal system governing private companies" in Art. 173 of the Constitution should be included in the interpretation of the provision. It can be argued that Art. 173 calls for regulation, and does not issue a command. However, regarding our issue, there is legislation implementing this goal of Art. 173 as will be discussed hereafter:

121.The first element to be considered is Decree-Law N. 200/67 which introduced in its Art. 5(3) the concept of mixed-capital companies:

"Mixed-Capital Company: a company which has the legal personality of private law, created by law for the exploitations of economic activity under the form of a corporation, whose voting shares belong to the Union or to the entity of the Indirect Administration".

122.The second element is Art. 27 of Law 6404 of 1976, whose intention appears to be ensure that mixed-capital companies should face the same conditions as companies in the private sector, rather than enjoy an unfair competitive advantage over private companies.

123.Although both of these Decrees were introduced before the new Brazilian Constitution of 1998, in the absence of Brazilian Supreme Court rulings to the contrary, they must be deemed to be valid under the Constitution, especially as they do not in any way contradict the provisions of the 1988 Constitution.

124.Respondents do not, indeed could not, claim that Art. 173 of the Brazilian Constitution is not applicable. Instead, they argue the proposition that there exist two different types of mixed-capital companies, and that Art. 173 of the Constitution applies only to the type that is engaged in commercial or other forms of economic activity. The Tribunal finds this distinction unconvincing.

125.No persuasive authorities have been presented to the Tribunal to support the Respondents' proposition that there exist two different kinds of mixed-capital companies. Rather, the Tribunal discerns two contrasting types of activity undertaken by mixed-capital companies. Where a mixed-capital company, in the course of its business, enters into a transaction that directly affects the public interest of the State and its citizens (such as, for example, the grant of a concession or exclusive licence in respect of the nation's vital natural resources) this may well be a matter that – notwithstanding the liberalizing effects of the modernization of Brazilian law – cannot lawfully be subject to dispute resolution processes such as private consensual arbitration.

126.However, the effect of the two decree laws mentioned above, taken together with the 1988 Constitution, lead to the conclusion that in ordinary commercial activity in which there is, for example, no disposal of the nation's mineral resources, there is no convincing legal argument that leads to the concept of mixed-capital companies being treated differently under the law than private companies. Indeed, to the contrary, the Tribunal considers that modern developments in Brazilian law lead to precisely the opposite conclusion.

127.This conclusion is borne out by the, at first sight, apparently inconsistent examples of *Petrobras* and *Compagas*. COPEL, proposing an *argumentum e contrario*, drew attention to the fact that Petrobras, the Brazilian national state-owned oil company, received specific legislative authority to enter into arbitration agreements. Petrobras is subject to the special provision of Art. 43 X of Law 9478/97 which requires:

The concession contract must accurately reflect terms set forth within the respective invitation to bid and within the approved proposal. Essential stipulations shall include: […] X – rules for settling disputes related to the contract and its performance, including reconciliation and international arbitration.

Since the present arbitration, however, has no connection with the petroleum industry, the rules applicable to the Brazil's foremost national petroleum company do not apply. In addition, the PPA is not a concession agreement, and Art. 43 X of Law 9478/97 is neither applicable nor an apt analogy in relation to the exercise by COPEL of its ordinary commercial activities – which are entirely different from the grant of an oil concession over the nation's vital mineral resources.

128.In contrast, the Paraná State Court of Appeal ruled in *Compagas* (Compagas v. Consórcio Carioca-Passarelli, *Tribunal de Alçada do Estado do Paraná* , Civil Appeal No. 247/646-0, 11 February 2004) that:

"the company is a mixed-capital company and its corporate entity is of private law […]. Hence, it is evident that the contracts executed by plaintiff and defendant are regulated by private law and there is nothing preventing conflicts from being resolved by arbitration in the manner foreseen in our legal system".

The core function of Compagas, a mixed-capital company, was the supply of gas to the State of Paraná. The Appellate Court determined that this was a mere commercial activity, not one that involved the public interest of the State.

129.According to the opinion by José Cretella Júnior as cited by Respondents, *"administrative contracts are executed for the functioning of public services"* . The mere sale and purchase of electricity, however, is clearly not part of any public services function (such as the efficient and nondiscriminatory distribution of electricity to the citizens of Parana) that may be rendered by COPEL. It does not involve the disposal of public property, or the nation's vital mineral resources. Neither does it confer, or involve the execution of any public services. Therefore, it cannot be characterized as an administrative contract, and the findings of Brazilian courts regarding the inadmissibility of arbitration clauses in such contracts in the absence of express legal authorization (as relied upon by COPEL, R I jur, pp. 31 f) do not apply to the present case. Rather, as the PPA concerns ordinary commercial matters, *i.e.* the mere sale of electricity, as opposed to the execution of administrative functions, this activity does not involve public interests, and this is confirmed by the decision of the Brazilian court in *Compagas*.

130.Regarding the fact that the Lower State Treasury Court of Curitiba has accepted its jurisdiction in this matter and that Claimants seems to have accepted the jurisdiction of that court, the Tribunal considers that it cannot draw an inference therefrom. This Tribunal, mandated to apply international standards in an international arbitration under the auspices of an international arbitral institution and with Paris chosen as the seat of arbitration, does not consider itself constrained by the jurisdictional decisions of the Lower Treasury Court of Curitiba City – particularly in view of the controversial history of the subsequent proceedings in the Appellate Court of the State of Paraná according to which the decision of the Lower Treasury Court still seems to be suspended.

131.Art. 25 of the Concession Act (Law No. 8.987/95) endorses the private law character of the PPA by stating:

"§ 1 Without prejudice to the liability to which this article refers, the concessionaire may contract with third parties [for] the development of services inherent, accessory or complementary to the granted service, as well as for the implementation of associated projects. § 2 The contracts executed between the concessionaire and third parties to which the previous article refers shall be governed by private law […]".

The distinction proposed by Respondents in regard to this provision according to which contracts between a public mixed-capital as opposed to a private concessionaire and third private have "a hybrid nature involving both public and private law" is not convincing as it finds no support in the wording of the law.

132.Art. 55(2) of Law 8666/96 (the Bidding Law) provides that the courts of the place where the headquarters of the mixed-capital company are located shall have exclusive jurisdiction. Applicability

of this law, however, requires as well that the underlying contract may be characterized as an administrative contract. And even if the PPA were deemed to be an administrative contract, the ratio of Art. 55(2) of the Bidding Law would not be inconsistent with the inclusion of an arbitration clause in such contract. This is elaborated in the comment of C. A. Carmona:

"That is what the Bidding Law intends: that the parties expressly agree that any claims taken to the Judiciary shall be decided in the jurisdiction of the Administration, excluding any other venues (domicile of the bidder, place of the fact, place where the thing is located), in order to facilitate the defense of the interests of the legal entity of domestic public law (Union States, Municipalities, agencies or state companies) in any actions that may arise. […] Nothing of this is incompatible with arbitration: when parties lay the venue of the contract (…) they are only determining that the judge of law who will carry out the acts that are not of competence of the arbitrator (acts that imply in the use of coercion, enforcement of the award, enforcement of injunctions) is carried out in the county chosen by the parties. It would appear to me, then, that this paragraph of Article 55 of the Bidding Law cannot, in any event whatsoever, be invoked to claim the impossibility of the arbitration clause in administrative contracts". (Carlos Alberto Carmona, *Arbitragem e Processo:* Um Comentário à Lei 9307/96, São Paulo, Editora Malheiros, 1998, pp. 54-55).

