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ARBITRAL AWARD

Arbitration Panel
In accordance with UNCITRAL Arbitration Rules

In the matter of an arbitration between

PETRÓLEO BRASILEIRO S/A - PETROBRÁS
TERMORIO S.A.
PRS – ENERGIA LTDA.
Brazil
Claimants – Counterclaim Respondents

And

NRG INTERNATIONAL HOLDINGS (No.2) GmbH
Switzerland
Respondent- Counterclaimant
NRGENERATING LUXEMBOURG (No.2) S.a.r.l
Luxembourg
Counterclaimant

March 8, 2004

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Chapter I. Identification of the Parties

[1] Claimants – Counterclaim Respondents

1. PETRÓLEO BRASILEIRO S/A – PETROBRÁS, a mixed-capital company organized under the laws of the Federative Republic of Brazil, with its head-office at Av. República do Chile, 65, CEP 20035-900, Rio de Janeiro, RJ, Brazil, registered with CNPJ/MF under No. 33.000.167/0001-01, hereinafter referred to as "Petrobrás" or "Claimant", assisted and represented in this arbitration by Andrade & Fichtner Advogados, with office at Avenida Almirante Barroso, 139, 4th floor, CEP 20031-005, Rio de Janeiro, RJ, Brazil;

2. TERMORIO S.A., a company organized under the laws of the Federative Republic of Brazil, with its head-office at Avenida Almirante Barroso, 63, rooms 815 to 817, CEP 20031-003, Rio de Janeiro, RJ, Brazil, registered with CNPJ/MF under No. 03.526.800/0001-39, hereinafter referred to as "TermoRio" or "Claimant", assisted and represented in this arbitration by Andrade & Fichtner Advogados; and

3. PRS – ENERGIA LTDA., a company organized under the laws of the Federative Republic of Brazil, with its head-office at Avenida Almirante Barroso, 63, rooms 706-707, CEP 20031-003, Rio de Janeiro, RJ, Brazil, registered with CNPJ/MF under No. 04.206.278/0001-70, hereinafter referred to as "PRS" or "Claimant", assisted and represented in this arbitration by Andrade & Fichtner Advogados.

Petrobrás, TermoRio and PRS are also collectively referred to as "Claimants".

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[2] Respondent / Counterclaimants:

1. NRG INTERNATIONAL HOLDINGS (No. 2) GmbH, a company organized under the laws of Switzerland, with its registered office at Steinackerstrasse 9, 8700 Kusnacht, Switzerland, hereinafter referred to as "NRG International" or "Respondent", assisted and represented in this arbitration by Vinson & Elkins L.L.P. Attorneys at Law, with office at The Willard Office Building, 1455 Pennsylvania Ave, N.W, Washington D.C. 20004-1008, USA; and

2. NRGENERATING LUXEMBOURG (No.2) S.a.r.l., acting through its Swiss branch, a company organized under the laws of Luxembourg with office at Steinnackerstrasse 9, 8700 Kusnacht, Switzerland, hereinafter referred to as "NRGenerating", assisted and represented in this arbitration by Vinson & Elkins L.L.P. Attorneys at Law. NRGenerating is not named as a Respondent, but is participating in this arbitration only as Counterclaimant.

NRG International Holdings (No. 2) GmbH and NRGenerating Luxembourg (No. 2) S.a.r.l., are also collectively referred to as "NRG" or "Respondents".

Chapter II. The Arbitral Tribunal

The Arbitral Tribunal has been constituted as follows:

[1] Claimants have jointly proposed as arbitrator Professor Gustavo José Mendes Tepedino, with office at Avenida Rio Branco, 151, 10th floor, room 1005, CEP 20040-006, Rio de Janeiro, RJ, Brazil, Fax nr. (55.21) 2531.7072, Email: tepedino@uol.com.br;

[2] Respondent/Counterclaimants have jointly proposed as arbitrator Professor Hermes Marcelo Huck, with office at Avenida Brigadeiro Faria Lima, 1744, 6th floor, CEP 01451-001, São Paulo, SP, Brazil, Fax nr. (55.11) 3038.1102, Email: mh@lhm.com.br;

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[3] The two arbitrators thus appointed have proposed as chairman of the Arbitral Tribunal Professor Luiz Gastão Paes de Barros Leães, with office at Rua Sampaio Vidal, 1154, CEP 01443-001, São Paulo, SP, Brazil, Fax nr. (55.11) 3815.1012, Email: prof.leaes@leaesadv.com.br.

Chapter III. The Constitution of the Arbitral Tribunal

[1] The Arbitration Clause

This Arbitral Tribunal was constituted in accordance with the UNCITRAL Arbitration Rules pursuant to the Arbitration Clause set forth in Section 16 of the Share Purchase and Sale Agreement entered into by Petrobrás, NRG International and PRS, on September 3, 2001 (the "Share Purchase and Sale Agreement").

[2] The Place of Arbitration

Pursuant to Resolution (a) expressed in the Minutes of the Meeting for the Constitution of this Arbitral Tribunal, dated September 10, 2002, the place of arbitration is Rio de Janeiro, RJ, Brazil.

[3] Language of the Arbitration

1. In accordance with Resolution (b) expressed in the Minutes of the Meeting for the Constitution of this Arbitral Tribunal, all proceedings under this arbitration were conducted in the English language, as set forth in Sections 4.4 and 16.1 of the Share Purchase and Sale Agreement.

2. All communications among the parties and the Arbitral Tribunal were also in English. When the Arbitral Tribunal has considered necessary that any evidence was given in Portuguese, the Arbitral Tribunal has requested the party tendering such evidence to provide

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an accurate translation of it to the arbitrators and to the other parties.

3. The Arbitral Tribunal accepted oral depositions in Portuguese, whenever the party requiring such testimony has provided the relevant simultaneous translation.

[4] Applicable Law

A. Applicable substantive law

1. Section 15.1 of the Share Purchase and Sale Agreement provided that the agreement should be governed in all respects by the Law of the Federative Republic of Brazil without regard to any choice of law rules.

2. Sections 4.4 and 16.1 of the Share Purchase and Sale Agreement provided also that any dispute or controversy relating to the validity, interpretation, performance and enforceability of such Agreement should be resolved exclusively and finally by international arbitration, in accordance with the Brazilian Law.

The parties agreed that the arbitrators did not have the power to decide in equity.

B. Applicable procedural rules

3. Pursuant to Resolution (c) expressed in the Minutes of the Meeting for the Constitution of this Arbitral Tribunal, the rules governing the proceedings of arbitration were the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL Rules"), as set forth in Sections 4.4 and 16.1 of the Share Purchase and Sale Agreement.

4. Where those Rules were silent, the Arbitral Tribunal was allowed to apply the procedural rules it deemed appropriate, such rules being determined by way of Procedural Orders. These procedural orders on specific procedural issues could be signed solely by the

Chairman of the Arbitral Tribunal, after agreement with his co-arbitrators.

[5] Procedural Timetable

1. The arbitration was to be concluded within 120 (one hundred and twenty) days as from the execution of the Terms of Reference, on August 26, 2003. In this way, the deadline for the final award was November 20, 2003, as initially defined.

2. As a result of the expertise and other events, there was a delay on the proceedings steps, requiring the extension of this arbitration first until January 30, 2004, afterwards until, March 1st, 2004, and finally to March 8, 2004.

Chapter IV. Background of the Dispute and the Proceeding

1. This arbitration arose out of a business relationship between the parties.

2. As a result of the power crisis that was predicted at the end of the last century and assailed Brazil in 2001, companies of various sizes worked to find a solution for the power shortage caused by the reduction in the water resources required to run the Brazilian hydroelectric complex. The solution for this problem led towards the development of alternative power sources, so as to reduce Brazil's dependency on its hydroelectric plants.

3. On December 18, 1998, Petrobrás, PRS and other parties entered into a Memorandum of Understanding with a consortium of entities to develop and operate a co-generation thermoelectric natural-gas plant in Duque de Caxias, RJ, Brazil, adjacent to the Duque de Caxias Refinery (the "Project"). The parties planned to develop the Project in three phases; after the final phase, it would be able to generate 300 t/h of steam and 1,040 MW of electric energy.

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4. In order to carry out the Project, the parties agreed to organize a special purpose company ("SPC") named TermoRio, to develop and operate this thermoelectric power plant, and through a Shareholders' Agreement the parties assumed the obligation to retain an equity interest in said SPC for a long period of time. However, on April 6, 2001, through a "Private Instrument of Purchase and Sale of Shares, Assignment of Credits for Value and Other Covenants", the members of the consortium formalized its withdrawal from the Project and under such instrument Petrobrás purchased its shares.

5. Upon the withdrawal of Reduc Investimentos Ltda of the consortium, Petrobrás and PRS agreed to an acquisition by NRG of a portion of equity interest of the Project. On July 30, 2001, NRG signed a Memorandum of Understanding to join the Project. On September 3, 2001, the parties signed a Share Purchase and Sale Agreement. NRG agreed to pay a premium to Petrobrás of US$ 1,000,000 to enter the Project, and to purchase from Petrobrás 50% of the outstanding shares in TermoRio. Upon consummation of such transaction, the ownership interests in TermoRio came to be as follows: Petrobrás, 43%; PRS, 7%, and NRG, 50%.

6. In September 2001, the parties entered into a series of contracts: (i) the Share Purchase and Sale Agreement dated September 3, 2001, which formalizes the purchase of TermoRio's shares by NRG and establishes funding obligations; (ii) the Second Amendment to the Shareholders' Agreement of TermoRio dated September 3, 2001, entered into by PRS Comércio e Participações Ltda, Petrobrás and NRG, with TermoRio and PRS as intervening parties, which together with the first Shareholders' Agreement of TermoRio dated November 30, 1999, and the Private Instrument for Amendment to the Shareholders' Agreement of TermoRio dated May 18, 2001, constitute the Shareholders' Agreement of TermoRio; (iii) the Capital Funding Agreement of September 6, 2001, entered into by Petrobrás, PRS, NRG, NRGenerating, NRG Energy, Inc. ("NRG Energy") (as a Guarantor) and, as intervening party, TermoRio; and (iv) the Loan Agreement of September 6, 2001, entered into by TermoRio and NRGenerating, as lender.

7. Before NRG entered the Project, an Energy Conversion Contract ("ECC") and an Engineering, Procurement and Construction Contract (the "EPC Contract") had already been executed. When

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NRG joined the Project, the parties agreed to anticipate the implementation of Phases II and III of the Project. To do that they agreed to negotiate an EPC for Phases II and III and to amend the ECC, in order to have Petrobrás' commitment to supply fuel to the plant and to purchase all of the power and steam generated by TermoRio. The parties also established in the Share Purchase and Sale Agreement that they should satisfactorily agree with the terms and conditions for the operation and maintenance of the Project ("O&M Agreement"). Finally, they agreed to perform all acts necessary for the transformation of TermoRio from a "*sociedade anônima*" into a "*sociedade por quotas de responsabilidade limitada*", upon the execution of the amendment to the ECC and the execution of the O&M Agreement, and after the term of the Put Option (as defined below), in accordance to Section 12.3 of the second Amendment of the Shareholders Agreement.

8. The parties agreed to complete the above referred to contracts on a later date but also agreed to start funding the Project immediately. The parties created a Put Option on behalf of NRG, whereby NRG would be able to require Petrobrás to purchase its interest in TermoRio, as set forth in Section 4.1 of the Share Purchase and Sale Agreement, in some specific events (the "Put" or "Put Option"). As per the Fourth Amendment to the Share Purchase and Sale Agreement, executed on February 8, 2002, the term of the exercise of the Put Option was extended until March 20, 2002.

9. On the other hand, the Capital Funding Agreement, dated September 6, 2001, created a Call Option, established in its Section 8.2, whereby, in case of an Event of Default (as defined by the referred agreement), the non-defaulting party should have the right to acquire all the shareholding participation of the defaulting party for its book value and also to acquire the corresponding portion of the outstanding credits held by the defaulting party, at 90% of their face value. For the purposes of the exercise of the Call, the events set forth in Section 8.1 of the Capital Funding Agreement was to be considered an Event of Default.

10. The ECC amendment and O&M Agreement failed to be executed within the time limit assigned in the Share Purchase and Sale Agreement and the parties agreed to extend this deadline four times. On April 17, 2002, NRG exercised the Put, requesting Petrobrás to pay US$ 68,639,768.40 for its shares and credits.

11. On April 30, 2002, Claimants filed a petition with the State court in Rio de Janeiro against NRG seeking an *ex parte* injunction suspending the effect of the Put. By Order dated May 3, 2002, the court granted an injunction against NRG, suspending the effects of the Put Option until final resolution by the Arbitral Tribunal.

12. On May 16, 2002, Petrobrás exercised the Call Option offering to pay US$ 57,349,037.07 for NRG's shares and credits in TermoRio. On May 17, 2002, Claimants submitted a Notice of Arbitration. On June 3, 2002, NRG submitted a Response and Notice of Counterclaims.

13. On September 10, 2002, the Arbitral Tribunal was constituted. On February 7, 2003, Claimants submitted their Statements of Claim. On February 11, 2003, the Arbitral Tribunal acknowledged receipt of the Statements of Claim and ordered NRG to respond. On March 13, 2003, pursuant to that order, NRG submitted a Statement of Defense and Counterclaims.

14. On April 22, 2003, Claimants submitted their Answer to the Counterclaims and Replication to the Statement of Defense. On April 30, 2003, and on May 19, 2003, NRG filed two petitions; the first (i) requesting an interim declaration of the Arbitral Tribunal that certain issues were not in dispute, and the second (ii) informing that NRG Energy and certain of its affiliates had filed voluntary petition for reorganization under Chapter 11 of the United States Bankruptcy Code in a court in New York. On June 2, 2003, Claimants presented responses to both petitions and requested that the Arbitral Tribunal (i) considered that the filing for reorganization by NRG Energy was an Event of Default by NRG under the Capital Funding Agreement; and (ii) denied NRG's request for a preliminary ruling. On the same date, Petrobrás filed an individual petition requesting that the Arbitral Tribunal declared that (i) the New York court in which NRG Energy filed its voluntary Chapter 11 petition was notified by the Arbitral Tribunal of the existence of the present arbitration; and (iii) that the New York court blessed any eventual transfer of shares ordered by this Arbitral Tribunal.

15. On June 13, 2003, the Arbitral Tribunal issued Procedural Order nr. 8, which ordered (i) Claimants to state and quantify the amounts of their claims and (ii) NRG to confirm whether under the United

States. Bankruptcy laws NRG Energy's reorganization could adversely affect the accomplishment of any future orders of the Arbitral Tribunal. On June 23, 2003, NRG presented a response to Procedural Order No. 8 and Statement of Defense to the new claim mentioned in item 14, above, *in fine.* On June 25, 2003, Claimants presented their response to the Arbitral Tribunal.

16. On August 26, 2003, during the first hearing held in the city of Rio de Janeiro, (i) the Terms of Reference were finalized and executed by the Arbitral Tribunal and the parties, and (ii) evidence and respective justification were specified by the parties. Claimants requested to produce the following evidence: (a) inspection of TermoRio's facility by the Arbitrators; (b) oral evidence, including hearing of NRG's representative; and (c) accountant expertise. NRG requested the following evidence: (a) supplemental documentary evidence and (b) oral testimony of witnesses. In addition, NRG required mandatory written submission of the oral testimonies.

17. On September 2, 2003, the Arbitral Tribunal, through Procedural Order nr. 10, admitted the conversion of oral testimonies into written statement signed by the witnesses and requested that such statement would be filed ten (10) days prior to the hearing. In the same decision, the Arbitral Tribunal also admitted expert evidence, consisting on an accounting opinion, and appointed Mr. Alfredo Torrecillas Ramos as expert to report it, in a technical approach, strictly within the limits of specific issues.