133.The principle of lawfulness – sometimes also referred to as "legality" – as put forth by Art. 37 of the Brazilian Constitution, has indeed to be respect, as Respondents rightly point out. But regardless of the question of its applicability to mixed-capital companies, contrary to COPEL's understanding, the Tribunal does not perceive that it can be interpreted to create an obligation for mixed-capital companies to obtain statutory permission before entering into an arbitration agreement. It rather stipulates that governmental entities and entities owned by the government are bound by the laws and must act in accordance with them.

134.In the present case, there is on the one hand no special provision that restrict the parties' access to arbitration, and on the other hand there is a general permission to submit to arbitration in Art. 1 of the BAA which reads:

"Persons capable of contracting may settle through arbitration disputes related to disposable property rights".

Although the subjective arbitrability of the state and state-owned entities to agree on arbitration is not expressly referred to by this provision, it is understood that at least in *iure gestionis* contracts, like the PPA, these parties may opt for arbitration. This proposition is confirmed by Brazilian scholars like J. A. F. Costa (J. A. Fontoura Costa and G. Tusa, Expectativas a Âmbito de Aplicabilidade da Nova Lei da Arbitragem, in: Arbitragem – a nova lei brasileira e a praxe internacional, 1997, p. 194), an author cited by COPEL in the context of Art. 1 of the BAA.

135.The other laws cited by COPEL which mention the possibility of arbitration as dispute settlement mechanism might indeed concern matters of public interest, like the National Treasury (Art. 11 of Decree-Law N. 1312/1974), Concession contracts in public utility areas (Art. 23 XV of Law N. 8987/1995; Art. 93 X of Law N. 9472/1997, Art. 35 XVI of Law 10233/2001), tariffs (Art. 4 of Law N. 10438/2002) and agreements of public-private partnerships (Art. 10 of Bill 2546/03; Art. 13 of State Law 14689/04; Art. 11 of State Law 11688/04). Hence, statutory requirement to implement arbitration might have been necessary in these cases. More importantly, the fact that under these laws arbitration shall be agreed upon rather evidences the national and state legislators' trust in this means of dispute settlement. In the matter of the present arbitration the legislator seems not to have felt the necessity to require implementation of an arbitration clause, presumably because public interests are not at stake. Nonetheless, the Parties are free to opt for arbitration using the authorization in Art. 1 BAA.

136.In ICC Case No. 11559/KGA (preliminary award, 28 April 2002, text submitted by Claimant) the arbitral tribunal was faced with a very similar problem as in the present case. The Brazilian subsidiary of a US company had concluded a power purchase agreement with Two Brazilian mixed-capital companies acting as federal public services concessionaires for the generation and distribution of electricity. The agreement included an ICC arbitration clause, but when a dispute arose and arbitral proceedings commenced, the respondents challenged the arbitral tribunal's jurisdiction. The challenge was based on grounds similar to the ones proposed by Respondents in the present arbitration. The Tribunal was formed by two Brazilians, Prof. Sergio Bermudes and Dr. Francisco

Rezek, and one Portuguese, Dr. João Morais Leitão. The tribunal rejected the jurisdictional challenge and held:

"On the other hand, this legislative development removes any legitimacy to the appeal that the Respondents attempt to make to the principle of legality, since the aforementioned provisions of law 8987/95 [i.e. the Concessions Act] and the general principle of habitability of the issues related to alienable patrimonial rights, found in Law 9307/96 [i.e. the Arbitration Act], are precisely what constitutes the authorization provisions that allowed the Respondents, even in the light of the principle of legality, to validly agree to the arbitration provision […]". (at para. 86)

137.The majority of this Tribunal expresses the greatest respect for the views put forward in the Dissenting Opinion of our distinguished Co-Arbitrator Prof. Fontoura. However, in view of all the above considerations, in the present case, as well as in the above mentioned ICC case, the majority of the Tribunal concludes that COPEL had subjective arbitrability enabling it to enter into the arbitration agreement under which the present arbitration was commenced.

H.VII Objective Arbitrability

1. Arguments by Respondents

138. Respondents' contention is that the subject-matter of this arbitration is non-arbitrable pursuant to Art. 1 BAA as it entails rights provided for by public policy rules which cannot be disposed of, and therefore may not be arbitrated (R II jur, paras. 133-142).

139.Art. 1 of the BAA limits arbitrations to disputes that involve only disposable equity rights[2] (R I jur, para. 136). Matters of public policy are non-disposable in this sense. (R I jur, para. 172). Hence, adjudication of public policy issues is non-arbitrable under Brazilian law. Respondents provide electrical power to consume in the State of Paraná. Thus, the PPA concerns public interests (R I jur, para. 138) and, as a result, arbitration is not permissible.

140.In addition, Section 17 of the PPA, *e.g.*, provides for price readjustment components pegged to foreign exchange variation which is forbidden by Brazilian law (Law N. 10.192, dated 14 February 2001; *see* R I jur, paras. 159-161). The said law is a public policy rule the content of which cannot be disposed of by the parties' volition (R I jur, paras. 155-158 and R II jur, paras. 135-137).

141.There are even more public policy issues involved, as the purported obligation to purchase the plant is not in line with the mandatory rules of the Brazilian bidding laws which require a competitive bid process prior to the procurement as regulated by Law 8666/93. (R I jur, para. 165 and R II jur, paras. 137-138). Secondly, the obligation to purchase the plant amounts to a fine higher than the principle obligation, thus violating Art. 412 of the Brazilian Civil Code and the specific regulations that limit the penalty for breach of contracts in the electricity sector to 10% of the amount of the principle obligation. (R I jur, paras. 166-167)

142.The obligation's unlawfulness must not be circumvented by commencing arbitration "by equity" and rendering an arbitral award that is enforceable after being homologated. Therefore, Art. 1 of the BAA seeks to prevent arbitration of non-disposable equity rights (R II jur, paras. 139-142).