18. On September 15, 2003, both parties submitted to the Arbitral Tribunal their queries to the expert. On September 26, 2003, the Arbitral Tribunal enacted Procedural Order nr. 12, considering that part of the queries submitted by Claimants were impertinent. The Arbitral Tribunal accepted the remaining Claimants' queries and NRG's queries.

19. On October, 7, 2003, the Arbitral Tribunal, through Procedural Order nr. 13, accepted the supplementary queries submitted by the parties. On October 22, 2003, the Arbitral Tribunal extended the arbitration term until January 30, 2004.

20. On November 27, 2003, the Expert's Report was delivered. On December 1st, 2003, the technical assistants of the parties delivered their respective opinions on the Expert's Report. In the same date,

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the parties submitted to the Arbitral Tribunal the names of the witnesses they intended to present as well as the detailed subject upon and the language in which such witnesses would render their testimonies.

21. On December 5, 2003, the parties submitted to the Arbitral Tribunal their clarification queries regarding the Expert's Report. On January 6, 2004, the expert delivered his clarifications.

22. On January 6 and 7, 2004, the expert and the witnesses hearings were held in the city of Rio de Janeiro. On January 6, 2004, the parties and the members of the Arbitral Tribunal questioned the expert and the technical assistants. Next day, on January 7, 2004, the witnesses indicated by both parties testified at the arbitration hearing. Finally the parties' counsels, Mr. José Antonio Fichtner and Mr. Alden L. Atkins, presented their final oral arguments.

23. The Arbitral Tribunal decided to change the deadline for delivery of the post-hearing memorials and the date of the final award, respectively to February 16 and March 1st, 2004, pursuant to Procedural Orders nr. 19 and 20, dated January 12, 2004, and February 5, 2004, respectively.

24. On March 1st, 2004, the Arbitral Tribunal issued Procedural Order nr. 21 postponing the deadline for delivery of the final award to March 8, 2004.

25. The Arbitral Tribunal issued twenty one Procedural Orders, numbered from 1 to 21, to wit: Procedural Order nr. 1, dated 11.14.02; Procedural Order nr. 2, dated 10.28.02; Procedural Order nr. 3, dated 01.09.03, Procedural Order nr. 4, dated 02.11.04; Procedural Order nr. 5, dated 03.18.03; Procedural Order nr. 6, dated 04.15.03; Procedural Order nr. 7, dated 05.20.03, Procedural Order nr. 8, dated 06.13.03; Procedural Order nr. 9, dated 08.20.03; Procedural Order nr. 10, dated 09.02.03; Procedural Order nr. 11, dated 09.19.03; Procedural Order nr. 12, dated 09.26.03; Procedural Order nr. 13, dated 10.07.03; Procedural Order nr. 14, dated 10.22.03, Procedural Order nr. 15, dated 10.29.03; Procedural Order nr. 16, dated 10.31.03; Procedural Order nr. 17, dated 11.14.03; Procedural Order nr. 18, dated 12.12.03; Procedural Order nr 19, dated 01.12.04; Procedural Order nr. 20, dated 02.05.04. and Procedural Order nr. 21, dated 03.01.04.

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Chapter V. Summary of the Parties' allegations

[1] Statements of the Claim of the Claimants

1. Given the precedent that the original members of the consortium had failed to pursue the completion of the Project, in order to admit Respondent into TermoRio, the other Shareholders required a specific representation from the new shareholder concerning its ability and intention to fulfill the financial investments necessary for implementation of the Project, as mentioned in the following Recital to the Share Purchase and Sale Agreement entered into by the parties:

> *"WHEREAS, the NEW SHAREHOLDER has the financial capability and the disposition to make the necessary financial contributions together with the other shareholders of TERMORIO to achieve the completion of the Project;"*

2. The Claimants also mentioned that the above quoted representation requested from NRG with respect to its financial ability and willingness to carry out its obligations was essential for the success of the Project, considering that the obligations undertaken by the shareholders of TermoRio worth approximately US$ 715,200,000.

3. In addition, Section 11.4.1 of the Share Purchase and Sale Agreement and Section 2 of the Capital Funding Agreement stated that each shareholder should make equity contributions in an amount equal to at least 30% (thirty percent) of the costs associated with the Project, considering that TermoRio planned to raise financing in the market for the remaining 70% (seventy percent) of the total Project cost.

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4. Pursuant to the spirit of cooperation and good faith of the Claimants, and considering NRG's firm intention to enter into the Project and contribute financially to its success, the parties included a Put Option on behalf of NRG, granting to the new partner the right to withdraw from the Project in those cases in which, due to the fault of TermoRio or the remaining shareholders, the Project did not prove viable. Among the events that could trigger the Put Option, two specific events, the non-amendment to the ECC and the non execution of the O&M Agreement, within the time limit assigned in Section 4.1 of the Share Purchase and Sale Agreement, could lead to NRG's exercise of the Put Option.

5. Considering the importance of NRG's obligation to contribute with its own funds to the Project, and considering NRG's 50% equity interest in TermoRio, the parties executed the Capital Funding Agreement and the Loan Agreement. The Capital Funding Agreement established the funding mechanism for the Project, whereby the parties agreed to provide capital to TermoRio in the form of subordinated loans. Section 8.2 of this agreement contained a Call provision, which stated that, upon an Event of Default, the non-defaulting party could acquire the defaulting party's participation and outstanding credits, at 90% of their face value.

6. The Loan Agreement, entered into by TermoRio and NRGenerating, established the terms for NRG's loans to TermoRio for NRG's portion of the Project costs, in accordance with the terms and conditions of Section 2 of the Capital Funding Agreement, Section 11 of the Share Purchase Agreement and Section 5.2 of the Second Amendment to the Shareholders Agreement. In line with Sections 2 and 3 of the Loan Agreement, the disbursements to TermoRio should be made through drawdowns, by means of notices sent by TermoRio to the shareholders requesting the sums to be disbursed. The Call Option was extended under Section 8.2 of the Capital Funding Agreement to all shareholders of TermoRio.

7. Considering the magnitude of the Project, and of NRG's ownership, NRG's capital contributions in the form of equity or subordinated loans were vital. However, it became apparent to Claimants that NRG assumed obligations in excess of its actual capabilities. In the case, instead of making the other partners aware of its worldwide financial problems, NRG concealed its economic distress, which prevented it from continuing to invest in the Project.

8. In fact, successive delays on the payment obligations to TermoRio, continuous requests for waiver and grace periods for its funding obligations and the search for external sources of financing ("bridge loans") revealed the financial difficulties of NRG and constituted, according to Claimants, a violation *per se* of the Capital Funding Agreement.

9. Furthermore, NRG failed to disclose in due time to Claimants the acquisition of all NRG outstanding shares by Xcel Energy, Inc. According to Claimants, when NRG finally made this deal known to the other shareholders, NRG practically confessed that it no longer wanted to proceed with the Project.

10. NRG failed to make timely payments corresponding to drawdowns nrs. 5 and 6, regarding the Loan Agreement, only honoring them later, within the grace period granted. Repeatedly NRG was availing itself of the 10-day grace period to fulfill its obligations to fund the Project. The drawdowns nrs. 7 and 8 have not been paid until the present date.

11. Claimants alleged that, as NRG was not afforded with the waiver requested in connection with said payments, neither with the bridge loan searched, it considered the possibility to exit the Project by way of the exercise of the Put Option. In order to be able to exercise the Put and not suffer contractual penalties, NRG decided to delay the negotiation of the ECC and the O&M Agreement. In order to ensure its right to exercise the Put, NRG did not attend negotiations and refused to execute the ECC. And the O&M Agreement could only be executed after the execution of the ECC.

12. Fearing the economic and financial consequences of its default and in order to prevent (i) the Event of Default under the Capital Funding Agreement for the non-payment of drawdown nr. 7, and (ii) the exercise of the Call Option by the other shareholders, NRG attempted to withdraw from the Project by making use of the Put, on April 17, 2002. NRG' s bad faith became evident on the day after the exercise of the Put Option, when it proposed an amicable resolution of the dispute to TermoRio.

13. Additionally, NRG sent a letter to Alstom Switzerland Ltd., with whom TermoRio executed the EPC, informing, in a fraudulent

manner, that it had transferred its shares in TermoRio to Petrobrás and that it ceased, therefore, to provide the guaranties previously offered. Such misrepresentation by NRG forced Petrobrás to replace the guarantees towards Alstom Switzerland Ltd. and Alstom Brasil Ltda. (jointly "Alstom"), in order to prevent the interruption of the construction of the plant.

14. The exercise of the Put could not release NRG from its funding duties until such time the transfer of shares occurred. According to Section 4.5 of the Share Purchase and Sale Agreement, the payment of the Put price and the transfer of the shares should occur simultaneously. Such payment was interrupted due to the Order of the Brazilian court that suspended the effects of the Put. Thus, NRG remained a shareholder of TermoRio, and consequently NRG continued to be liable for capital contributions to the Project, according to Section 2(e)(iii) of the Capital Funding Agreement and to Section 3, sole paragraph, of the Loan Agreement.

15. Besides the breach of the principle of good faith, failing in its duty to disclose to the other partners its financial hardship and inability to contribute funds required by the Project, NRG maliciously abused its right to exercise the Put. The execution of the ECC and the O&M Agreement were considered a condition precedent for the exercise of the Put Option. Considering that NRG maliciously and deliberately delayed the execution of the two agreements, the non-execution of such instruments could not be used as a condition precedent enabling NRG to exercise the Put.

16. According to Claimants, "whenever a party deliberately fails to take action that falls to it or that it must necessarily take part in order to secure a gain for itself, such party is misusing an unconscionable provision and violating the principle of objective good faith". The Put Option was an unconscionable provision because it is left to the discretion of one party. In the case, NRG retained its Put Option by preventing the execution of the ECC and the O&M Agreements. Therefore, because abusive, NRG should be prevented from benefiting from the effects of the exercise of its Put Option against Claimants.

17. Besides the above mentioned contractual breaches, according to Claimants, another legal impediment prevented the exercise of the Put Option. The fact that NRG was already in default when it

attempted to exercise the Put should prevent NRG from exercising it. Pursuant to the Brazilian Civil Code, in bilateral contracts, neither of the contracting parties may demand performance by the other party before fulfilling its own obligations.

[2] Statements of the Defense and Counterclaims of Respondent and Counterclaimants

1. In July 2001, NRG signed a Memorandum of Understanding to join the Project. In September 2001, NRG entered into a series of contracts with Petrobrás, PRS and TermoRio: (i) the Share Purchase and Sale Agreement; (ii) the Capital Funding Agreement; (iii) the Loan Agreement and (iv) the Second Amendment to the Shareholders' Agreement.

2. Although the parties signed those four agreements, fundamental issues of the Project remained unsolved. First, the parties needed to amend the ECC that had been signed a year before. In such contract, Petrobrás had agreed to supply fuel to TermoRio and to purchase all of the power and steam generated by the plant and to pay TermoRio for its services. According to NRG, the ECC was the most important agreement for the Project because it established the revenue stream and allocates the economic risks for the 20-year lifetime of the Project. Second, the parties needed to negotiate a new agreement for the operation and maintenance of the Project (O&M Agreement), now with NRG providing those services. Third, the parties agreed to transform TermoRio from a *sociedade anônima* to a *sociedade por quotas de responsabilidade limitada*. The transformation was important to NRG since it would improve the after-tax profitability of NRG's investment under United States tax laws.

3. While those and other important issues remained open, the parties agreed to immediately begin funding the Project in order to permit construction to start. However, as immediate funding posed a significant risk to NRG's investment, Petrobrás offered, and NRG accepted, the right to exit the Project if, among other reasons, the amended ECC and O&M Agreements and any other document or agreement relating to the Project were not completed, in due time. It was the Put Option mechanism.

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4. As the mentioned agreements were complex, the parties negotiated for months. The original ECC was an enormously complex agreement that was almost 300 pages long. It was not unusual for the parties to exchange lists of 5 to 70 open issues. Each proposed revision took time and careful analysis. As the agreement was revised, new issues arose. After two months of hard negotiations, Petrobrás insisted that the ECC be restructured into a Participation Agreement. NRG argued that it could have exercised the Put as early as November, but in good faith it agreed to extend the term many times and continued to negotiate.

5. However, according to NRG, Claimants continuously caused delays in the negotiations and the parties never reached a final agreement on the terms of the ECC or of a so-called Participation Agreement. Albeit faced with a slow and difficult process of negotiating first an amended ECC and afterward a Participation Agreement, NRG continued to devote significant resources to the Project. And, on the other side, it extended the Put deadline many times. Indeed, in order to induce NRG to continue funding the Project, Claimants repeatedly assured NRG that it could exercise the Put. In April 2002, it had become clear that final agreement would not be completed to NRG's satisfaction. By then, always acting in good faith, NRG had invested already US$ 64.3 million in the Project and decided it could not continue to risk more money in a project in such disarray. For that reason, it exercised the Put on April 17, 2002. It is NRG's opinion that, under the Loan Agreement, NRG's obligation to continue to fund the Project ended when it exercised the Put Option.

6. Similarly, the O&M Agreement was also never completed. In the original ECC, Petrobrás had agreed to perform the services to operate the TermoRio plant. When NRG entered the Project, the parties anticipated that NRG would perform those services instead. NRG presented the first draft of the agreement to Claimants and tried to expedite the negotiations. According to NRG, Claimants refused to negotiate the terms for an O&M Agreement. To ensure that the Project remained on schedule, NRG proposed an interim service agreement. Claimants refused to sign it. In addition, TermoRio refused to negotiate with NRG until it entered into a Long Term Services Agreement with Alstom Power Group.

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7. Thus, by April 2002, several essential issues remained outstanding on the O&M Agreement and the Participation Agreement. In addition, TermoRio had not been converted into a *sociedade por quotas de responsabilidade limitada*. Without agreement on these issues, NRG was entitled to exercise the Put. Nevertheless, it spent many weeks negotiating alternative funding arrangements and refrained from exercising the Put. NRG sought a bridge loan in an effort to remain in the Project. Claimants contended on the present arbitration that NRG's effort to obtain a bridge loan shows bad faith, when it demonstrates NRG's utmost good faith.

8. On April 26, 2002, NRG delivered to Petrobrás an executed Shares' Transfer Order Form ("Form") to transfer the shares. Also on April 26, 2002, NRG sent a letter to Alstom informing Alstom that it had transferred its shares to Petrobrás. Petrobrás did not honor the Put, did not execute the Form, and did not submit the Form to Banco Bradesco to cause the transfer of shares.

9. Although Claimants asserted that NRG failed to make timely payments on drawdowns nrs. 4, 5 and 6, there was no Event of Default and most delays were caused by Claimants themselves.

10. Claimants also alleged that NRG misled them about the acquisition of NRG by Xcel, what, in accordance to NRG, is not true. In February 2002, Xcel, which owned 74% of NRG's stock, publicly announced its intention to commence a tender offer to buy back the remaining shares of NRG common stock. Xcel's announced tender offer was made to NRG's shareholders and was not based on any prior negotiations with NRG. On the other side, neither the Project Agreements nor Brazilian law required NRG to inform Claimants about Xcel' s public tender offer. Nevertheless, NRG informed Claimants of Xcel's public tender offer in a meeting on February 18, 2002, and continued to inform them in meetings and letters thereafter.

11. With the end of Brazil's drought and the Brazilian energy crisis over, Petrobrás intended to cut its investment in TermoRio and to withdraw from thermoelectric projects, as announced by Petrobrás' President. According to NRG, Petrobrás was clearly trying to use NRG's exit as an excuse to reduce its obligations in the TermoRio Project. To NRG's knowledge, the amended ECC and O&M Agreement still have not been completed and executed.

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12. The misconduct of the Claimants continued. Pursuant to Section 4.4 of the Share Purchase and Sale Agreement, any dispute related to the exercise of the Put Option should be submitted to arbitration within 30 (thirty) days. Notwithstanding this provision, to prevent the arbitration from being completed by the deadline, Claimants filed a petition with the Fifth Corporate Court in the judicial district of Rio de Janeiro, seeking an injunction, suspending the effects of the Put and Petrobrás' obligation to acquire NRG's credits in TermoRio, until final resolution by the Arbitral Tribunal. The court granted the injunction against NRG; Claimants now argue that their damages continue to increase until the shares are transferred, when they brought that injury upon themselves. Moreover, Claimants have suffered no losses. Francisco Gros, then President of Petrobrás, said in July 2002, "[t]here is no loss, it is a purchase of NRG's shares".

13. In accordance with the representation above, NRG asserted the following defenses, responding to the claims made by Petrobrás, PRS and TermoRio: (i) the claims are defective because Claimants failed to specify or submit proof of their damages; (ii) Claimants' claims under the Capital Funding Agreement are defective because they breached their duty to enter into mutual discussions with NRG; (iii) NRG does not have a continuing obligation to fund TermoRio after it exercised the Put; (iv) Claimants may not profit from their own turpitude, and they deceptively and maliciously used the Put right to induce NRG to enter the Project and to continue to fund it; (v) Claimants breached the contract before trying to exercise the Call, and therefore cannot recover damages; (vi) Claimants failed to mitigate their alleged damages; (vii) NRG does not owe damages for drawdown numbers 5 and 6; (viii) NRG' s attempt to negotiate a bridge loan does not violate any of the Project agreements; (ix) the draw down notices were defective because they were issued without shareholder approval, which is required by the Shareholders' Agreement; (x) NRG may not be blamed for TermoRio's own failure to obtain financing; (xi) NRG acted in good faith; (xii) NRG did not maliciously abuse its right to exercise the Put and did not maliciously cause de non-concurrence of a condition precedent; (xiii) the Put is not an unconscionable provision; (xiv) NRG did not misrepresent its actions to Alstom; and (xv) Claimants are not entitled to attorneys fees under Article 20, § 3°, of the Brazilian Civil Procedure Code.

14. Together with the Defense summarized above, and relying on the same factual grounds concerning the merits of the case, Respondent and Counterclaimants have filed a Counterclaim against Claimants. In short, they allege that Claimants have breached Section 4 of the Share Purchase and Sale Agreement, by failing to comply with its contractual obligation to accept the Put, to pay NRG, and to accept the shares and credits.

15. According to the Counterclaim, despite NRG's good faith efforts to complete the necessary agreements, the parties failed to amend the ECC, to execute the O&M Agreement and to complete the documents necessary to convert TermoRio into a *sociedade por quotas de responsabilidade limitada*. After extending the deadline four times in good faith, NRG exercised the Put.

16. Petrobrás, PRS and TermoRio have offered weak excuses to avoid their obligation to accept the Put. First, they argued that NRG could only exercise this right if the Project did not prove viable. Section 4 of the Share Purchase and Sale Agreement placed no limit on the reason based on which NRG may exercise the Put Option. Second, Claimants blamed NRG for the failure to complete the agreements, when such failure was caused by Claimants' fault. Third, Claimants contended that NRG could not exercise the Put because it was in breach of the Project agreements, but they admit that there was not an Event of Default when NRG simply exercised a contractual right.

17. Still in accordance to the Counterclaim, Claimants breached their duty to act in good faith, by acting with malice to induce NRG to continue to fund the Project. Accordingly, Petrobrás, PRS and TermoRio have acted in bad faith by frustrating and delaying the exercise of the Put in an effort to avoid their duty to assume NRG's funding obligation once it exits the Project.

18. Besides, in the interest of fairness and equity, it is the opinion of Respondent and Counterclaimants that Claimants should be ordered to return NRG's money that they have unjustly obtained though their improper conduct. In other words, Petrobrás will receive a 19,5% rate of return but, under the Put, will pay NRG only a 15% rate of return. Under Brazilian law the principle of unjust enrichment provides that a party that unfairly receives a benefit from another party should not be allowed to retain it.

19. Based on all these arguments, Respondent and Counterclaimants request: (i) to recover from Petrobrás, PRS and TermoRio, their losses, damages and reasonably expected unearned profits, in the amount set forth in the relief sought below; (ii) to be paid in immediately available U.S. dollars; (iii) to have a declaratory order by the Arbitral Tribunal saying that NRG does not owe a continuing duty to pay 5% of TermoRio's capital contribution requests after its shares are transferred to Petrobrás; (iv) to have a declaratory order by the Arbitral Tribunal that Petrobrás, upon payment of the amounts due to NRG, should accept the TermoRio's shares and assume NRG's obligations under the Project agreements.

[3] Answer to the Counterclaims by Claimants and Reply to the Statement of Defense

1. In its Answer to the Counterclaims and Replication to the Statement of Defense, Claimants reaffirmed their request for the award in their Statement of Claims, arguing that:

   (i) according to Whereas Clause no. 9 of the Share Purchase and Sale Agreement, NRG assured that it had the financial capacity and interest necessary to pay the Project's financial obligations;

   (ii) NRG's withdrawal from the TermoRio Project was strictly connected to the economic distress that NRG has been experiencing during the last several months;

   (iii) the evidence that is being brought to the proceedings will show that the participation agreement was not executed due to NRG's delays and that the O&M Agreement was not executed because on April 16, 2002, NRG transferred that agreement to Alstom Power O&M Ltd.;

   (iv) the TermoRio's conversion into a *sociedade por quotas de responsabilidade limitada* was contractually conditioned to the signing of the ECC and O&M agreements and to expiration of the deadline for exercising the Put Option;

   (v) the delays in NRG contributions to the Project began less than three months after its admittance to TermoRio, and

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drawdowns nrs. 4, 5 and 6 (dated December 2001 and February 2002) were already paid late;

(vi) according to Yahoo Finance website, in March, 2002, Xcel (NRG's controlling company) announced the intention of selling all of NRG's assets outside the United States;

(vii) on April 8, 2002, NRG informed TermoRio of its financial difficulties and asked the other shareholders for a waiver notifying its partners that it was seeking a bridge loan from third parties, using its equity interest in TermoRio;

(viii) on April 16, 2002, NRG informed once again of its financial difficulties and asked for a waiver;

(ix) on April 17, 2002, drawdown nr. 7 came due, the cure period began but NRG failed to pay. After 6:00 p.m. on the same day, NRG exercised its Put right incorrectly. The original version of the Put Option notice was never delivered to Claimants.

(x) on the next day, after the incorrect exercise of the Put Option, NRG sent a letter to TermoRio proposing an amicable resolution of the dispute.

(xi) after obtaining suspension of the Put in court, Petrobrás exercised its Call Option;

(xii) the vote by the shareholders was not required for the issuance of drawdown notices because according to clause 5.2.2 of the Shareholders' Agreement, the parties confirmed the pledge of effecting contributions of resources and to render guarantees that may become necessary to the Project, and the parties agreed that the decisions concerning the amounts, as well as the convenience and opportunity of the realization of such pledge should be object of deliberation by the shareholders. The "deliberation" occurred on September 06, 2001, when the parties entered into the Capital Funding Agreement and two Loan Agreements, which established the amounts of the contributions. The execution of the Capital Funding Agreement and the Loan Agreements was approved by all members of the Board of Directors of TermoRio, at a meeting held on that date.

2. The Claimants also requested the Arbitral Tribunal to adjudge and declare that:

"a) Claimants are not liable for any breach of Section 4 of the Share Purchase and Sale Agreement;
b) There was no need to call a Shareholders' Meeting to issue the Drawdown Notices;
c) Claimants have not breached their duty of good faith nor have acted with malice;
d) Claimants have not been unjustly enriched;
e) Claimants shall not pay any award to NRG;
f) Claimants did not breach the contracts and did not act in turpitude;
g) NRG is not entitled to recover attorneys' fees nor the cost of this arbitration;
h) NRG has no right to discuss in the present arbitration its obligation to pay 5% of TermoRio capital requests after its share are transferred to Petrobrás."

[4] Additional written statements and requests by Claimants and Respondent and Counterclaimants

1. On April 30 and May 19, 2003, NRG filed two petitions, the first requesting the issuance by the Arbitral Tribunal of preliminary rulings to eliminate three issues that were not in dispute, since they had not been genuinely contested by the Claimants in their Answer to the Counterclaim: (i) their failure to quantify their alleged damages, (ii) whether the Claimants, if condemned, should pay NRG in U.S. dollars, and (iii) whether NRG should be required to continue to fund 5% of the Project, after its exit. The second petition informed the Arbitral Tribunal that NRG Energy and certain of its affiliates had filed on May 14, 2003 for Chapter 11 voluntary reorganization in the United States Bankruptcy Court in the Southern District of New York ("United States Court").

2. On June 2, 2003, the Claimants filed two petitions, commenting on NRG' s above submissions and requesting the Arbitral Tribunal (i) to deny NRG's plea for a preliminary ruling relating to the mentioned issues; (ii) to take into consideration the filing of the voluntary Chapter 11 petition by NRG Energy, and declare that NRG incurred in an Event of Default under Section 8.1(c) of the Capital Funding Agreement and (iii) to send a notice to the United States Court,

requesting that the Court approves any eventual transfer of shares ordered by the Arbitral Tribunal.

3. The Arbitral Tribunal's Procedural Order nr. 8, dated June 13, 2003, ordered Claimants to state and quantify the amounts of their claims, according to item (h) of the preliminary decisions of the Minutes for the Constitution of the Arbitral Tribunal and Article 3(3)(e) of the UNCITRAL Rules. With regard to the other issues, the Arbitral Tribunal decided they would be analyzed later with the merits of the case and dealt with properly in the award. With respect to Claimants' request to send a notice to the foreign court in which NRG Energy filed a voluntary petition for reorganization, the Arbitral Tribunal asked NRG to confirm that such reorganization could not adversely affect the accomplishments of any future orders of the Arbitral Tribunal related to the present proceeding.

4. As already mentioned on item 15 of Chapter IV, above, on June 23, 2003, NRG submitted a response, declaring that the reorganization of NRG Energy would not adversely affect any future award of the Arbitral Tribunal ordering relief relating to the Respondents. NRG Energy was not a party to this arbitration at all and signed the agreements only as a guarantor of the obligations of NRG. Besides, it was not necessary to notify the United States Court of this arbitration, considering that NRG Energy already has disclosed the existence of this arbitration to its creditors, in accordance with standard practices in reorganization proceedings in that court. NRG also denied that the bankruptcy petition filed by NRG Energy a year after NRG exercised the Put constituted an Event of Default under the Capital Funding Agreement.

5. On June 25, 2003, Claimants provided an estimation of the amount of their claims.

6. Additionally, Claimants also argued that the relevant facts that led to the exercise of the Call Option were:

   a) extension of the payment deadlines requested by NRG for draw downs 4, 5 and 6 in the issue months of December 2001 (the first two) and February 2002:

   In December 18, 2001, NRG was asked by TermoRio to pay draw down 4 on or before January 10, 2002. Such payment, on request of

NRG, was postponed to February 13, 2002 (Letter dated January 29, 2001). NRG ended up paying such drawdown No. 4 on March 15, 2001.

Draw down No. 05 was sent to NRG on December 18, 2001, to be paid on or before January 25, 2002. On request of NRG, TermoRio agreed to concede to NRG (in the same Letter, dated January, 29) a postponement of the payment deadline, to February 13, 2002. The payment was not made within the cure period. drawdown No. 5 was paid in March, 14, 2002.

On February 26, 2002 TermoRio sent to NRG the Drawdown Notice No. 06, received by NRG on February 28. It was due on or before March 14, 2002. Another Notice was sent from TermoRio to NRG.

The Notification was sent on March 19, 2002. The cure period has finished on March 30. Payment was made on April 1st.

b) putting up for sale all of NRG's assets throughout the world (except in U.S. territory) in February 2002:

On March 17, 2002, it became public in the internet that XCEL and NRG were intending to sell all its international affiliates.

In a letter dated April 8, 2002, NRG disclosed to Claimants that its outstanding shares were being acquired by XCEL Energy and, further that NRG was considering a restructuring of its international portfolio, in witch it had also requested to the other Shareholders of TermoRio a waiver of its funding obligations; and stated that it needed to obtain a bridge loan in order to continue its participation in the Project.

On November 22, 2002, the Directors of NRG presented a request for Bankruptcy against the Company. On May 14, 2003, NRG itself filed for Chapter 11 Restructuring in a US Court.

c) Drawdown Notice No. 07 was sent to NRG on April 1, 2002. It was due on or before April 17, 2002. It has never been paid by NRG.

d) On April 26, 2002 NRG dispatched to Alstom Switzerland Ltd., a company with which TermoRio made its principal agreement in the amount of approximately five hundred million U.S. dollars (U.S. 500,000,000.00), a letter to notice that NRG had transferred its

shares in TermoRio to Petrobrás and that it would in the future cease to provide the guaranties which it had committed to.

7. On August 19, 2003, Claimants filed a petition requesting as an additional relief that NRGenerating Luxembourg S.a.r.l be not entitled to counterclaim, under Rule 19.3 of the UNCITRAL Rules, since it was not a Defendant in the arbitration.

8. On August 25, 2003, Respondent/Counterclaimants submitted a petition in response to Procedural Order nr. 9 arguing that NRGenerating is a proper party because (i) Claimants waived any objection because they raised their arguments too late, (ii) NRGenerating is a necessary party to effect a transfer of the credits, and (iii) NRGenerating has a claim under the same contracts arising from the same facts. NRG also argued that (i) the Call did not refer to drawdowns nrs. 4, 5 and 6, (ii) Claimants were responsible for delays regarding drawdowns nrs. 4, 5 and 6, and (iii) any alleged default was cured when TermoRio accepted payment.

9. On August 26, 2003 Claimants filed a petition answering Respondent/Counterclaimants petition of August 25, where they asserted that NRGenerating was a necessary party to the arbitration due to the fact that it is the owner of the credits under the Loan Agreement.

10. Claimants explained that only NRG International Holdings is a respondent because it was the sole signor of the Put. Thus, the Put was incorrectly exercised, since it included the claim of credits owned by a different entity.

11. Additionally Claimants contested that they would have asserted any claim involving the transfer of shares and credits. Request was in this particular limited to the non validity of the Put Option and the consequent validity of the Call Option. What also spoke for the fact that NRGenerating did not have to be a party and in fact could not be a party in this arbitration was the clear wording of Article 19.3 of the UNCITRAL Rules, which states that only a respondent can bring a counterclaim.

12. Claimants affirmed that NRGenerating insisting on being accepted as a Counterclaimant or Respondent had one sole reason: the need to cure the irregular exercise of the Put Option. Further, Claimants

explained why including NRGenerating as a party could in fact increase their liability and explained why Articles 30 and 21.3 of the UNCITRAL Rules do not apply to this case.