143.In addition, Respondents rely on the view of their expert Prof. de Mello, who contends that the interests and rights of COPEL as a federal utilities concessionaire cannot be disposed of, which thus prevents adoption of arbitration as dispute settlement mechanism. In particular, Prof. de Mello contends that "the binding of payments to the fluctuation of the exchange rate of US Dollars could never, under any circumstances, be examined by Arbitration Court, since this matter very clearly involves a right that cannot be disposed of" (Prof. Dr. Celso Antonio Bandeira de Mello, as cited by Respondents in their PowerPoint presentation at the hearing on jurisdiction, 6 July 2004, p. 13).

144.The Respondents emphasize that their position is favorable to arbitration as a whole, but stress that the rules of law, such as the principle of "Strict Lawfulness" must be respected (R II jur, paras. 170-176).

2. Arguments by Claimant

145.UEGA contents the Respondents' position that the dispute concerns non-disposable rights (C II

jur, pp. 22 ff). All rights at issue in this arbitration are disposable as the PPA is a private law contract (C I jur, para. 116). It was negotiated "*at arm's length*" (C I jur, para. 118) and concerns rights, obligations and remedies of private law while *"significantly lacking clauses placing UEGA under the direction, or "police power" supervision of COPEL"* (C I jur, para. 117).

146. Besides, the terms "public policy" and "non-disposable rights" are not synonymous and must not be confused under Brazilian law as evidenced by Art. 39 of the BAA. Claimant argues that although indisposable rights reflect notions of public policy, the mere fact that a case may concern public policy does not necessarily render the underlying rights indisposable (Mr. Baker, hearing on jurisdiction, 6 July 2004, transcript, p. 124). Arbitrators may decide issues of public policy, whereas the Brazilian Supreme Court scrutinizes the compliance of the award with the prevailing notions of public policy. The presumption of the BAA in regard to arbitrability issues is broad, excluding only the disputes relating to non-transferable patrimonial and property rights (C I jur, paras. 120-122).

147.Although public sector activities might be at stake in the present case, that does not necessarily imply that public policy matters are involved. UEGA refers to its expert, Dra. Selma Maria Ferreira Lemes, former legal counsel for Respondents, who testified, that

"[t]here is not the slightest doubt that the business activity of commissioning the construction of a power plant and of commercializing electric power in all its modalities of production and generation represents an available right under the definition of art. 1 of the BAA. Furthermore, in no way is this conclusion affected by whether the provider of the goods (i.e., the concessionaire) is an entity related in some way to the public sector (e.g., a mixed-capital company) or a private company".

(Expert Opinion of Dra. Selma Lemes, dated April 29, 2004, at para. 15; *see* C I jur, para. 125 and Expert Opinions Annex, Tab B)

148.But even if public policy issues needed to be considered, the Tribunal was not barred from adjudicating such issues. Only non-disposable property rights may not be arbitrated (C I jur, para. 132). UEGA points out that the Tribunal is not requested to adjudicate on the legitimacy or the proper execution of state authority (C I jur, para. 130) but to role on *"[t]he consequences of the exercise of such authority on the parties' contractual rights and obligations […]*" (C II jur, p. 24), i.e. the effect of the proper application of Brazilian laws to the present dispute (C I jur, para. 132). Neither the validity of the Brazilian laws themselves, in particular of those provisions regulating the electricity sector, nor issues of mandatory public policy will be at stake in the arbitration (C I jur, para. 126 and 136).

149. Furthermore, UEGA contents the Respondents' submission in regard to the violation of the Brazilian bidding laws. The relevant provisions do not apply to mixed-capital companies like the Respondents (C I jur, para. 133). Respondents have represented and warranted that they had fully complied with all applicable Brazilian laws.

150. After all, the Respondents' challenge of jurisdiction itself contravenes Brazilian public policy (C I jur, para. 142). Respondents' reluctance to arbitrate does not pay tribute to but disregards Brazil's efforts in the recent years to foster the use of arbitration as a means of dispute settlement (C I jur, para. 143).

3. The Tribunal

151. Objective arbitrability concerns the question whether the subject-matter of the dispute is capable of settlement by arbitration. The Tribunal expressly acknowledges that a state may legitimately consider certain types of disputes not eligible to be submitted to arbitration.

152. The subject-matter of this arbitration is arbitrable not only under the applicable French law, but even under the BAA. According to Art. 1 of the BAA all transferable of disposable rights might be submitted to arbitration. The tribunal is not persuaded by the Respondents' assertion that the present dispute was non-disposable in this sense as it concerned providing power electricity and therefore concerned public interests. The PPA concerns the mere sale of electricity by UEGA to COPEL. The electricity to be purchased by COPEL was to be generated by a power plant to be developed, financed and built by UEGA. COPEL was to be responsible for operation and maintenance of the plant as well as provision of the fuel (i.e. gas) required for generating electricity and off-taking of the produced electricity. Thereby the state-controlled party was to retain control over the actual generation and distribution of electricity for the state of Paraná. COPEL's main activity might be

rendering a public utility service under Art. 21 (12) lit. b of the Brazilian Constitution. The core transaction between the Parties to this arbitration, however, only concerned the sale and purchase of energy, a mere commercial matter, and does as such not involve public interests. Besides, Art. 21 of the Constitution rather seems to enumerate the powers of the Union without stating that these powers are necessarily exercised by rendering public utility services.

153.COPEL relies on the teaching of J. A. F. Costa and R. L. V. Pimenta:

"Actually, the questions which involve public order are – at least with respect to the specific aspects of the public, collective and general interests – non-disposable. Consequently, they should neither be submitted to arbitration nor should be put in the scope of the procedural disposability"

(Ordem Pública na Lei n. 9.307/96, in: Arbitragem – lei brasileira e praxe internacional, 2nd ed., p. 381). As stated by the authors, non-disposability requires that collective and general interests of the public are concerned. The mere sale and purchase of electricity, however, does not concern these interests. Therefore, the subject-matter of this dispute remains arbitrable under Art. 1 of the BAA.

154. This conclusion is endorsed by the ruling of the Paraná State Court of Appeal has ruled in the Compagas Case (*see supra*: Compagas v. Consórcio Carioca-Passarelli, *Tribunal de Alçada do Estado do Paraná*, Civil Appeal n. 247/646-0, 11 February 2004):

"The subject matter does not involve indisposable rights since the dispute between the parties refers to the economic-financial disequilibrium of a contract for services and nothing prevents plaintiff, in its capacity as a mixed-capital company, with a corporate entity of private law, to enter into a transaction or resolve its conflicts by means of an arbitration agreement. The interest is simply economic. There is no public interest whatsoever involved, in the true sense of the term".

155.According to Art. 2059 of the French Code Civil *"all persons may submit to arbitration those rights which they are free to dispose of"*. Furthermore, Art. 2060(1) of the Code Civil stipulates that "*one may not submit to arbitration questions of personal status and capacity […] and more generally in all areas which concern public policy"*. Applicability of these provisions to international arbitrations has been questioned by French courts (rf. Fouchard, Gaillard, Goldman on International Commercial Arbitration, 1999, para. 560). French case law has meanwhile adopted another approach in regard to international arbitrations allowing Tribunals to hear disputes concerning public policy matters but submitting the awards to subsequent court review (Fouchard, Gaillard, Goldman on International Commercial Arbitration, 1999, para. 563).