Chapter VI. Relief Sought by the Parties

[1] Relief sought by Petrobrás

In its Statement of Claim, Petrobrás requested the Arbitral Tribunal to adjudge and declare the following:

"a) Respondent is not entitled to exercise the Put Option established in Section 4.1 of the Share Purchase and Sale Agreement;

b) Respondent incurred in an Event of Default under the Capital Funding Agreement regarding the Draw Down 7;

c) The Shareholders of TermoRio are entitled to exercise their Call Option under the Capital Funding Agreement;

d) In addition to letter (b) above, Respondent is in default under the Share Purchase and Sale Agreement (Section 11.4.1), the Shareholders' Agreement (Section 5.2.4 of its second amendment) and the Capital Funding Agreement (Section 2) for not complying with its funding obligations provided therein after the attempt exercise of the Put Option;

e) Respondent should comply with its above-mentioned funding obligations until the date Respondent's shares are transferred and it is no longer registered as a shareholder of TermoRio;

f) Claimant is entitled to compensation due to losses incurred because of Respondent's failure to comply with its funding obligations towards the Project until the transfer of shares of Respondent to be calculated by the arbitral tribunal, at the appropriate procedural time;

g) Claimant is entitled to compensation due to losses incurred because of Respondent's capital contribution defaults before the EPC Contractors which shall be calculated by the arbitral tribunal, at the appropriate procedural time;

h) Respondent made fraudulent misrepresentation to EPC Contractors in the letter dated of April 26, 2002, stating that it is no longer a shareholder of TermoRio;

i) Claimant is entitled to compensation due to losses incurred due to Respondent's fraudulent misrepresentation before the EPC Contractors be calculated by the arbitral tribunal, at the appropriate procedural time;

j) Claimant is entitled to indemnification due to Respondent's default in acting in bad faith and pursuing a bridge loan before the financial market and "selling the Project" without Claimant's nor TermoRio/PRS' consent, which indemnification shall be calculated by the arbitral tribunal, at the appropriate procedural time;

k) Claimant is entitled to indemnification because of Respondent's default on misusing the unconscionable provision 4.1 of the Share Purchase and Sale Agreement and preventing the execution of the Participation Agreement – ECC and the O&M Agreement, thus preventing Claimant to obtain non-recourse financing for the project which indemnification shall be calculated by the arbitral tribunal, at the appropriate procedural time;

l) And Claimant is entitled to an award of arbitration costs, judicial court costs (for the preliminary motion) and attorneys' fees as provided in Article 20, par. 3, of the Brazilian Civil Procedural Code (CPC)."

[2] Relief sought by PRS – Energia Ltda.

The relief sought by PRS, in its Statement of Claim, except for the fact that it did not claim exercise of the Call Option and it was seeking different damages, coincided with the relief requested by Petrobrás as per items (b), (d), (e), (h), (j), (k) and (l), above, except for the following demand:

"In view of the facts and arguments set forth in this Statement of Claim, Claimant requests the Arbitral Tribunal to adjudge and declare that:

a) Claimant is entitled to compensation for losses and damages arisen out of Respondent' s withdrawal from the Project, either if this withdrawal is caused by the exercise of a Put Option by Respondent or if this withdrawal is caused by exercise of the Call Option by Petrobrás trigged by Respondent's contractual defaults."

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[3] Relief sought by TermoRio

The relief and remedies requested by TermoRio, in its Statement of Claim, were different from the relief and remedies requested by PRS and Petrobrás, inasmuch as it did not claim the exercise of the Call and did not file any plea for damages.

[4] Additional relief sought by the Claimants

In the Reply to Respondent's Answer and Counterclaims, Petrobrás, PRS and TermoRio have jointly added the following prayer for relief:

> *"Claimants reaffirm their request for the award provided in their Statements of Claim, and also request the Arbitral Tribunal to adjudge and declare that:*
>
> *a) Claimants are not liable for any breach of Section 4 of the Share Purchase and Sale Agreement;*
> *b) There was no need to call a Shareholders' Meeting to issue the Drawdown Notices;*
> *c) Claimants have not breached their duty of good faith nor have acted with malice;*
> *d) Claimants have not been unjustly enriched;*
> *e) Claimants shall not pay any award to NRG;*
> *f) Claimants did not breach the contracts and did not act in turpitude;*
> *g) NRG is not entitled to recover attorneys' fees nor the costs of this arbitration;*
> *h) NRG has no right to discuss in the present arbitration its obligation to pay 5% of TermoRio capital requests after its shares are transferred to Petrobrás".*

In amendment to the claim, Petrobrás, PRS and TermoRio further requested the Arbitral Tribunal to adjudge and declare that (i) NRG Energy's petition for reorganization constitutes an "Event of Default" under section 8.1(c) of the Capital Funding Agreement, and (ii) requested the Arbitral Tribunal to add the following prayer of relief:

> *i) "NRGenerating Luxembourg S.a.r.l. is not entitled to counterclaim, under Rule 19.3 of the UNCITRAL Rules, since it was not a Defendant in this Arbitration;*

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j) The Put Option was incorrectly exercised by Respondent NRG International Holdings, since the calculation of the Put Price attached to the Put includes the amount of US$ 63,721,363.17 in credits owned by a different entity, NRGenerating Luxembourg, against TermoRio."

[5] Relief sought by NRG

In their Statement of Defense and Counterclaims, Respondent and Counterclaimants have formulated the following prayer for relief:

"NRG asks that the Arbitral Tribunal to enter an award in favor of NRG and denying Claimants any relief or damages for their claims. Specifically, NRG respectfully requests an award declaring and adjudging that:

a) NRG is entitled to exercise the Put and Petrobrás, PRS and TermoRio are liable for their breach of Section 4 of the Share Purchase Agreement;
b) Petrobrás, PRS and TermoRio have breached their duty of good faith and have acted with malice;
c) Petrobrás, PRS and TermoRio have been unjustly enriched;
d) Petrobrás is required to indemnify NRG pursuant to Section 8.1 of the Share Purchase Agreement;
e) Petrobrás, PRS and TermoRio must pay the award to NRG in immediately available United States dollars or, at NRG´s discretion, the equivalent amount in Reais to a non-resident account of NRG in Brazil;
f) NRG has no obligation to pay 5% of TermoRio´s capital requests after its shares are transferred to Petrobrás;
g) Petrobrás must accept NRG´s Shares, must register the transfer with Banco Bradesco, and must assume NRG´s obligations under the Project Agreements;
h) Awarding NRG US$ 142,193,967 in damages as follows:

- *US$ 86,826,009 for the Put price calculated as of March 13, 2002, and increasing thereafter until NRG receives payment (Ex. 89);*

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- *US$ 5,618,476 for NRG's expenditures on the TermoRio Project for development costs and payments to Petrobrás and PRS, plus the profits it would have earned on that money if it had been invested elsewhere (Ex. 90,92);*

- *US$ 3,873,007 for Claimants' unjust enrichment;*

- *US$ 45,876,475 for the present value of the profits NRG would have earned on this Project (Ex. 91);*

- *plus additional interest and damages that will be incurred by NRG until it receives payment;*

i) Claimants' claims are defective because they failed to specify or submit proof of their damages;
j) Claimants may not assert claims under the Capital Funding Agreement because they failed to comply with the mutual discussion provision of Section 9.1 of that agreement;
k) Claimants are not entitled to exercise the Call;
l) NRG is not in default and has no obligation to continue funding TermoRio after it exercised the Put;
m) Petrobrás, PRS and TermoRio are not entitled to any relief because they breached the contracts and are trying to profit from their own turpitude;
n) Claimants are not entitled to recover any damages because they failed to mitigate their alleged injuries;
o) NRG is not liable for breach of the Capital Funding Agreement in connection with its payments for drawdown nrs. 5 and 6;
p) NRG did not breach any contractual obligations by seeking a bridge loan;
q) NRG did not breach a duty to act in good faith;
r) Claimants are not entitled to recover any damages for TermoRio's failure to obtain financing;
s) NRG did not maliciously abuse an unconscionable provision by exercising the Put and did not maliciously cause the non-concurrence of the conditions precedent to the Put;
t) Claimants are not entitled to recover attorneys fees under Article 20, § 3°, of the Brazilian Civil Procedure Code;
u) Claimants are not entitled to recover for fraud;
v) Petrobrás, PRS and TermoRio must pay NRG the costs of this arbitration and NRG's attorney's fees in accordance with Articles 38-40 of the UNCITRAL Arbitration Rules; and

w)Such other relief as is just and proper."

Chapter VII. Evidence

Besides documents and exhibits, having the Arbitral Tribunal considered not to be necessary the physical inspection of TermoRio´s facilities, the parties have used other means of evidence such as expertise and witnesses.

[1] Expert Evidence

1. The Arbitral Tribunal, through Procedural Order nr. 10, issued on September, 2nd, 2003, admitted expert evidence for an accounting opinion and appointed Mr. Alfredo Torrecillas Ramos as expert. On September, 15, 2003, the parties submitted their queries to the expert. The accounting expert's report was submitted to the Arbitral Tribunal on November 27, 2003.

2. Additional queries were submitted by the parties and, on January 6, 2004, the expert presented in writing form his clarifications. The technical assistants nominated by each of the parties, Mr. Paulo Moreira Alves de Brito and Mr. Rogério Ribeiro for Petrobrás and Mr. Ricardo Júlio Rodil, from Vilas Rodil Gorioux Faro Auditores e Consultores, for NRG delivered their technical opinions subsequently.

3. On January 6, 2004, at the hearing held in Rio de Janeiro, the parties and the members of the Arbitral Tribunal questioned the expert, followed by the technical assistants' comments on the outstanding issues. Afterwards, the floor was opened to the parties to question the expert and the technical assistants on any other opinion expressed by them in their respective reports.

[2] Witnesses Testimony

1. On December 1st, 2003, each party communicated to the Arbitral Tribunal as well to the other party its list of witnesses. The Arbitral

Tribunal notified each of the witnesses requiring its presence on the hearing held on January 7, 2004.

2. During the hearing the following witnesses testified: first, indicated by Petrobrás, Mr. Luiz Carlos Moreira da Silva, Mr. Paulo Roberto Barbosa de Oliveira and Mr. Cezar de Souza Tavares; afterwards, indicated by NRG, Mr. Robert Kohn, Ms. Amy Sieben and Mr. Fábio Panico.

Chapter VIII. Arbitration Costs and Fees

[1] Arbitrators' Fees

1. Pursuant to Article 38 of UNCITRAL Rules, the arbitrators' fees were fixed, taking into consideration the sum in dispute, the complexity of the subject-matter and the time spent by the arbitrators. All these factors considered and taking into account the International Chamber of Commerce Court of Arbitrations' cost scale, in force as from July 1, 2003, the arbitrators' fees were fixed in the Terms of Reference in US$ 250,000.00 for each arbitrator, in addition to the advance made before the Terms of Reference, and already paid by the parties in two installments.

[2] Reimbursable Expenses

1. In addition, the Arbitral Tribunal fixed a provisional advance of US$ 6,000.00 for reimbursable expenses related to the arbitration costs incurred with respect to hearings, such as meeting room, simultaneous translation, data show and audio equipments, transcription, translation, transportation, courier etc. According to Procedural Order nr. 20, dated February, 5, 2004, as such amount proved to be insufficient, the Arbitral Tribunal requested each party to provide additional R$ 10.000,00. Due to new costs, the Arbitral Tribunal made another request of expenses fund on the amount of R$ 10.000,00 each, as per Procedural Order nr. 21, dated March 1, 2004.

2. All the expenses incurred by the Arbitral Tribunal will be indicated on an Expenses Report to be presented to the parties within the next 30 days.

Chapter IX. Arbitral Award

[1] Preliminary Issues

A. Submission of Counterclaim without a Statement of Defense

1. Through petition of August 19, 2003, Petrobrás, PRS and TermoRio opposed themselves to the entrance of NRGenerating in the arbitration procedure as a Counterclaimant arguing that the Article 19.3 of the UNCITRAL Rules only admits the filing of a counterclaim by the defendant. In Procedural Order nr. 10, of September 2, 2003, the Arbitral Tribunal admitted NRGenerating as Counterclaimant, due to the evident interconnection of issues that emerge from the business relations between the Claimants and NRG International and NRGenerating, object of this arbitration (Brazilian Code of Civil Procedure, Article 46, IV). In the Terms of References, signed by all the parties on August 26, 2003, NRGenerating appears only as Counterclaimant.

2. The Arbitral Tribunal maintains its decision that NRGenerating is a legitimate party to appear as Counterclaimant in this arbitration. In effect, notwithstanding the opposition made by the Claimants, in their Statements of Claim, they admit the interrelation of the Capital Funding Agreement, entered into on September 6, 2001, among Petrobrás, PRS and NRGenerating (with the intervenience of TermoRio) with the Share Purchase and Sale Agreement and the other agreements, related to the Project. Said agreements are linked in a relation of complementarity. This is so true that the exercise of the Call Option, which is one of the main issues of the arbitration, is contemplated in the Capital Funding Agreement, in its Section 8.2, and it has to be stressed that the corresponding Call notice made by the Claimants was expressly addressed to NRGenerating.

3. The Brazilian doctrine admits the existence of various sorts of "union of contracts", either by means of "connected contracts" ("*contratos conexos*")(when, through different documents, the parties intend to

achieve one sole purpose); or by means of a series of "related legal transactions" ("*negócios jurídicos correlacionados*" (when although the several agreements remain autonomous among themselves, they all govern, in a complementary and deeply linked form the private economic activity) (see Pontes de Miranda, Tratado de Direito Privado, Tome XXXVIII, Rio de Janeiro, Borsoi, 1962 § 4.257, page 368, and Brazilian Supreme Court decisions: Agravo de Instrumento nº 62.684, 1a Turma, Justice Rel. Aliomar Baleeiro, e Recurso Extraordinário nº 80.448, 2a Turma, Justice Rel. Thompson Flores).

4. Therefore, reaffirming the terms of Procedural Order nr. 10 and in order to avoid inconsistent results, this Arbitral Tribunal decides to admit to this arbitration NRGenerating as a Counterclaimant, since the exercise of the Call under the Capital Funding Agreement is one of the main issues of this arbitration, and the respective Call notice sent by the Claimants was also addressed to NRGenerating, which is a party to the mentioned Agreement.

5. The co-defense joinder, in this case, is perfectly admissible, due to the undeniable connection of the issues under discussion in the present arbitration, and the risk of having contradictory decisions, and, consequently, deprived of any effectiveness to the parties.

B. <u>The reorganization of NRG Energy and the effects of the arbitration</u>

6. On May 19, 2003, the Arbitral Tribunal was informed by NRG that NRG Energy and certain of its affiliates had filed before the United States Court voluntary petitions for reorganization under Chapter 11 of the United States Bankruptcy Code, without including, however, the companies involved in the present arbitration. Bearing in mind that NRG International and NRGenerating are controlled by NRG Energy, Petrobrás, through petition of June 2, 2002, requested the Arbitral Tribunal to notify the United States Court in which the petition was filed of the existence of the present arbitration, requesting the United States Court to issue an official statement to the Arbitrators that the transfer of the shares held by NRG International in TermoRio and the payment of the Call Price would not be affected by the reorganization under allegation of possible fraud by the creditors of NRG Energy.

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7. In addition, Petrobrás requested that NRG be declared in default, under section 8.1(c) of the Capital Funding Agreement, which states that an event of default occurs if any party "goes into receivership, administrative, liquidation or other similar event or otherwise is unable to pay its debts as they fall due or makes or seeks to make any scheme of arrangement or composition with its creditors other than a Party's voluntary liquidation solely for the purpose of amalgamation or reconstruction on terms previously approved in writing by the other Party".

8. This Arbitral Tribunal, through Procedural Order nr. 8, of June 13, 2003, decided that NRG Energy was not a party of the present arbitration, since it appears in the Capital Funding Agreement (§ 10.14); Share Purchase and Sale Agreement (§ 10.3) and Loan Agreement (§ 20.7) solely as guarantor of the Respondent, reason for which the Arbitral Tribunal did not see the need to notify the United States Court, requesting the confirmation that this reorganization would not affect the fulfillment of any future order of the Arbitral Tribunal relative to the present arbitration procedure. In any event , this Arbitral Tribunal was informed by the United States Court that it had already been aware of the existence of this arbitration, through the Affidavit of Scott J. Davido, of May 14, 2003, and assured that the companies that are parties in this arbitral proceedings were not parties of the reorganization plan.

9. Maintaining the above decision, and due to the same reasons that denied the request to notify the United States Court, this Arbitral Tribunal also declares that the defendant-counterclaimant NRG International and the counterclaimant NRGenerating – which did not file the voluntary petition for reorganization - are not in default under §8.1(c) of the Capital Funding Agreement. The petition for reorganization filed by NRG Energy did not constitute an event of default by NRG International or by NRGenerating, since NRG Energy, Inc. entered into the above mentioned agreements solely as a guarantor for said companies (Section 10.14 of the Capital Funding Agreement). The request for reorganization does not mean default for any of the guaranteed companies (NRG International or NRGenerating).

[2] Claim

1. Having these preliminary issues been overcome, the Arbitral Tribunal will now discuss the merits of the present arbitration. To that effect, the first central issue to be dealt with is the definition of which right of the parties shall prevail, either the Claimants' right to exercise the Call Option, or the NRG International's right to exercise the Put Option.

2. The Arbitral Tribunal, by majority of votes, considers that the Put Option is legitimate, and therefore the Call Option is illegitimate, based on the following reasons, as outlined below in items (a) through (f) and in the dissenting opinion attached hereto, which constitutes part of this Arbitral Award.

A. Precedents of the transaction subject-matter of the claim

3. This case relates to a "project finance", in other words, a financial transaction in a particular economic unit structured on the basis of the cash flow generated by that economic unit. In this form of financing, the collateral for the investment or for the loan to the investors or to the lenders is concentrated more in the contracts ensuring the future profitability of the investment, than in the assets that may be offered by the economic agents involved in the project. In these transactions, it is essential that the financial feasibility of the project be guaranteed, in such a way that the earnings originated therefrom ensure the repayment of the loan or the investment (Peter K. Nevitt & Frank Fabozzi, Project Finance, 6th ed., 1995, p. 7).

4. Hence, it is common in this type of operation for the financial balance of the project to be structured by consolidating both ends of the production process: guaranteed access to raw materials at a competitive price, and guaranteed sale of the production of the economic unit, ensuring the market of its products. Thus, the project, as an economic unit, is able to attain the desired profitability in such a way as to generate the funds necessary to repay the loan or investment.

5. The finance project for TermoRio provided for this contractual collateral at both ends of the production cycle, in such a way that, when NRG joined the Project, the parties thereto agreed that the existing Energy Conversion Contract, signed by Petrobrás and TermoRio in October 10, 2000 ("ECC") would need to be renegotiated

and amended, by means of which Petrobrás would undertake to supply necessary fuel to the thermoelectric natural gas co-generation plant ("Plant") and would purchase all the electric power generated by it.

6. As the project was designed for the construction, management and maintenance of the Plant [therefore, a project as called in the financial terminology, Build-Own-Operate ("BOO")], the parties also agreed to negotiate a operation and maintenance contract for the Project ("O&M Agreement"), which services would be provided by NRG.

7. The parties agreed to enter into these contracts (amended ECC and O&M Agreements) on a subsequent date, after the entering of NRG in the Project. But, they also agreed to start investing the funds immediately in the Project. To that effect, they agreed on a Put Option mechanism ("Put Option") in favor of NRG, by means of which NRG could require Petrobrás to purchase its equity participation in the Project if the aforementioned contracts, deemed to be essential to the Project, were not concluded within the period stipulated in the Share Purchase and Sale Agreement (section 4.1). On the other hand, the parties executed a Capital Funding Agreement on September 6, 2001, which established a Call Option provision ("Call Option"), stating that, upon an Event of Default of either party (as defined in the Capital Funding Agreement), the non-defaulting party could purchase the shares and the credits held by the defaulting party in TermoRio, at 90% of their face value, in other words, with a penalty of 10% (Sections 8.1 and 8.2 of the Capital Funding Agreement).

8. On April 17, 2002, NRG exercised the Put Option, requiring Petrobrás to pay US$ 68,639,768.40 for NRG's shares and credits in TermoRio. On May 16, 2002, Petrobrás exercised the Call Option offering to NRG the amount of US$ 57,349,037.07.

B. <u>The construction of the Put Option</u>

9. The Put Option is provided for in Section 4 (Sections 4.1 to 4.7) of the Share Purchase and Sale Agreement.

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10. Under Section 4.1, NRG International would have the right to require Petrobrás to purchase all, but not less than all, the shares issued by TermoRio owned by NRG, in case any of the conditions provided for in Sections 4.1.1 to 4.1.7 were not complied with within a period of no later than 60 days from the execution of the Agreement. Such period could be extended for a further 30 days, except in case of Section 4.1.3.

11. Sections 4.1.1 and 4.1.4 are worthy of a special attention. The first Section refers to the execution of an amendment to the ECC, providing for the obligation of Petrobrás to purchase 100% of the electric power generated by TermoRio pursuant to a financial formula deemed to be appropriate to the parties and, in this respect, the original ECC should be observed. The second Section refers to the execution of the O&M, with regard to the terms and conditions for and operations and maintenance of the Plant.

12. Thus, if the events referred to in the two items (Sections 4.1.1 and 4.1.4) did not occur within 60 days, NRG would be authorized to exercise its right to the Put Option, and to receive not only the amount originally paid for the shares in TermoRio, but also the full amount of all the capital contributions made to TermoRio in the form of subordinated loan or equity ("Option Price" – Section 4.3), as was regulated in the Capital Funding Agreement.

13. The systematic interpretation of the Put Option provision, taking into account all the remaining rights and obligations assumed by the parties under the various agreements – *i.a.* "Share Purchase and Sale Agreement", "Shareholders Agreement", "Capital Funding Agreement", "Loan Agreement" – leads necessarily to the conclusion that such provision was agreed by the parties with the scope of ensuring to NRG the right to withdraw from the Project recovering the full amount of funds contributed thereto (as equity or loans), if the amended ECC and the O&M have not been entered into, after a certain period of time.

14. The business logic that ruled this provision derives from the conclusion that the financial balance of the project finance depended necessarily on the definition of a new ECC. In fact, considering that Petrobrás would undertake the obligation to supply all the necessary fuel, and to purchase 100% of the electrical power generated by the Plant, it seems obvious to conclude that the recovery of the

investment made in TermoRio would depend precisely on the amount and the conditions of the supply of fuel and the guaranteed sale of electric power. In other words, the possibility of NRG to regain the investment made and the estimated amount of this return depended essentially on entering into the amended ECC.

15. The same can be said, although to a lesser extent, with regard to the O&M. The initial idea was that NRG would provide the operation and the maintenance of the Plant, for an appropriate payment. In other words, this payment would also naturally be one of the essential factors by which NRG could assess the convenience and the opportunity of its investment. The fact that, subsequently, it was decided to hire a third company for the operation and maintenance of the plant does not alter this circumstance.

16. It should be emphasized that the guarantee of return of the investment, or the remuneration of same was a way to attracting such investment, as it is made clear by the statements of the witnesses appointed by both parties.

17. In short, considering that the essential elements for determining the financial and economic aspects of the business had not been defined at the time of the execution of the aforementioned agreements (Share Purchase and Sale Agreement, Shareholders Agreement, Capital Funding Agreement and the Loan Agreement) – such definition would only occur upon the execution of the amended ECC and the O&M – the parties avail themselves of the Put Option in order to guarantee the right of withdrawal to NRG, receiving the full amount invested in advance, should these negotiations fail.

18. In other words, when the aforementioned agreements were entered into on September 2001, there was still a lack of definition as to the essential elements of the TermoRio Project. Hence, it would only be acceptable to NRG to advance the funds into the Project, if, on the other hand, it was guaranteed that the absence of definition of these essential elements, within a given length of time, would entail to NRG the right to withdraw from the Project ("exit mechanism"), recovering the entire amount invested, plus the amount corresponding to interest. Besides, this is the function typically attributed by call option and put option provisions in corporate transactions.

19. The correct construction of the Put Option, leads us, therefore, to the conclusion that the entering into the amended ECC ad the O&M was an essential element in ensuring the balance of the parties to the deal. And the compliance with the conditions provided for in Sections 4.1.1. and 4.1.4. of the Share Purchase and Sale Agreement was not a mere formality, but essential to the continuance of NRG in the Project.

20. This conclusion was confirmed by the statements of witnesses that recognized the importance of the ECC and the O&M in establishing the financial balance of the business. Also, the witnesses alluded to the fact that the representatives of Petrobrás repeatedly during the course of the negotiations assured NRG that it would always have the guarantee of the Put Option, if these agreements were not reached. This repeated reminding on the exercise of the Put Option was confirmed by the witnesses of both Claimants and Respondent.

C. Requirements for the exercise of the Put Option

21. Option contracts are not specifically regulated by Brazilian legislation. Doctrine and case law are unanimous, however, in recognizing that put options or call options have the same legal nature as contracts (mutual consent) of a unilateral nature, since it establishes obligations only to one contracting party (to buy or to sell), and conversely confers to the other party a *potestative* right (*"direito potestativo"*), which may be exercised by means of its own declaration of will (Caio Mário da Silva Pereira, Instituições de Direito Civil, vol. 1, 19th. ed., Rio de Janeiro, Forense, 2001, page 367; Orlando Gomes, Contratos, Rio de Janeiro, Forense, 1973, 3rd ed., n. 96, page 142).

22. Also, as to the nature of the put option or the call option, Brazilian legal doctrine understands that it reveals a preliminary contract. In other words, its purpose is to enter into another contract – the contract to buy or to sell – and it can be subject to specific performance if it contains all the elements necessary to implement the following contract.

23. The Put Option at issue is regulated in detail in the Share Purchase and Sale Agreement (Section 4) which clearly defines the price (Option price). Hence, the exercise of the Put Option depends solely and exclusively on the manifestation of will – the *potestative* right –

by NRG, and in this event the other contracting parties will be bound to comply with their obligation, in other words, to buy the shares.

24. It should be added that the Put Option was tied to an "initial term" (article 123, Civil Code of 1916 ; article 131 Civil Code of 2002) and to "resolutory conditions" (article 119, Civil Code of 1916; article 127 Civil Code of 2002). The initial term was 60 days, as of the signature of the Share Purchase and Sale Agreement, and it was successively extended by the contracting parties, in such a way that during this period the exercise of the right was suspended (but not the right itself, which was confirmed by the execution of the agreement which provided for such option right).

25. In addition, the Put Option was linked to future and uncertain events, whose cumulative occurrence would eliminate NRG's right to sell its equity participation in TermoRio. These future and uncertain events which would lead to the extinction of the Put Option are qualified as resolutory conditions, in the precise terms of article 119 of the Civil Code of 1916 (article 127 Civil Code of 2002).

26. Among these events, as was emphasized in the previous item, those provided for in Sections 4.1.1– the execution of the amended ECC – and 4.1.4 – the execution of the O&M are particularly relevant. These events did not occur and therefore led to the exercise of the Put Option by NRG.

27. It is to be inferred, therefore, that the exercise of the Put Option depended solely on the manifestation of will by NRG (*potestative* right), with due regard to the initial term of 60 days, which was successively extended, and provided that the resolutory conditions had not occurred.

28. In this case, the validity of the Put Option is undeniable, as is the occurrence of its initial term. The controversy relates only as to whether the resolutory conditions had taken place. For NRG, the two events leading to the extinction of the Put Option did not occur; according to Petrobrás the non-occurrence of these events would have derived from the negligence and bad faith of NRG, since all the essential elements of the contracts (amended ECC and O&M) to be entered into would have been the subject of an agreement between the parties at that stage of the negotiation. NRG is supposed to have deliberately, therefore, failed to execute the aforementioned contracts

in order to maintain the possibility of exercising the Put Option, because of its financial distress.

29. It is appropriate, therefore, to examine the legal nature of the resolutory condition at issue, as well as the evidence produced by the parties to confirm the validity and effectiveness of the exercise of the Put Option, as well as its legitimacy. This is outlined in the items below. But, before dealing with this issue, it seems relevant to examine a formal argument, which is the specific capacity of NRG International to exercise the Put Option, taking into account that a substantial part of the investment made in TermoRio was made through loans from NRGenerating.

D. Capacity to exercise the Put Option

30. The holder of the Put Option on the shares, as it is clearly established in Section 4 of the Share Purchase and Sale Agreement, is NRG International, the company that actually signed the notice, to express the exercise of the Put Option, on April 17, 2002.

31. Petrobrás argues that the funds contributed to TermoRio were mostly made by NRGenerating as subordinated loans. For this reason, NRG International could not include in the Put Price the loans made by NRGenerating, as NRG International exercised itself the Put Option. Such it is true that, according to the Claimants, NRGenerating would not be able to remit the corresponding funds abroad due to the fact that the registration of the foreign loans with the Central Bank of Brazil has been made in the name of NRGenerating, as the lender.

32. If the Claimants' argument may present some difficulties with respect to the registration with the Central Bank of Brazil of the remittance of the funds, this does not indicate that such difficulty would have the effect of substituting the company holding the right to the Put Option and, therefore, its ability to exercise the Option.

33. The analysis of the underlying agreements – Share Purchase and Sale Agreement, Loan Agreement and Capital Funding Agreement – enables the Tribunal to conclude that the holder of the right to the Put Option is indeed NRG International, TermoRio's shareholder. The Option price corresponds to the amounts paid by the shareholder for the purchase of TermoRio's shares, plus any

amounts that may have been contributed in the Project, either through equity or loans.

34. It should be clearly emphasized that, since the beginning, the parties agreed that the Project would be financed through contribution in equity or through subordinated loans (Section 2 of the Capital Funding Agreement), according to predetermined percentages. It was also established that NRGenerating could make capital contributions on behalf of NRG International (Section 3.1. of the Capital Funding Agreement). All obligations of NRG International were emphasized, therefore, as follows: "NRG International or NRGenerating" (Section 2 of the Capital Funding Agreement).

35. To conclude, therefore, that the funding by NRGenerating, on behalf, and on account of, NRG International was agreed on by the parties, and which could not altEr the shareholder's capacity nor the capacity of the holder of the Put Option. It is worth emphasizing that the purchaser of the shares in TermoRio is NRG International, with whom lies, solely, the right to sell them, under the terms of Section 4 of the Share Purchase and Sale Agreement. NRGenerating is not even a signatory of this instrument, and therefore it could never be the holder of the Put Option.

36. Even if the Put Option price includes amounts contributed as subordinated loans by NRGenerating, in the name of, and, for the account of, NRG International, as was agreed between the parties, this fact does not produce the change in the circumstance that NRG International is the holder of the Put Option, and not other company.

E. Formal aspects of the exercise of the Put Option

37. Claimants allege that, the regular exercise of the Put Option occurred only on April 18, 2002. Such allegation is based on the fact that, on April 17, 2002, the Put notice was delivered at the offices of Petrobrás after banking hours. In addition, Claimants argue that the person who received the Put notice was not a Petrobrás employee, and did not have the power to receive a document of such importance. Besides, the notice of April 17 did not have the corporate stamp that would characterize its proper receiving by Petrobrás. Only on April 18, the Put notice was sent by Notary Register official.

38. Respondent, on its turn, argues that the Put notice was received on April 17 in the offices of Petrobrás by someone "whose only obligation was to register by protocol the received documents" (as admitted by Mr. Luis Carlos Moreira), what would legitimate such person to receive documents on behalf of the company. Furthermore, according to the Respondent, Section 4 of the Share Purchase and Sale Agreement did not require that the Put notice be sent by Notary Register official, as it was on the following day solely for ratification purposes.