156.The underlying contract is purely commercial concerning the sale and purchase of electricity. Thus, no non-disposable rights are at stake. The Tribunal in ICC Case N. 11559/KGA (text submitted by Claimant) has ruled on the challenge of its jurisdiction on the grounds of the alleged "inalienable nature of the patrimonial rights involved in the Contract" that

"it is the understanding of this Panel that such inalienability has no legal or contractual basis. There is no legal or contractual basis resulting from the very purpose of the Contract, because the purchase and sale of electric energy produced by the plants that the Claimant, as an independent power producer, agreed to "design, build, license, operate and maintain…" cannot be classified as a sovereign act, it can only be characterized as a contract germane to distribution of electric energy of which [Respondent] is the concessionaire. If this were not the case, it would be absurd to consider any and all commercial activity by the administration, to be sovereign, which is contrary to what is set forth at least in art. 173 of the Brazilian Constitution. In addition that lack of basis is also evident with respect to the goal of the Contract, since although it is true that the electric energy to be purchased by the Respondents was so satisfy a collective need, this was the final goal of the immediate purpose which was to reinforce the available production of electric energy, resorting to independent producers. The ultimate goal undoubtedly constitutes a commercial activity, complementing the activity that is the purpose of the aforementioned concession". (at paras. 81-82)

157.The notion of non-disposability is distinct from the concept of public policy matters. This perception is reflected in Art. 39 of the BAA which differentiates between cases where *"the subject-matter of the dispute is not capable of settlement by arbitration"* and cases where *"the recognition or enforcement of the award would be contrary to the national public policy"*.

158. Tribunals may well decide on public policy matters. Their decision may, however, be reviewed by

the Supreme Court of Brazil in homologation procedures in regard to violation of the prevailing notions of public policy rules. Non-disposable rights, to the contrary, may not be submitted to arbitration at all.

(…)[3]

and Articles 38 and 39 of the BAA as the arbitration clause is null and void and concerns non-arbitrable public policy issues. The Tribunal, however, has an obligation to ensure that any award is enforceable as evidenced by Art. 35 of the ICC Arbitration Rules (R I jur, para. 186). In order to meet this obligation the Tribunal must therefore refrain from exercising jurisdiction in the present case.

164.Respondents emphasize that Brazil *"is likely, if not the only, place for enforcement of any decision rendered in this case"* (R I jur, para. 1). This observation is premised on the contention that all parties have their assets exclusively located in Brazil (R I jur, footnote 1).

165.Respondents also refer to the negative repercussions the rendering of an ineffective arbitral award not eligible for confirmation in Brazil would have in the arbitration community (R II jur, para. 172).

2. Arguments by Claimant

166.UEGA declares Respondents' assessment in regard to a later enforcement of a possible arbitral award in Brazil conjectural and irrelevant to the determination of the jurisdiction issue (C II jur, p. 25).

167.Aside from this, the duty of avoiding any grounds of nullity stipulated by Art. 26 (now Art. 35) of the ICC Arbitration Rules has no relevance in the present case. In support of this position UEGA cites from the ruling of the Tribunal in ICC Case N. 4695 which resembles Respondents' line of argument in the present dispute:

"It is obvious that if a tribunal would decline to exercise jurisdiction on the basis of the possible difficulties of a future enforcement in a given country, then there would be no award at all, susceptible of being enforced in other jurisdiction […] But if the Tribunal finds, as it does, that it has jurisdiction, it cannot fail to exercise it. Otherwise, it would be concurring in a failure to exercise jurisdiction and could even be accused of a denial of justice".

(ICC Case N. 4695, XI Y.B. Com. Arb. (1986) at p. 42; *see* C-127)

3. The Tribunal

168.In the light of its duty under Art. 35 of the ICC Arbitration Rules the Tribunal will endeavor to render an award enforceable in Brazil. However, it is hard to see how the issue of enforceability in any particular country including Brazil could affect the Tribunal's jurisdiction. In any case, the procedural history of this dispute before Brazilian courts reported earlier in this Award, particularly as the decision of the Lower Treasury Court seems to be suspended by decision of the Court of Appeal, does not suggest that enforcement would not be possible in Brazil.

169.To the contrary, the Tribunal even more complies with its duty to render an enforceable award if the latter resists challenges in the courts of its country of origin, i.e. France, since enforcement in other countries, including Brazil, can generally be denied if the award has been set aside by the courts of the place of arbitration.

170.The ruling of the Tribunal in ICC Case N. 4695 (Interim Award, November 1984, XI Y. B. Com. Arb. (1986), p. 42) is precisely on this point:

"It is obvious that if a tribunal would decline to exercise jurisdiction on the basis of the possible difficulties of a future enforcement in a given country, then there would be no award at all, susceptible of being enforced in other jurisdictions […] But if the Tribunal finds, as it does, that it has jurisdiction, it cannot fail to exercise it. Otherwise, it would be concurring in a failure to exercise jurisdiction and could even be accused of a denial of justice".

171.Therefore, although this Tribunal hopes and expects its Award to be enforceable in Brazil, it cannot deny the jurisdiction it finds it has in this case due to the claim that the later Brazilian courts

might not proceed to enforce its Award.

H.IX Estoppel and Venire Contra Factum Proprium

1. Arguments by Respondents

172.Respondents contend that the principle of *non concedit venire contra factum proprium* does not apply to entities of the public administration such as the Respondents (R I jur, para. 130). The reason is that entities of the public administration are subject to the constitutional principle of Supremacy of the Public Interest over the Private Interest (R I jur, para. 131 and R II jur, para. 118).

173.The notion of the principle of Supremacy of the Public Interest is recognized in Art. 2035 of the new Brazilian Civil Code. Respondents explain that this principle was developed in a time when Brazil was suffering hyperinflation (Mr. Muriel, hearing on jurisdiction, 6 July 2004, transcript, pp. 70 f). Respondents submit that any party doing business in Brazil should be aware of a "certain degree of uncertainty" regarding the state's dealing with private parties. Additionally, Claimant derived several benefits from contracting with a state-owned entity; in particular it took advantage of the market held by COPEL. It may now not strive to take the advantages but non of the disadvantages of contracting with state-owned companies in Brazil (Mr. Muriel, hearing on jurisdiction, 7 July 2004, transcript, pp. 21 f).

174.Consequently, Respondents' public interest prevail over the private interests of UEGA and the principle of *non concedit venire contra factum proprium* is overridden (R I jur, para. 131).