39. Despite of the arguments raised by the parties, the Arbitral Tribunal concludes that NRG was not formally in default at the moment of the Put Option exercise, contrarily to what is alleged by Claimants, once, in accordance with Section 8.1 of the Capital Funding Agreement, default occurs when payment is not made after 10 (ten) days after receipt of the notification. Such notification was made by TermoRio on April 18, 2002.

F. Validity and effectiveness of the exercise of the Put Option

40. In the case at issue, it is undeniable that the initial term for the exercise of the Put Option has lapsed (period of 60 days that was successively extended up to March 20, 2002), and that at least two of the events listed as resolutory conditions did not occur: the amendment of the existing ECC, subsequently converted into a Participation Agreement, and the execution of the O&M Agreement.

41. Under these circumstances, it was legitimate for NRG International to exercise the Put Option. It is, also, unquestionable that, at the time of the exercise of the Put Option, NRG was not in default of any of its contractual obligations; even Petrobrás alleges that the default occurred later, with the failure to pay drawdown nr. 7 and the subsequent drawdowns (as defined in the Loan Agreement).

42. In this context, the only fact which could affect the validity and the effectiveness of the Put Option – as was claimed by Petrobrás – would be the evidence that the resolutory conditions had not been met – that is to say, the execution of the amended ECC and of the O&M Agreement – due to NRG's abuse and acting in bad-faith. It is important, therefore, to examine the nature and effects of these resolutory conditions.

43. The exercise of a put option right is associated with the non-execution of other legal transactions. Therefore, the occurrence of the condition depends on facts relating to the will of the contracting parties, in other words, it depends on whether or not certain declarations of will have been made. The conditions associated with human acts are referred to as potestative conditions in contrast to causal conditions, which are associated with facts beyond the will of the parties.

44. Among the potestative conditions the legal doctrine distinguishes the simply potestative ("*condição simplesmente potestativa*") from the purely potestative condition ("*condição meramente potestativa*"). The purely potestative conditions are proscribed from the Brazilian legal order (article 115 of Civil Code of 1916; article 22 of Civil Code of 2002), because they subject the validity of the legal transaction to the pure discretion of one of the parties, in such a way that the occurrence of the event that releases or suspends the legal transaction burdened with conditions depended on the spirit of that party. On the other hand, there are the simply potestative conditions, which although retaining a certain connection with somebody's will, they imply the need of the occurrence of given events that are not associated with mere human discretion. These events are the objective elements of the potestative condition, which guarantee that they will be accepted by the legal order.

45. It is to be noted, once again, that the execution of the amended ECC and the O&M Agreement constitutes a condition that is simply potestative in nature, which is accepted by the Brazilian legislation, and is not to be mistaken with purely potestative conditions, which are banned by the Brazilian legal order.

46. The execution of these agreements was not subject to NRG's sole discretion, but depended on a succession of objective factors, which do not depend solely on NRG's will. There had to be negotiations on a series of essential items, the definition of which was subject to concurrent will of NRG and Petrobrás. This type of condition, involving the future entering into a contract by the parties, is unanimously recognized by doctrine as being valid, precisely because it is characterized as a simply potestative, rather than as purely potestative condition.

47. As it is a simply potestative condition, Petrobrás had the burden of proofing that the failure to carry out such condition was due to NRG's malicious conduct (bad faith). Article 120 of Civil Code of 1916 (article 129 of Civil Code of 2002) establishes that:

> "It is deemed to have occurred, with regard to the legal effects, the condition whose implementation was maliciously obstructed by the party it does not benefit (...)" (our emphasis).

48. As the legal doctrine unanimously points out, malice means a deceitful attitude, or, in other words, characterized by the deliberate intent of preventing a condition from occurring. For this reason, for the condition to be deemed to have taken place (with respect to the legal effects), the mere fault is not enough, and the other party must evidence the existence of a deceitful intent, of bad faith, by the party that is supposed to have caused the event not to occur.

49. In the case at issue, the facts alleged by the parties, and the evidence submitted, do not, in any way, prove that there was deceitful attitude, in bad faith, by NRG, which would have led to non-occurrence of the condition, which was failure to execute the amended ECC and the O&M Agreement.

50. Initially, we should note that NRG, on successive occasions, agreed to the extension of the initial term of the Put Option, which shows its good faith in continuing to negotiate, thus avoiding the sale of its shares in TermoRio, and continuing to contribute with the funds necessary to finance the Project.

51. In the original wording of the Put Option, the amended ECC and the O&M Agreement would have been entered into within 60 days (in other words by November 3, 2001). During this period, obviously, NRG would spend an amount of resources for financing the Project without any collateral (the agreements) and such amount spent would have been much lower than the amount it actually contributed to, because of the extension of the Put deadline by several months, to the extent that the exercise of the Put Option was made on April 17, 2002.

52. This element alone proves to be groundless the argument of Petrobrás that NRG allegedly acted in bad faith by avoiding to enter

into the contracts because of its financial distress (and it does not matter whether this is true or not). Yet, if NRG did not intend to continue financing the Project, it could have simply not agreed to the successive extensions of the initial term of the Put Option, thus quitting the Project with the recovery of the amounts initially invested. Its conduct, however, was quite different: NRG agreed to the extension of the Put Option several times, allowing the parties to gain more time to attempt successfully to complete the negotiations, even though this meant the obligation of investing further sums in the Project. And these amounts were fully contributed to the Project, being no default, until April 17, 2002, when the Put Option was exercised.

53. Failure to enter into the contracts seems to have derived from a succession of factors that cannot be confused with malicious conduct by NRG. These were complex contracts of critical importance in establishing the financial balance of the business. For this very reason, they depended on negotiation of a series of issues.

54. As the evidence given in the case shows, particularly that of the witnesses heard at the hearing, these negotiations took place throughout the Put Option period, becoming more complex as Petrobrás, for reasons of internal convenience, sought a change to the structure of the ECC, turning it into a "Participation Agreement", with which NRG agreed.

55. While the parties were celebrating – at a lunch – the understanding reached on the conditions of the transaction, as Petrobrás alleges, the fact is that the evidence of the case records shows that altough the negotiations were carried out loyally by both sides, there were a number of pendingissues, which were important to the definition of the business. It is unquestionable, for example, that only after the lunch at the Copacabana Palace quoted by Petrobrás, in which the "closing of the deal" was supposed to have been celebrated, the lawyers of both parties worked on the drafts of the contracts. It is obvious, therefore, that it could never be claimed that, at that time, all the important points had been covered, and there were only formalities to be dealt with. As it has been observed, the lawyers of both sides requested various changes to the drafts of agreements, after said "celebration".

56. In short, an examination of the facts and evidence leads to the conclusion that Petrobrás has failed to prove bad faith of NRG, as would be necessary for the assumption that the extinctive condition of the Put Option had been implemented. This Tribunal is able to, at the most, pick glimpse of failures by both sides in the negotiations, or in other words, certain acts could reveal a certain degree of negligence by both sides, but nothing that would suggest malice or deceitfulness, such as would be required to apply the aforementioned provision of the Brazilian Civil Code. It was clearly shown that the agreements to be concluded were complex and there was a succession of issues between the parties to be overcome. This did not occur.

57. Hence, the Tribunal, by majority of votes, concludes in favor of the validity and effectiveness of the exercise of the Put Option. It was exercised by the holder of this right – NRG International – after the initial term had elapsed, since two of the events that it would be required to take place to extinguish this right had not in fact occurred. And this failure was not due because of the malicious conduct of any of the parties, but by in view of the existence of pending issues which were not agreed on during the negotiations, and which were conducted in an environment of loyalty and good faith.

G. Legitimacy of the exercise of the Put Option

58. One may raise the question whether the fact that NRG kept conducting the negotiations on the amended ECC until the eve of exercising the Put Option, on April 17, 2002, without disclosing to Petrobrás, at least tacitly, its discontent at the failure to enter into this agreement, would not constitute a demonstration of disloyalty and abuse in the exercise of its right? In other words, through this conduct, would not NRG have exceeded the limits imposed on the normal exercise of the Put Option, because of the duty of mutual loyalty which should be observed in contractual relationships?

59. For the Claimants, this question is justified by the fact that one day before the exercise of the Put Option, in addition to a previous lunch celebrating the understandings reached with Petrobrás as to the basic conditions of the ECC, NRG sent a letter to TermoRio, stating its interest in the venture and in the continuation of the Project. And, even after having exercised the Put Option, NRG would again

express its willingness to maintain the investment in a letter dated April 18, 2002 addressed to TermoRio, making no mention of the failure to enter into the agreements and the insecurity that this could be producing.

60. In this context is the question of whether NRG's exercise of the Put Option, in this interval, would not be incompatible with the expectations created in the other contracting party with regard to the negotiation of the ECC. Would this two conducts by NRG constitute a deviation from the conduct, which, up until then, it had been pursuing before Petrobrás? Moreover, the provision of the Put Option was stipulated by the parties as a mechanism to guarantee the right of NRG to withdraw from the Project, should the amended ECC and the O&M Agreement be not executed, and these, it would seem, were almost concluded, since such conclusion supposed to be the reason for the aforementioned lunch celebration by the parties. Would the limits imposed on the exercise of the Put Option not have been exceeded for the financial purposes envisaged thereby? In short, would this paradoxical behavior by NRG invalidate the legitimacy of the Put Option?

61. Article 422 of Civil Code of 2002 expressly establishes the objective good faith ("*boa-fé objetiva*") as being the rule of conduct imposed on the contracting parties, whether for the conclusion or the performance of contracts. This provision must be interpreted jointly with the provisions of article 187 of Civil Code of 2002, in which the principle of good faith is expressly invoked as a limit imposed on the holder of a right to its exercise. Good faith, hence, is directly linked to the abuse of right, in this role of limiting, or even preventing, the exercise of a legal power deriving from a contractual relationship. Even before the enactment of the Civil Code of 2002, this rule was already applied to commercial covenants, as per the article 131, 1 of the Brazilian Commercial Code. Article 187 of Civil Code of 2002 states that:

> "the holder of a right, who, in exercising it, manifestly exceeds the limits imposed by its financial or social purpose, by good faith and good morals, commits an illegal act".

62. This was also the same reasoning of article 161, I of Civil Code of 1916, in *contrario sensu*. The law establishes, therefore, the abuse of right as an illegal act (see Silvio Rodrigues, *Curso de Direito Civil*, vol. 1, 31st. ed., São Paulo, Saraiva, 2000, page 313.), without implying necessarily the need for the presence in it of any intentional element. As Justice Ruy Rosado de Aguiar Júnior teaches, pursuant to the Civil Code, it is appropriate to think of the abuse of right when the conduct of the holder of the right, objectively taken, manifestly exceeds the aforementioned limits, regardless of any subjective requirement, this does not meaning, as it is obvious, that, in most cases, the abuse is not intentional, and that the fault or deceitful conduct of the holder of the right be legally irrelevant ("O Novo Código Civil e o Código de Defesa do Consumidor. Pontos de Convergência.", in Revista de Direito Renovar, vol. 26, May-August, 2003, pages 14-15).

63. The limitations as to the exercise of a right are established by law, as a legal duty, therefore the voluntary breach of such limitations constitutes an illegal act, *proprio sensu*. This duty is laid down through paradigms (good-faith, good morals, the social and financial purpose of the law) as to how the holder can act. These are generic guidelines, with a double purpose: on the one hand, they are to guide the relevant holders in determining the legal acts they can carry out, and, on the other hand, they constitute relief against the strict application of abstract schemes conceived by law.

64. Hence, the care that legislators have taken in only declaring illegal the manifested excess of the aforementioned limits, which we understand, given the vague nature of these guidelines, and confirming the notion of declaring them illegal acts. Abuse of right, therefore, takes place, only when the "holder of a right" manifestly exercises such right beyond good-faith and the limits imposed by its financial or social purpose or by good morals. The illegal nature of the abuse of right lies, therefore, in the intolerable degree to which this excess is made manifest.

65. The examination of the facts and the evidence brought to this arbitration case do not reveal, as we already have observed, that NRG was inspired by the deceitful intent of exercising its power to a degree able to cause damage to Petrobrás. We should now examine whether, even though the intentional element was absent, NRG's behavior would have led to the fruition of its right beyond the limits

imposed by its financial purpose, by good-faith, or by good morals, thus causing a damage to Petrobrás. In other words, whether this exercise was abusive and in bad faith. And the answer is definitely no.

66. Indeed, the fact of NRG having conducted the negotiations with regard to the amended ECC agreement up to the eve of April 17, 2002, when it exercised the Put Option, with the consequent intention to withdraw from the Project, does not reveal, as is alleged by Petrobrás, an inconsistent behavior by NRG as opposed to the conduct it had been adopting, up until that point, and which would justify the reference to the breach of good faith that ought to rule the contracting parties. Much to the contrary, there would be breach of good faith had NRG refused to continue negotiating with Petrobrás, with regard to the execution of the aforementioned contracts, and whose execution before the deadline of the Put Option would inhibit its exercise.

67. Hence, NRG's exercise of the Put Option, at the term agreed by the parties, does not reverse the legitimate expectations of the other contracting party. In fact, the exercise of the Put Option would only be improper, and to this extent even abusive, if Petrobrás had no more expectations in sight (by virtue of an agreement by the parties), with the possibility of NRG exercising this legal power (Put Option), if the execution of the amended ECC (or Participation Agreement) and the O&M Agreement did not occur within the agreed term. The so-called rule of *tu quoque* is not to be applied in the case. In other words, the rule to which the subsequent behavior of a contracting party proves to be incompatible with the attitudes expressed previously, leading to the breach of good faith (Antonio Junqueira de Azevedo, "Interpretação do Contrato pelo Exame da Vontade Contratual", in Revista Forense, vol. 351, Rio, July-September 2000, page 280).

68. Nor can it be said that the successive extensions of the deadline for exercising the Put Option, agreed between the parties, would have created in Petrobrás a properly grounded expectation that a further postponement would be agreed to, for so long as the negotiations with regard to the two contracts would continue. It would even be naive to confuse the legitimate expectations created, as a standard, for a line of behavior adopted in the performance of a contract, with the possibility of periodic extensions, which, at the very least,

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depend on the will of both parties. In fact, the situation that Petrobrás faced, at the time of the Put Option, was precisely the same that had prevailed previously. In other words, notwithstanding the negotiations with regard to the contracts, NRG always had the right to withdraw from the Project, by exercising the Put Option, if the contracts were not concluded within the agreed term. There was, therefore, no frustration of legitimate expectations, meaning a breach of good faith.

69. It remains to be said that, in exercising the Put Option within the term, neither did NRG deviate from the financial or social purpose proper to such right, in this contractual context. The events provided for in Section 4.1 of the Share Purchase and Sale Agreement did not subject the exercise of the Put Option to the financial unfeasibility of the Project, objectively identified in the propositions therein provided for, as the Claimants allege. In fact, the financial feasibility of the Project, *id est,* its ability to generate the cash necessary to amortize the investment was not and never was questioned by NRG, since this constituted a prerequisite of the entering into the Project.

70. In fact, the purpose of the Put Option was another. The establishment of the put option provision, in the case at issue, was intended to protect NRG against events that might obstruct its expectations that the Plant would acquire the ability to generate cash, by entering into contracts guaranteeing the supply of raw materials and the purchase of electricity power produced by the Plant, on an economically feasible scale. The failure to enter into these two contracts, within the period agreed, reversed these expectations and led to the exercise of the Put Option, in order to enable NRG to withdraw from the Project, with the recovery of the amounts already paid. The limits imposed by its financial or social purpose were not, therefore, exceeded.

71. The fact that NRG continued to handle the negotiations with regard to the amended ECC up to the eve of the day NRG exercised the Put Option (which it was obliged to do due to a contractual provision), to the point of view of both parties celebrating the progress of the negotiation days before, without NRG expressing its discontent with the failure, within due time, to enter into the amended ECC or to have taken any measure to notify Petrobrás of its imminent exercise of the Put Option, if the ECC was not executed (moreover, this was not a contractual obligation) may perhaps mean a reproachable

conduct of NRG in terms of breach of courtesy. It is not, however, sufficient to qualify the act as illegal, since it "manifestly" did not exceed the limits imposed by good faith, at least to the degree required by law.

H. The Put Option price and the interest due

72. Once decided, by majority vote, the regularity of the exercise of the Put Option, the Arbitral Tribunal now decides on the matter of the Put Option price and the interest due.

73. Section 4.3 of the Share Purchase and Sale Agreement provides that, once the Put Option has been exercised, the purchase price of the shares (as defined thereto) will be equal to US$ 634,115.40, as defined in Section 2 thereto, plus any amount disbursed by NRG in its capacity of TermoRio shareholder including, but not limited to, any capital contribution made by NRG to TermoRio, in the form of subordinated loans or equity additional to the shares acquired or by virtue of the payment guaranteed provided to the EPC contractor under the EPC, and plus an additional amount equivalent to 15% per annum on top of that (option price). The option price, thus established, must be paid free of any and all taxation.

74. The compensatory or remunerative interest of 15% per annum, provided for in said contract, deserves a special analysis. Articles 1,062 and 1,063 of the Civil Code of 1916 establish the delinquent interest rate at 6% a year, when such rate has not been previously agreed by the contracting parties, or when they are payable by virtue of a law. This means that, by a convention by the parties, this limit may be exceeded. Article 1,262 of the Civil Code of 1916, on the other hand, allowed for free stipulation by the contracting parties of the compensatory or remunerative interest rates.

75. This freedom to set delinquent or compensatory interest rates was, however, restricted by article 1 of Decree no. 22,626, of April 7, 1933, the so-called "Usury Act" ("*Lei da Usura*"), which forbids the settlement of an interest rate at more than double the legal rate, set at 6% a year (therefore at a maximum 12% per year). It also prohibited the fixation of compound interest, other than the accumulation, of interest payable on current account, year on year. The Usury Act states in its whereas provisions that this restriction is related to the "higher significance of the country's economy" given

that, above this limit, interest rate would be exaggerated, if they were not in compliance with either their purpose as a compensation – since the creditor is deprived of the use of its capital – or for the late payment, thus "preventing the development of the productive classes".

76. The effectiveness of the provision referred to was removed from the scope of the Brazilian financial system by article 4, clauses VI and IX, of Law no. 4,595, of December 31, 1964, which authorized the National Monetary Council to govern credit, and to set its own ceiling on interest rates. This is the ruling of the Federal Supreme Court, as set out in Abstract no. 596. But outside this specific field, the Usury Act is still in force in Brazil, reinforced by a Decree of November 29, 1991.

77. The Civil Code of 2002 (consolidating and ratifying the previous law and the prevailing court precedents) deals with delinquent interest and compensatory interest, respectively, in articles 406 and 591. Article 406 provides that, in the absence of agreement between the parties, the rate of delinquent interest will be the same as the one for late payment of taxes to the National Treasury. Hence, it is admitted that delinquent interest be agreed at a rate higher than this rate (to be in effect only when the rate is not previously agreed). On the other hand, article 591 of Civil Code of 2002 establishes that compensatory interest rates may not exceed, under penalty of being necessarily reduced, the rate referred to in article 406, and it may be compounded annually. In this case, the interest rates agreed at higher levels will not prevail, in contrast to what is allowed to take place in the case of delinquent interest.

78. It so happens that, according to the inter-temporal laws (Law of Introduction to the Civil Code, article 2, paragraph 2), a subsequent general law does not take priority over a previous special law (in this case, the Usury Act). For this reason it is appropriate to examine the question of the validity of the Usury Act in the context of the Civil Code of 2002. Pursuant to article 2,046 of the Civil Code of 2002, "all remissions, in legislative acts, to the Codes referred to in the preceding article (the Civil Code and the first part of the Commercial Code) are deemed to be made to the provisions of this Code". So as to infer that the remission undertaken by the Usury Act in its article 1 (*in fine*) to article 1,062 of the revoked Civil Code (Civil Code of 1916), must hereafter be read as remission to article 406 of the Civil

Code of 2002. From where also derives the conclusion that permission to set interest rates above the legal rate by an express provision is still restricted by the prohibition set out in article 1 of the Usury Act , in other words, confined to double the legal rate.

79. The limit to be complied with (pursuant to the provisions of the aforementioned law) for both compensatory and delinquent interest rates – whether or not they are provided for contractually – refers, obviously, to Brazilian currency (rather than to the United States dollar). Hence, this maximum interest rate of 12% per year cannot be strictly applied in this case. And even more when dealing with international contracts, where "the (interest) rate in force for late payment of taxes due to the National Treasury" (as article 406 of the Civil Code of 2002 states) could not be possibly applied.

80. The principle expressed in the *ratio legis*, however, remains valid and effective. In other words, the determinant reason for limiting the interest rates pursuant to the Usury Act, which derives from public policy, taking into consideration the social interest as prevailing over the individual interest is still applicable. And, the determinant reason for this limit, as the Usury Act itself affirms, is to "prevent and suppress the excesses practiced by usury", that are contrary to "the higher interest of the country's economy". This is the reason why, although the present arbitration deals with international contracts governed by Brazilian law, the obligations thereto are undeniably subject to the principle expressed in the *ratio legis* that informed over a public policy rule, regarding interest rates.

81. In this case, the Arbitral Tribunal should analyze whether the rate of 15% a year in United Stated dollars – expressly agreed by the contracting parties in setting the remunerative interest rate – reflects the reality of international practice, or whether it exceeds it. If it exceeds it, it would cause an imbalance that the Usury Act seeks to avoid. In this case, in being verified an excess, a "reduction" would come into effect, as expressly refers article 591 of the Civil Code of 2002, in view of the Brazilian public order. The Brazilian court precedents always admitted the reduction of the interest rate up to the legal ceiling, whenever the agreed interest rates were established beyond the limit admitted by law (Judgement of February 23, 2003, Resp. n. 487.927 - MG 2002/0174933-0, 4ª. Turma, Justice Rel. Aldir Passarinho Junior).

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82. In international arbitration, interest rates have been, quite often, lowered significantly, resulting in rates that range from 6% to 8,5% a year (or the Libor annual rate plus 1% a year, calculated monthly) and annually compounded, but never reaching 15% a year. The matter has been discussed in the precedents of the International Court of Arbitration of the International Chamber of Commerce (ICC), as can be seen in its collection of arbitral awards (Collection of ICC Arbitration Awards, note "appropriate rate of interest", volume II, page 249, and volume III, pages 86, 100, 108, 143, 152, 185, 382, 443, 468, 513, 592 and 600).

83. Taking into consideration still as parameters the Brazilian bonds issued in international markets between September and November of 2001 (original deadline of the Put), one verifies that the gross yield of these papers confirm the same rate of 8% per year. Petrobrás had two notes in the international financial market, during the same period, with yields of 8.27 and 8.70.

84. For all these reasons, the Arbitral Tribunal decides, by majority vote, with the dissenting opinion on this issue attached hereto, that the compensatory interest rate of 15% a year is excessive, as it fails to correspond to interest rates in force in the market. For that reason, the Arbitral Tribunal establishes the reduction of the agreed interest to 8% (eight percent) per annum, and annually compounded in the composition of the Option price. The Arbitral Tribunal, by majority of votes, believes that interests should not be a source of unjust enrichment for any party, but should simply compensate the party for losses incurred or for the deprivation of the use of its capital, thus reestablishing the *status quo ante.*

85. Section 4.4 of the Share Purchase and Sale Agreement also provides that, if the Put Option price is not paid within 30 days immediately following the exercise of the Put Option, Petrobrás will be liable for a fine corresponding to 5% of the amount payable, plus delinquent interest at the rate of 1% a month.

86. The same arguments as raised above are applied to delinquent interests, which may not surpass the legal rate. In this case, the contractually agreed rate is to be reduced to 8% (eight percent) per year, which represents the average rate effective in the market during the same period. The delinquent interests constitute the indemnification for a breach of an obligation, that is, for the delay in

the payment of a debt (Clóvis Beviláqua, "*Código Civil dos Estados Unidos do Brasil Comentado*", vol. IV, 1931, pp. 227-228). The breach of the payment obligation causes the occurrence of delinquent interest, however, such interest may not concur cumulatively with the compensatory interests, under penalty of anatocism (compound interest over interest). The anatocism is prohibited by Brazilian law (Article 4 of the Decree 22.626, of April 7, 1933; *Stare Decisis* 102 and 121 of the STJ).

87. The Brazilian superior courts have admitted as a rule the prohibition of cumulative incidence of compensatory and delinquent interests, to be only allowed if derived of express legal provision or contractual provision. In the first case, the only relevant example is the real estate expropriation, where the interests accumulation is exceptionally authorized by Article 15-B of the Decree-Law 3.365, of June 21, 1941. In the second case, the Superior Justice Court has ruled as follows: "Accumulation of delinquent and compensatory interests after maturity: Impossibility without prior agreement." ("Recurso Especial 206.440/MG, DJ 30.10.2000, p. 161").

88. In the present case, Section 4 of the Share Purchase and Sale Agreement does not mention, in any of its clauses, the accumulation of compensatory with delinquent interests. Section 4.5 only provides that if the Put price is not paid until the agreed date, the price will be subject to delinquent interest, at the rate of 1% per month. This rate is now reduced to 8% per year. For not being expressly provided in the contract, nor in the law, the accumulation of interests should not prevail.

I. <u>Effects of the exercise of the Put Option during the arbitration</u>

89. Section 9.5 of the Capital Funding Agreement establishes that in the course of any arbitration and until the Arbitral Award is delivered the contracting parties should continue to perform their obligations to finance the Project.

90. The Claimants resort to this contractual provision, and also to the injunction granted by the Fifth Corporate Court in the judicial district of Rio de Janeiro that suspended the effects of the Put Option, to sustain that NRG had the obligation to pay the outstanding drawdowns.

91. Before dealing with this allegation, it should be observed that the decision in respect of these issues does not affect the conclusion reached by the Arbitral Tribunal, by majority, on the validity and effectiveness of the exercise of the Put Option. This is because the Put Option was exercised prior to an event of default regarding the non-payment of drawdowns nrs. 7 and 8, in such a way that, even if failure to pay this drawdowns is characterized as default by NRG, it would not affect the validity or effectiveness of the Put Option, imposing only the duty to reimburse Petrobrás for the damages caused by this failure to pay, and, possibly, that of continuing to finance the project during the course of the arbitration proceedings, until such time as the arbitration court decides in respect of the Put Option.

92. In short, the validity and effectiveness of the Put Option and the existence, or not, of NRG's obligation to finance the project during the course of the arbitration are independent and autonomous issues. Hence it is possible to decide that the exercise of the Put Option is valid and effective, but that during the arbitration NRG should continue to finance the Project, and be liable for the indemnification for the fact of not having done so.

93. Upon duly clarification of this issue, we should examine the alleged default. In this regard, there are two possible interpretations. The first is that there is a specific provision in the agreement dealing with arbitration related to the exercise of the Put Option (Section 4.4. of the Share Purchase and Sale Agreement). This provision is very clear to establish that any dispute and controversy related solely to the Put Option should be resolved by arbitration, and the decision should be given within no later than 30 days.

94. It seems quite clear that the concern of the parties was to avoid setting up arbitration proceeding that will serve as an instrument to delay the payment of the Put Option price and the consequent withdrawal of NRG from the Project, as a result of the exercise of the Put Option. It is also clear that the parties never thought of, or agreed to, the supposition of discussing the exercise of the put option during long arbitration proceedings, which would impose on NRG not just a delay in receiving its payment, but which would also oblige it to continue financing the Project. Thus, it is legitimate to conclude that Section 9.5. of the Capital Funding Agreement should not fall on the assumption of arbitration, whose purpose is the

exercise of the Put Option. Establishing a maximum term of 30 days for resolving the dispute, neither party could expect the other to assume responsibilities beyond this period in the specific case of the exercise of the Put Option.

95. The second interpretation, however, is that Section 9.5 of the Capital Funding Agreement, for being broad and expressly referring to "any arbitration", implies that NRG should make all the contributions which were required from it in the course of the arbitral proceedings. According to this construction, in spite of the parties having clearly intended to resolve the claims in relation to the Put Option in a period of 30 days, the possible and involuntary insufficiency of this period for the solution of the issues by arbitration could not be considered as enough reason to release NRG of its contractual obligations, thus imputing indefinitely and exclusively to Petrobrás, from that moment on, the responsibility of financing the Project.

96. Independently of adopting any one of the alluded positions above, the fact is that, due to the decision of the Court of Justice of Rio de Janeiro, all the effects of the Put Option were suspended according to the Brazilian law and the discharge of NRG of its obligations would only occur (i) through another court order, motivated by a specific request, which did not occur; or (ii) through the exercise of the Call Option by Petrobrás, which effectively occurred on May 16, 2002.

97. With regard to drawdowns nrs. 7 and 8, NRG failed to make the payments although it had a contractual obligation to pay the amounts requested. Pursuant to section 4.5 of the Share Purchase and Sale Agreement, the Option price should be paid by Petrobrás within 30 days counting from the exercise of the Put Option, and the payment of the price and the transfer of the shares in TermoRio would take place at the same time. And, section 2(e)(iii) of the Capital Funding Agreement sets that the NRG International's and NRGenerating's obligation to make capital contributions to the Project will only cease when their shares in TermoRio have been transferred to Petrobrás.

98. This being so, even though the Put Option has been exercised, drawdowns nrs. 7 and 8 – which were due during the interval immediately following the exercise of the Put Option – have not been paid. Such failure to pay constitutes a default, and thus causes NRG

to indemnify Petrobrás for the consequences of such default, as defined by this Arbitral Tribunal.

99. Under these conditions, since the validity and effectiveness of the Put Option is recognized, the Arbitral Tribunal concludes, by majority of votes, with the dissenting opinion attached hereto, that the following amounts should be subtracted from the sums previously paid in by NRG, and which should be returned to it (since they are included in the Put Option price), by analogy with the provisions of Section 4.5 of the Share Purchase and Sale Agreement: (i) delinquent interests in the amount of 8% per year calculated pro rata temporis on the amount of the drawdowns nrs. 7 and 8, during the following periods: (a) from April, 17, 2002 until May, 16, 2002, for drawdown nr. 7; and (b) from May 13th, 2002 until May, 16, 2002, for drawdown nr. 8; and (ii) a 5% fine on the total defaulting amount.

100. Other than drawdowns nrs. 7 and 8, finally, the Arbitral Tribunal decides that, upon Petrobrás exercise of the Call Option, it became undeniable that NRG no longer participated in the Project. In other words, NRG would withdraw the Project no later than May 16, 2002, either because of the Put Option or because of the Call Option. This consideration leads the Arbitral Tribunal to infer that Petrobrás could no longer expect NRG to continue financing the Project, after May 16, 2002, even in the course of arbitration. Consequently, this Arbitral Tribunal concludes that NRG should not remain bound to the Project after such date, once Petrobrás has exercised the Call Option.

J. The consequence of recognizing the effectiveness of the Put Option in relation to other issues

101. Once decided by majority vote that the exercise of the Put Option by NRG was valid and effective, the Arbitral Tribunal now focus its attention on the implications of such decision on the outstanding issues under dispute.