175.Signature of the PPA by public officers managing the Respondents constituted an unauthorized act in respect to the insertion of an arbitration clause. As such, the arbitration clause is null and void (R I jur, paras. 104-106). Moreover, due to the supremacy of the public interest the public administration has the obligation to invalidate the illegal acts that were performed in the past without being hindered to do so by the principle of *non concedit venire contra factum proprium* (R I jur, paras. 132-133). Respondents argue that, unlike a private company, they must not cope with but challenge all illegal provisions in the contract including the arbitration clause if they do not want to risk being held responsible for that. This reasoning applies even if representations and warranties were made in the contract (Mr. Muriel, hearing on jurisdiction, 6 July 2004, transcript, pp. 87 f).

176.In addition, Respondents assert that the validity of the arbitration clause was questioned for the first time upon notification to be present at this arbitration (Mr. Muriel, hearing on jurisdiction, 7 July 2004, transcript, p. 78).

2. Arguments by Claimant

177.UEGA resorts to the principle of *non concedit venire contra factum proprium* to argue that Respondents are estopped from contesting the validity of the arbitration clause (C II jur, p. 21). Prior conduct evidences the Respondents' commitment to arbitrate. By signing the PPA including the arbitration clause and expressly representing and warranting the power to perform all obligations under the contract and agreeing to be bound by any arbitral award, the Respondents documented their intent and ability to settle their contractual disputes by arbitration (C I jur, para. 111). Thus, in Art. 15.2(a) of the PPA COPEL represented and warranted it had fully complied with all applicable Brazilian laws (Mr. Baker, hearing on jurisdiction, 6 July 2004, transcript, p. 121).

178.Furthermore, UEGA points out that Respondents have repeatedly agreed on arbitration as dispute settlement mechanism in agreement related to the Araucária Project (C I jur, para. 112). Hence, COPEL has over the course of five years of contracting with Claimant repeatedly demonstrated its commitment to arbitration. Claimant refers to various agreements entered into by COPEL and Claimant as well as third companies all of which provided for ICC arbitration. Thereby, confidence was created in Claimant that COPEL had the capacity to submit to arbitration (Mr. Baker, hearing on jurisdiction, 6 July 2004, transcript, pp. 132 ff).

179.Claimant refers to Yves Derains who stated that "international ordre publique would vigorously reject the proposition that a State organ, dealing with foreigners, having openly, with knowledge and intent, concluded an arbitration clause that inspires the contractant's confidence, could thereafter, whether in the arbitration or in the execution proceedings, invoke the nullity of its own promise". (as cited by Mr. Baker, hearing on jurisdiction, 7 July 2004, p. 49; see C-95).

180.Besides, there is a rule in international arbitration that reliance on alleged obstacles to arbitration vested in municipal law by either a state or a state-owned company should be rejected by Tribunals (C I jur, para. 109). This principle is well-recognize and has the status of a substantive rule of private international law. As such it has to be observed in international arbitration (C I jur, para. 110).

181.In the same vein, Claimant invokes the ruling of the Tribunal in the Benteler case (C-92) by determining that "[t]he prevailing view is that it would be contrary to fundamental principles of good faith for a State party to an international contract, having freely accepted an arbitration clause, later to invoke its own legislation as grounds for contesting the validity of its agreements to arbitrate". (as cited by Mr. Baker, hearing on jurisdiction, 6 July 2004, transcript, p. 150)

182. Claimant further notes that Respondents had actually agreed to the nomination of Prof. Hunter and affirmatively asked the ICC to appoint an arbitrator for Claimant as the latter had at this time not yet been designated. This conduct is inconsistent with the idea of subsequently relating to a jurisdictional objection. Besides, the law suits against Claimant had been filed only after the commencement of arbitral proceedings. Thereby, Respondents, inter alia, sought to enjoin Claimant's bank account and all foreign exchange proceeds in order to render Claimant unavailable to pay the advances on the arbitration fees. Then, Respondents sought to prevent Claimant from participating in the arbitration by a judicially ordered fine at the amount of USD 170,000 a day for any act performed in this arbitration. These acts by Respondents are inconsistent with the undertakings in the PPA (Mr. Baker, hearing on jurisdiction, 6 July 2004, transcript, pp. 113 ff).

3. The Tribunal

183.Even if, contrary to the finding of the Tribunal, COPEL would have been restricted under Brazilian law from entering into the arbitration agreement with UEGA, it could be argued that it is now precluded from relying on the respective provisions of the Brazilian law as it has freely agreed to submit all disputes to arbitration and warranted that it complied with all pertaining duties and restrictions.

184.This is the pertaining perception under French law. The Paris Court of Appeals rejected the contention of a party that the arbitration agreement was invalid on the grounds that requisite parliamentary authorization was missing. The French Court held that

"international public policy … [prohibited] NIOC from availing itself of restrictive dispositions in its national law to withdraw a posteriori from the arbitration to which the parties agreed"

(CA Paris, 17 December 1991, Gatoll v. National Iranian Oil Co., NIOC, 1993 Rev. Arb. 281)

and further that

"the prohibition excluding governments from referring their disputes to arbitration is confined to domestic contracts. Consequently, the prohibition is not a matter of international public policy. In order for an arbitration agreement in a contract to be valid, it must simply be established that the contract is international and that it was concluded for the purposes and in accordance with the usages of international commerce" (CA Paris, 24 February 1994, Ministère tunisien de l'équipement v. Bec Frères, 1995 Rev. Arb. 275 and XXII Y. B. Com. Arb. 682 (1997).

185. This is considered to be in accordance with a general principle of international arbitration and widely accepted (Fouchard, Gaillard, Goldman on International Commercial Arbitration, 1999, para. 546; Paulsson, 2 Arbitration International 90 (1986), p. 4).

186.COPEL's attitude towards arbitration is inconsistent with its previous conduct as it had entered into numerous other contracts providing for dispute settlement by ICC arbitration before.

187. In addition, COPEL warranted in the PPA that it could validly submit to arbitration. COPEL has represented and warranted in Clause 15.2(a) of the PPA that it

"has all requisite power and authority to conduct its business, to own its properties and to execute, to deliver and to perform its obligations under this Agreement"

and in Clause 15.2 (b) that

"it has full authority lawfully to enter into this Agreement, to purchase the Initial Dependable Capacity from [UEGA] without a competitive bid and to perform all of its obligations under this Agreement […]".

COPEL further contractually accepted arbitration as the means of dispute settlement (Clause 34.3 of the PPA) and agree to be bound by any award of the Tribunal appointed under the arbitration agreement (Clause 34.4 of the PPA). Moreover, COPEL has waived any right to object to the validity of its consent to submit to arbitration (Clause 34.4 of the PPA).

188.Most importantly, COPEL raised the proposition of the arbitration clause's invalidity only after UEGA had completed construction of the Plant. Furthermore, COPEL, respectively COPEL GENCO, had already assumed operation and maintenance of the plant in December 2001. Respondents did not question the PPA's validity until this arbitration commenced. Furthermore, ANEEL never questioned COPEL's capacity to arbitrate.

189.Also under Brazilian law an investor is not rendered unprotected in such a case. Art. 37 of the Brazilian Constitution reflects the principle of morality and thereby adopts the notion of good faith which needs to be honored. The Respondents' understanding of the supremacy of the public interests collides with the constitutional duty of all governmental entities to obey the principles of lawfulness and morality. Thereby governmental entities, including the Respondents are bound by the laws and the prevailing notions of morality and good faith. COPEL can therefore not freely derogate from its previous commitment to arbitrate all disputes.

190. It is common practice in international arbitration to reject the attempt of state parties to resort to their own national law in order to claim the arbitration agreement's invalidity despite having freely entered into the latter. The decision of the Tribunal in the Benteler Case may serve as an example (Benteler v. Belgium, Rev Arb 339 (1989), pp. 345 et seq.).

191.In Elf Aquitaine Iran v. NIOC (Ad hoc preliminary award, 14 January 1982, XI Y. B. Com. Arb. 97 (1986), para. 24) the sole arbitrator, Gomard, esq., held that

"it is a recognized principle of international law that a State is bound by an arbitration clause contained in an agreement entered into by the State itself or a company owned by the State and cannot thereafter unilaterally set aside the access of the other party to the system envisaged by the parties in their agreement for the settlement of disputes".

192.The Tribunal in the ICC Case No. 11559/KGA (text submitted by Claimant) has held in this regard:

"The conduct of the Respondents, up to the beginning of this arbitration, was therefore contrary to the impugnment of the validity of the arbitration provision that only until now, in the course of these proceedings, they seem to advocate. Thus, respecting the will of the parties, based on the principle of good faith and applying the principle that prohibits venire contra factum proprium, the logical conclusion is that it is not licit for the Respondents, contracting all their prior described conduct, to now argue the invalidity of the waiver of jurisdictional immunity and the arbitration provision that they freely agreed to with the Claimant". (paras. 12-13)

193.For all these considerations, COPEL is prevented from now claiming that it is not bound by the arbitration agreement it signed.

H.X Is respondent Nº 2 (COPEL GENCO) Bound to Arbitration?

1. Arguments by Respondents

194. The Respondents contention is that COPEL GENCO is not a party to this arbitration. COPEL GENCO did not sign the PPA and only signed the Amendment to the PPA as an intervening consenting party thereby not assuming rights and obligations towards UEGA (R I jur, para. 202 and R II jur, para.151) Respondents point out that the first amendment to the PPA did not expressly reinstate or incorporate the arbitration agreement. Therefore COPEL GENCO did not perform any act that could possibly be deemed as adhesion to the arbitration clause contained in the PPA (Mr. Muriel, hearing on 6 July 2004, p. 15, paras.16 ff) due to the lack of the mandatory approval by ANEEL neither the PPA nor its Amendment ever became effective between the parties to the arbitration. Thus, COPEL GENCO cannot have performed any obligation under the PPA as contended by UEGA.

Even if it had performed such obligation it would have done so on behalf of COPEL as an agent. No contractual relationship between COPEL GENCO and UEGA would have been created by such performance (R II jur, paras. 152 f).

195 Furthermore, Respondents contest that COPEL GENCO is an assignee of the PPA regarding COPEL's generating assets (R II, para.154).

2. Arguments by Claimant

196.COPEL was reorganized in the context of its privatization forming five subsidiaries wholly-owned by COPEL as a holding. One of them is COPEL GENCO which was formed as a separate legal entity in January 2001.

197.UEGA contends that COPEL GENCO is bound by the arbitration clause contained in the PPA was well. Although COPEL GENCO is a party to the First Amendment to the PPA which does not include an arbitration clause, it has nonetheless consented to the arbitration. According to Art. 4, § 1 of the BAA inclusion of an arbitration agreement by reference is possible. The first Amendment clearly refers to the terms of the PPA including the arbitration clause. The PPA and the Amendment constitute an indivisible economic whole. Contrarily to the Respondent's submission, there is no distinction between an "intervening party" and any other party to a contract under Brazilian law (C II jur, pp. 3 f).

198.Claimant refers to Art. 3.3 of the First Amendment to the PPA (C-1E) where the Parties including COPEL GENCO ratified and confirmed the remaining provisions of the PPA and thereby as well the arbitration clause (Mr. Baker, hearing on jurisdiction, 6 July 2004, transcript, p. 135).

199.Additionally, UEGA argues that COPEL's generation assets were conveyed to COPEL GENCO (C I jur, para. 63). Hence, COPEL GENCO is subject to the same dispute settlement mechanism as COPEL, *i.e.* arbitration

200.Furthermore, UEGA emphasizes that COPEL GENCO has performed mutual obligations under the PPA and thereby accepted the dispute resolution clause contained in this contract. COPEL GENCO has taken over operation and maintenance of the plant and was invoiced for the monthly payments by UEGA upon request by COPEL. Thus, COPEL GENCO must be deemed to be bound by the arbitration agreement through acceptance by performance (C I jur, para.68).

201.As COPEL instructed Claimant to contract with, turn over the plant to and invoice COPEL GENCO, there is no necessity of piercing the corporate veil. COPEL GENCO is a proper party to this arbitration (Mr. Baker, hearing on jurisdiction, 6 July 2004, transcript, p. 173).

3. The Tribunal

202.Generally, a party that has not signed an arbitration agreement cannot be bound by it. However, COPEL GENCO signed the "First Amendment" to the PPA both of which form and indivisible economic whole. The "First "Amendment" by its title implies that the PPA is at its foundation and that it cannot have a separate and independent existence on its own.

203.COPEL GENCO comes into play in Art. 3.4 of the "First Amendment" which reads: "*COPEL GENCO S/A, a wholly owned subsidiary of COPEL ("COPEL Generation"), joins in this Amendment as an intervening party to be recognized as an agent of COPEL for the purpose of tendering certain performance of COPEL to IPP under the Power Purchase Agreement; provided however, that the joinder of COPEL Generation shall in no way relieve, relieve or work any novation of COPEL's obligations as the primary obligor under the Power Purchase Agreement or amend or modify in any existing obligations of COPEL under the Power Purchase Agreement, including those obligation of COPEL for further assistance with respect to any reorganization of transfer of assets of COPEL as set forth in Clause 21.5 of the Power Purchase Agreement*".

On the one hand, the wording of this provision includes some limitation regarding the involvement of COPEL GENCO as a party. On the order hand, the general rules of the PPA including the agreement to settle disputes by arbitration are applicable by virtue of Art. 3.3 of the "First Amendment" which provides:

"The parties expressly ratify and confirm the remaining provisions, terms and conditions of the Power Purchase Agreement signed May 31, 2000, which have not seen expressly amended or modified by this Amendment and which shall remain in full force and effect".

But here again, a limitation must be recognized due to the introductory section of the First Amendment which, in its third paragraph, provides:

"COPEL and IPP are hereafter jointly referred to as "Parties" and individually as a "Party".

204. Therefore, the reference to the "parties" in Art. 3.3 cannot be understood to expressly include COPEL GENCO. Thus, further examination is required as to whether COPEL GENCO has submitted to arbitration.

205. Not only French law (Art. 1443, para 1), but also Art. 4 (§ 1) of the BAA expressly allows for conclusion of an arbitration agreement by reference to another document containing an arbitration clause:

"The arbitration clause shall be in writing contained in the contract itself or in a separate document referring thereto"

206.However, COPEL GENCO not only signed the First Amendment. The First Amendment also transferred to COPEL GENCO major obligations of performance of the PPA. And, indeed, thereafter, COPEL GENCO in fact took over such performance as is illustrated by the following: COPEL GENCO performs COPEL's obligations under the PPA, took over operation and maintenance of the Plant from UEGA and was invoiced for the monthly payments by UEGA upon requests by COPEL. It is also understood that COPEL GENCO remains in possession of the Plant as at the date of this Award. It has contracted with third parties for the maintenance of the plant. It is irrelevant in this context that COPEL GENCO purportedly currently maintains the Plant in stand-by modus only.

207. If Respondent's arguments were to be accepted the result would be that for this major part of the performance of the PPA an entirely different dispute settlement system, i.e. through the courts of Brazil, would be applicable than for the remainder of the obligations resting with COPEL itself. The dispute settlement clause contained in the PPA would be rendered meaningless and senseless if COPEL GENCO as the party performing the contract was not bound by it whereas COPEL was bound but does not perform major obligations under the contract. The crucial fact is that COPEL GENCO itself actually took over performance by COPEL. Moreover, upon request by COPEL, UEGA invoiced COPEL GENCO for the monthly payments. Therefore, Respondent's proposition that no legal relationship existed between COPEL GENCO and UEGA and that the former did not assume any rights and obligations towards the latter is not sustainable.

208.A mere guarantor or issuer of a letter of credit cannot be assumed to be bound by an arbitration clause contained in the underlying contract. However, a party taking over substantial performance of a contract incorporating an arbitration clause must be deemed bound by that clause. A contractual agreement to submit all disputes to arbitration makes sense only if the party performing the obligations under the contract is bound by it. Otherwise the arbitration agreement would be rendered meaningless by a unilateral act of COPEL, i.e its reorganization into a holding company with no own operational capabilities. In view of the importance given to arbitration as the dispute settlement system for the PPA, another conclusion could only be drawn if the First Amendment expressly so stated – which it does not.

These considerations are in conformity with French arbitration law where, as well,

"an international arbitration clause is valid and operative to such a point that it also applies to parties who directly implicate themselves in the performance of the contract…" (Derains and Goodman-Everard, Chapter "France" in Int. Handbook on Comm. Arbitration, p. 11)

209.Therefore, irrespective of what the exact legal position of COPEL GENCO is under substantive Brazilian law due to the terms "intervening party" and "agent" in art. 3.4 of the First Amendment, the Tribunal concludes that, by signing the First Amendment and subsequently performing the PPA, COPEL GENCO is also bound by arbitration clause in the PPA.

H.XI Considerations regarding Costs at this stage

1. Relief Sought by Respondents

210.Regarding costs, without submitting further arguments in this regard, Respondents (R I jur. Page 70) request from the Tribunal:

"ordering the Claimant to reimburse to the Respondents all the amounts incurred by them with the processing of this present arbitration proceeding, including but not limited to lawyer's fees and travel expenses".

2. Relief Sought by Claimant

211.Also regarding costs, Claimant's final relief sought (C II jur page 26) is identified as follows:

"(2) Find that COPEL has breached the Agreement's arbitration clause by commencing actions in the local state courts of Paraná, and, accordingly,

a) award UEGA damages equal to the amounts incurred in defending against the state court actions;

b) order COPEL to indemnify UEGA for any further costs, fines or expenses that UEGA must pay as a result of or in connection with COPEL's local litigation;

(3) Order COPEL to pay UEGA's attorneys' fees and costs in connection with defending against COPEL's jurisdictional objections before this Tribunal;

(4) Require COPEL to pay its share of the advance on costs, and to the extent that it does not, prohibit COPEL from asserting any counterclaims in this arbitration".

3. The Tribunal

212.The Tribunal considers that not sufficient evidence is available from the Parties at this stage of the procedure, to distinguish which costs have occurred regarding jurisdiction on one hand and regarding the merits on the other hand.

Therefore, the Tribunal concludes that its decision on all costs shall be reserved for a later award or awards in this case.

I. Decisions

For the foregoing reasons, the Tribunal renders the following decisions:

1. The arbitration agreement between the Parties is valid and enforceable.

2. The Tribunal has jurisdiction over the claims raised in this arbitration.

3. Respondent Nº 2 COPEL GENCO, also, is bound by the arbitration and is under jurisdiction of this Tribunal.

4. All other claims including claims for costs are reserved for a later award or awards.

Made in Paris, being the place of arbitration, on December 6, 2004.

Prof. Karl-Heinz Böckstiegel

(Chairman)

Prof. Martin Hunter

(Arbitrator)

Prof. Jorge Fontoura Nogueira

(Arbitrator)

(Dissenting in Part)

International Chamber of Commerce (ICC)

International Court of Arbitration

ICC Arbitration 12656/KGA: UEG Araucária Ltda. (UEGA) (Brazil) v.

1) Companhia Paranaense de Energia (COPEL) (Brazil)

2) COPEL GENCO S.A. (Brazil)

1. I have signed the Award on Jurisdiction dated December 6, 2004 (the "Award") to confirm that:

a. it is indeed the majority award of my two colleagues;

b. I have no complaint about the conduct of the proceedings or the deliberations of the Tribunal, in which I have participated fully and consider to have been entirely fair, and;

c. I agree with most of the views expressed by my distinguished colleagues in their majority award.

2. There is, however, one crucial issue on which I am unable to agree with my colleagues. This concerns what came to be described during the hearing and the Tribunal's deliberations as "subjective arbitrability". The decision of the majority is set out in paragraphs 84 to 137 of the Award.

3. I believe that the opinion of my colleagues stems from a diversity of legal cultures, which has led to a different understanding of the role and effect of the Constitution of Brazil. Although I acknowledge that the opinion of the majority is honestly held, I feel obliged to explain my reasons for dissenting, below.

4. First, I would like to emphasize that, to the best of my knowledge, what is being appreciate here is the validity and/or effect of an article of the contract between COPEL and UEGA, in light of the Brazilian Constitution and in light of the legal nature of COPEL. This is not a decision about the importance or convenience of arbitration; neither is it about the good will of the trustworthiness of either party; nor is it a decision as to whether we are in favor or against arbitration. The question to be appreciated is whether, as a state-owned company, COPEL can take part in arbitration within the Brazilian legal framework.

5. Article 173 of the Brazilian Constitution is merely an article that calls for regulation, it does not issue a command. It simply states that a goal is to be reached, that is:

The law shall establish the legal system of public companies, joint-stock companies and their subsidiary companies engaged in economic activities connected with the production or trading of goods, or with the rendering of services […]

6. The way to reach this goal requires another statue to be legislated. It is quite clear that there is a difference between this Article 173 and Article 37 of the Brazilian Constitution, which has a mandatory character:

Article 37. The governmental entities and entities owned by the Government in any of the powers of the Union, the states, the Federal District and the Municipalities shall obey the principles of lawfulness, impersonality, morality, publicity, and efficiency […] (emphasis added)

7. It is difficult to conclude that the above mentioned in article 173 equalizes private and public companies. The reading of this article already informs the *raison d'être* of the law and the will of the legislator, which was to protect public entities from reckless administration. Moreover, Article **173, III**, explicitly determines that a specific law shall establish *bidding and contracting of works, services purchases, and disposal, with* ***due regard for the principles of government services****,* which are clearly and expressly determined in the also mentioned article 37. In such case there is no need for further interpretation The Brazilian Constitution is sufficient to decide about the subjective arbitrability: *in claris cessat interpretatio*. The supreme law speaks for itself and requires no other legal instrument to clarify its content.

8. As Philip S. James, Emeritus Professor of the University of Buckingham, states in Introduction to

English Law, Oxford University Press, 13th Edition, 1996:

[…] the cardinal rule concerning interpretation is the literal one. The words of an enactment must primarily be interpreted in their ordinary, literal or grammatical sense. And provided that the interpretation does not give rise to some absurdity, repugnancy, inconsistency or ambiguity, the court is not entitled to construe them loosely or fancifully, even if a strict construction appears to lead to a wrong result.

9. In a classical case coming from the English Law, Lord Wensleydale, *in***Grey v. Pearson (1857) 6 H.L. Cas. 61 at 106,** asserts that in construing statutes, the grammatical and ordinary sense of the words must be followed. This is the golden rule: be strict in interpretation, but modify the construction where essential to avoid absurdity or inconsistency.

10. Finally, it is important to bear in mind that Brazil is a civil law jurisdiction, where the principle of constitutionality is taught to every student at the beginning of his or her legal education as a matter of fundamental rule. Additionally, according to the civil Code of Brazil, public interests always prevail over private interests. It follows that the will of the parties is restricted in order to protect public policy precepts. This is clarified by article 2.035, as follows:

No private contract shall prevail if it violates public policy precepts, such as those provided for in this Code, in order to guarantee the social function of private property and contracts.

11. The awareness of constitutionality is more than important, it is actually vital to the settlement of this dispute. In view of this, the light of the constitution ought to be cast on the question of subjective arbitrability and on article 34 of PPA, in which COPEL purports to submit to arbitration. The legal nature of COPEL must also be considered, as well as the non-existence of a proper legal provision able to regulate companies such as COPEL and their possibility of taking part in arbitrations which is an alternative way to settle their disputes as long as a specific law permits it.

12. During the hearing, it was mentioned that PETROBRAS, which has the same Legal nature of COPEL, can participate in arbitrations. In fact, this is a result of a specific law permitting it (**Law 9478/1997, Article 43, X:***rules for settling disputes related to the contract and its performance, including reconciliation and international arbitration)*. This convincing argument was not contested; accordingly, the question remains – if companies like PETROBRAS and COPEL are free to contract as private companies, why then there is a special law to allow PETROBRAS to take part in arbitration? This is an analogical thought. The special law of PETROBRAS encompasses only this company; there is no extensive application.

13. It is clear that the activities of these two companies are completely different and shall not be mixed. No law allowing PETROBRAS to take part in arbitration will be used to grant permission for COPEL to do so. Each of the Brazilian state-owned company needs a specific law in order to regulate this possibility in accordance with the principle of strict lawfulness.

14. As regards another argument used in the hearings – the existence of a precedent ordinary legislation, that is, not a constitutional provision, permitting public companies, in the general sense of the expression to go to arbitration -, it must be remembered that the Brazilian Constitution is from 1988, including its article 37 with its strict mandatory content, and, for that, *lex posterior derogate priori,* especially if there are regulations of different rankings like a constitutional provision and a mere statutory one.

15. It is also revealing that the lawsuit presented by the Respondent to the Brazilian Judiciary, in Curitiba, was appreciated by a specialized branch of jurisdiction, which was called Lower State Treasury Court in the translations presented by the parties. It is relevant to emphasize that this so-called Treasury Court (*Vara da Fazenda Pública)* is, in fact, the responsible and competent branch of Brazilian Justice to settle disputes in cases where the principle of strict lawfulness is imperative, due to the nature of both parties or the nature of just one of them. This is quite clear in the Brazilian legal culture: COPEL did not hesitate about choosing this specialized Court nor did UEGA protest against it. On the contrary, the latter presented its response without contesting the appropriateness of this forum. This is a demonstration that in Brazil there is a non-controversial understanding that companies like COPEL are treated in a different manner than ordinary and private companies.

16. Thus, the decision concerning the possibility of COPEL taking part in an arbitration must consider,

first and foremost, that being a state-owned company like PETROBRAS, a law permitting it to participate in arbitration is required.

17. Secondly, one has to recognize that the regime that governs such a company is public.

18. Thirdly, as a consequence of being governed by a public regime, there is no other possible interpretation. The company's assets cannot be the object of any kind of obligations, without prior legislative consent. Thus, under the principle of strict lawfulness, suffice it to say that article 34.3 of the PPA is illegal and does not generate any effect, despite the liability that the misuse of the clause might produce in the field of the law of torts, or the liability for extra-conjugal damages. COPEL may be liable for possible damages that may arise out from the invalidity of Article 34.3, of the PPA, but this is a matter that must be addressed in another forum because COPEL cannot submit to private arbitration without legislative authorization.

19. In view of all the above considerations, my opinion is that Article 34.3 of the PPA is null and void, and I respectfully dissent from the views of my colleagues as expressed in the majority award. The arbitration should be dismissed for lack of jurisdiction.

Prof. Jorge Fontoura Nogueira

(Arbitrator)

(Dissenting in Part)

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1 O teor desta Sentença Arbitral encontra-se disponível nos autos do Processo 24.334/2003 do Tribunal de Justiça do Paraná.

2 The correct translation of this term was discussed at the hearing on jurisdiction on 6 July 2004. The following expressions have been considered: disposable patrimonial rights, disposable proprietorial rights, property rights, unmarketable rights and transferable rights (transcript of hearing on 6 July 2004, pp. 47 ff and 157 f).

3 NR – O trecho correspondente aos itens 158 a 163 não estavam disponíveis nos Autos do Processo 24.334/2003.