102. Several arguments were brought to this arbitration in order to evidence the validity of the exercise of the Call Option by Petrobrás, based on alleged defaults by NRG in its obligations vis-a-vis the TermoRio Project. In fact, after the exercise of the Put Option by NRG, it failed to comply with its funding obligations related to

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drawdowns nrs. 7 and 8. But this failure to comply with these obligations does not influence on the validity or the effectiveness of the previously exercised Put Option, as discussed in the previous item.

103. This being the case, once the Arbitral Tribunal has decided, by majority, that the Put Option has been validly exercised, any examination of the exercise of the Call Option by Petrobrás is completely impaired. Indeed, if the Put Option was exercised before the exercise of the Call Option, it is obvious that the first should be complied with, to the detriment of the second.

104. As it has been admitted, by majority of votes, that the Put Option was exercised validly and effectively, the Arbitral Tribunal considers, also by majority vote, that the exercise of the Call Option was not valid and that all the issues raised during the course of this arbitration associated with such matter are overcome, as the losses and damages claimed by Petrobrás.

[3] Other pleas

1. This Arbitral Tribunal now dedicates its attention to the other issues which were raised in the Statements of Claim and in the Statement of Defense and Counterclaims, as follows below:

   A. Obligation of NRG to pay additional 5% pursuant to Section 11.4.3 of the Share Purchase and Sale Agreement

2. NRG, in its Statement of Defense and Counterclaims, requests that the Arbitral Tribunal declares that it has no obligation in accordance with the contracts related to the Project, to continue investing 5% of TermoRio's capital requests, after its withdrawal of the Project, be it through the exercise of Put Option, or due to the exercise of the Call Option. PRS, in its turn, alleges, in its Statement of Claim, that the Arbitral Tribunal has no jurisdiction to analyze this controversy.

3. The dispute involving the additional 5% of contribution has its origin on Section 11.4.3 of the Share Purchase and Sale Agreement, which states that when all aggregate contributions requests exceeds 30% of

the total Project cost, and until no external financing is available (bridge loan), the parties should fund the Project in the following proportions: NRG 55%; Petrobrás 43% e PRS 2%. As one may see, NRG would invest 5% more than its share equity (50%), comprising, thus, the remaining 5% attributed to PRS.

4. This Arbitral Tribunal has the jurisdiction to examine this issue pursuant to Section 16.1 of the Share Purchase and Sale Agreement, agreed on the following terms:

> "Arbitration. Except the provision in Section 4.4, any dispute or controversy relating to the validity, interpretation, performance and enforceability of this Agreement shall be resolved exclusively and finally by international arbitration. The arbitration shall be conducted by 3 (three) arbitrators in accordance with the Rules of Arbitration of the United Nations Commission on International Trade Law – UNCITRAL ('UNCITRAL Rules') then in effect. If there are 2 (two) Parties to the relevant dispute, each Party shall select an arbitrator in accordance with the UNCITRAL Rules. The arbitrators so nominated shall then agree within 15 (fifteen) days as of the date their confirmation by the Court of Arbitration of Rio de Janeiro on the nomination of a third arbitrator to serve as Chairman. If there are more than 2 (two) Parties to the arbitration, then the arbitrators shall be selected as provided in the UNCITRAL Rules. All arbitration proceedings under this Agreement shall be conducted in English language in Rio de Janeiro, Brazil. Any decision or award of the arbitration tribunal shall be final and binding upon the Parties, and enforceable according to its terms by any court of competent jurisdiction. To the extent permitted by law, any rights to appeal from or cause a review of any such award by any court or tribunal are hereby waived by the Parties of this Agreement." (our emphasis).

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5. Having settled this preliminary issue, it should be noted that the amount of 30% of the total cost of the Project was only reached on June 7, 2002, with the drawdown nr. 9 (p. 18 of the Expert Report), after the exercise of the Call Option (May 16, 2002). Accordingly, since the Put Option was, by majority of votes, considered legitimate – and even if it were not –, after the exercise of the Call Option, the Arbitral Tribunal, unanimously, decides that NRG has no continuing obligation to fund TermoRio, and therefore has no obligation to the additional 5% capital contribution.

B. Authorization for the issuance of the drawdowns

6. NRG affirms that, according to Section 5.2.2 of the first amendment to the Shareholders Agreement, dated May 18, 2001, the shareholders of TermoRio should approve the requested capital contributions, which never occurred, having TermoRio, consequently, breached a contractual obligation. The Claimants, on the other hand, argue that this provision was fulfilled on September 6, 2001, when the Capital Funding Agreement was signed.

7. The Arbitral Tribunal unanimously decides to accept Claimant's allegations in this matter. The Capital Funding Agreement and the Loan Agreement establish the amounts, as well as the convenience and opportunity of the contributions which must be made in TermoRio and there is no provision as to prior deliberation by the shareholders. Furthermore, the execution of these two contracts was approved by all members of the board of directors of TermoRio, on September 6, 2001.

C. Obligation to contribute 30% with "own resources"

8. The Claimants allege that NRG is in default with their funding obligations (Section 11.4.1 of the Share Purchase and Sale Agreement; Section 5.2.4 of the Second Amendment to the Shareholders' Agreement; Section 2 of the Capital Funding Agreement), due to its intention to seek financing to effect the contributions to TermoRio. The mentioned agreements required that up to the amount of 30% of the total costs of the Project, the shareholders of TermoRio should invest with "own resources". The Claimants misinterpreted the provision, using the expression "own resources" with the meaning of "own funds".

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9. The Arbitral Tribunal decides, unanimously, that the contracts entered into by the parties do not require that the contributions be made with resources belonging to each shareholder, but that each shareholder be responsible for the contribution of at least 30% of the total cost of the Project, it being irrelevant which is the source of such resources, if originating from their own assets or from the capital market, including bank loans or other forms of debt.

D. Unjust enrichment alleged by NRG

10. NRG contends that Claimants have been unjustly enriched. This is so because under the Loan Agreement, NRG would be entitled to receive 19.5% interest on its credits to TermoRio, but Petrobrás would pay NRG only an interest of 15% on the Put, and therefore Petrobrás would be unjustly enriched "by acquiring NRG's credits at a discount". Under Brazilian law, though, the argument is unfounded, since the principle which prohibits the unjust enrichment is only applicable in a subsidiary manner (article 886, Civil Code of 2002), *id est*, only in the hypothesis in which the transfer of asset is deprived of a source of obligation. In this case, the conventional source, which established the alluded interest rates exclude the possibility of an unjust enrichment, since there is legal contractual cause for the transfer of assets.

11. It may also be discussed – as it was, on item [2], G, above – whether the interest rates established in the contracts are legitimate or not, such analysis being submitted to the competence of the Arbitral Tribunal. What may not be done, technically, according to Brazilian law, is to consider that a contractual provision generates unjust enrichment ("*enriquecimento sem causa*"). Therefore, this Arbitral Tribunal unanimously decides to reject NRG's claim regarding an unjust enrichment of Claimants.

E. Non observance by TermoRio of the parties share equity percentage in the issuance of the drawdowns

12 NRG alleges that the Expert Report evidenced that TermoRio did not respect, in the issuance of the drawdowns, the respective share equity of the shareholders.

13. This contention, however, refers to issues subjected to TermoRio's board of directors' decisions, which have been adopted in the presence of NRG appointed representatives. Moreover, this matter has no relation whatsoever with the withdrawal of NRG from TermoRio, be it due to the arguments raised for the exercise of the Put Option, be it for the Call Option. The Arbitral Tribunal, therefore, decides, unanimously, to reject NRG's pleading in connection with such matter

F. The sale of PRS shares to Petrobrás

14. In petition dated October 14, 2003, NRG informed the Arbitral Tribunal that it had been noticed of PRS's intent to sell all its shares of TermoRio to Petrobrás. According to NRG, on September 11, 2003, NRG would have been notified by the Chairman of the Board of Directors of TermoRio that PRS "expected to receive a proposal to sell all of its equity participation and credits in TermoRio to Petrobrás".

15. This notice, however, according to NRG allegation, was not accompanied by all the terms and conditions of the transaction. In virtue of this, NRG affirmed that the Claimants did not respect the right of first refusal contractually granted to NRG, if, as sustained by the Claimants, NRG is still a shareholder of TermoRio. NRG alleges that the non observance of the right of first refusal by the Claimants would represent the Claimants' recognition that NRG was no longer a shareholder and consequently no longer had obligations with TermoRio.

16. For this reason, NRG requested from the Arbitral Tribunal: (i) a declaration that should the Claimants proceed with the negotiation to acquire PRS shares in TermoRio, they would be recognizing that NRG is no longer a shareholder of TermoRio; and (ii) that it be ordered to the Claimants the disclosure of all the terms and conditions of the transaction in course.

17. This Arbitral Tribunal holds, unanimously, that this contention is beyond the scope of this arbitration, for it bears no effect on the decision concerning the validity of the exercise of the Put Option or of the Call Option.

G. NRG's Lost Profits from its Investment in TermoRio

18. The Put Price established in Section 4 of the Share Purchase and Sale Agreement seeks to compensate NRG for the investment made, including remuneration compatible with its capital contribution in TermoRio. The Put Price encompasses the notion of pre-liquidated damages and losses arising from the reversal of expectations that resulted in NRG's withdrawal from the Project.

19. Thus, the Put Option attributed to NRG represents, in line of principle, the consequence reasonably expected of the non occurrence of the events indicated in Section 4 of the Share Purchase and Sale Agreement, having compensatory nature. The request for complementary reimbursement for the lost profits made by NRG, in this line, would be considered a *bis in idem*, thus configuring indemnification founded in the same causes that led to the Put Option provision. On the other hand, if the request made by NRG refers to extraordinary damages, not reached by the provision of the Put Option, the identification and extension of these damages are covered with speculative and hypothetical character, whose indemnification is not admitted under Brazilian law.

20. Synthesizing, even if the exercise of the Put Option may have caused, in thesis, adversely economic consequences to each of the parties, associated with hypothetical events, such damages are not to be reimbursable. Therefore, this Arbitral Tribunal unanimously decides to reject NRG's pleading for compensation of lost profits.

H. Alleged expenses by NRG in connection with the Project

21. NRG contends that it is entitled to be repaid for the expenses made in connection with the Project, because it would not have incurred those expenses but for Claimants' agreement to honor the Put Option and their agreement to convert TermoRio into a "*sociedade por quotas de responsabilidade limitada*". NRG has the burden to prove the expenses it incurred with the Project. In the arbitration proceedings there is no evidence of such expenses, but only a general report produced by NRG, with reference to expenses without specific discrimination and explanation, nor fiscal invoices. In view of the absence of proof of the alleged amounts, this Arbitral Tribunal unanimously, rejects the relief sought by NRG regarding this matter.

I. Losses and damages sought by PRS

22. According to PRS, TermoRio did not obtain external financing for the remaining 70% of the Project total costs, due to the uncertainty created by the attitudes of NRG. As allege the Claimants, besides NRG having exercised the Put irregularly, it hindered the conclusion of the Participation Agreement (which replaced the amended ECC) and of the O&M Agreement.

23. Since TermoRio has not obtained the senior debt financing agreement for the remaining 70% of the Project, PRS had to continue to provide with the requested capital contribution in TermoRio with its own resources. This equity disbursement above the 30% of the total project cost exceeded, as alleged by PRS, its initial investment estimate in the Project, resulting in a financial cost that, in its understanding, must be reimbursed by NRG.

24. Having the Arbitral Tribunal, by majority, pronounced itself for the validity and legitimacy of the exercise of the Put Option, there are no legal grounds for the reimbursement to PRS by NRG, since NRG acted in a regular exercise of a contractual right conferred to it.

25. Even if that was not the judgement of this Arbitral Tribunal, there would be no necessary causality between the damages sustained by PRS and the exercise of the Put Option by NRG, in view of the fact that the 30% only were reached on June 7, 2002, with the drawdown nr. 9 (page 18 of the Export Report), thus after the notice to exercise of the Call Option was sent by Petrobrás (May 16, 2002). For these reasons, the Arbitral Tribunal unanimously decides to reject PRS's pleading for compensation of losses and damages.

J. Announcement by NRG of sale of assets

26. According to Claimants, the fact that NRG publicly offered to sale its assets, including its equity participation in TermoRio, as alleged, constitutes a breach of Section 6.1 of the Shareholders Agreement. Therefore, this Arbitral Tribunal unanimously decides to reject Claimants' pleading in connection with such alleged breach.

27. However, the evidence of a web page, whose content presents an advertisement of NRG in regard to the sale of its assets in TermoRio, in the terms in which it was made, is not sufficient to characterize,

in technical terms, the sale capable of constituting a breach of contract.

K. Argument that the interest should only be applicable to the difference between the Put price and the Call price

28. The argument of the Claimants that the interest should only be applicable to the difference between the Put price and the Call price is not acceptable. There was no deposit of the undisputed amount. Therefore this amount was not legally at the disposal of NRG. For this reason, this Arbitral Tribunal unanimously decides to reject such pleading.

L. The acquisition by Xcel Energy, controller of NRG, of the outstanding shares of this company

29. The fact that NRG has not notified the other shareholders of TermoRio that its controlling shareholder, Xcel Energy, had made a tender offer to buy NRG's shares and to become its sole shareholder, may not be considered a contractual breach, and does not have any direct repercussion in the justifying events of the Put Option. There is no breach of objective good faith, in this case, since there was no legal duty of information regarding the above mentioned transaction. Therefore, this Arbitral Tribunal unanimously decides to reject Claimants' pleadings in connection with the referred acquisition.

M. Letter sent by NRG to Alstom on April 26, 2002

30. In a letter dated April 26, 2002, NRG notified TermoRio EPC contractors, Alstom that it no longer was a shareholder of TermoRio and that, due to this fact, the guarantees that it had offered to Alstom would cease to exist.

31. According to Claimants, besides constituting crime of fraudulent misrepresentation, NRG's behaviour placed at risk the whole Project, forcing the replacement of the offered guarantees to Alstom by the other shareholders of TermoRio.

32. NRG, in its turn, affirms that there was no fraudulent misrepresentation on its part nor the intention to deceive Alstom, since on that same day NRG sent the mentioned letter, the Share

Transfer Order was submitted to Petrobrás, so that Petrobrás, upon payment of the Put price, could acquire TermoRio´s shares of NRG. Since NRG did not expect that Petrobrás would refuse to accept the Share Transfer Order, one could not say that the content of its letter to Alstom was fraudulent.

33. In fact, even if Petrobrás had suffered any losses, the elements that characterize the crime of fraudulent misrepresentation under Brazilian law are not present, in this case, and not even the elements of the duty to indemnify, once the Put Option was considered valid and effective by majority of votes of the Arbitral Tribunal. Thus, the letter written by NRG presents itself as reasonable, capable of being considered as manifestation of the regular exercise of the holder of a Put Option right. The Arbitral Tribunal, for the above reasons, unanimously decides to reject Claimants' pleading in connection with such matter.

N. Currency of Payment

34. Under the Project agreements, Petrobrás must pay NRG in available U.S dollars. NRG granted the loans to TermoRio in U.S dollars, and its credits are expressed in U.S. dollars (Section 3.1 of the Capital Funding Agreement and Section 2.1 of the Loan Agreement requiring NRG's loans and capital contributions to TermoRio to be made in U.S. dollars). The parties agreed that the "US$ is the currency of account and payment for each and every sum at any time due [to NRG] from TermoRio hereunder" (Section 7.3 of the Loan Agreement). TermoRio is required to repay its loans to NRG "in New York, N.Y. for value received on the due date." The drawdown receipts are denominated in U.S. dollars (see Exhibit 87 to the Statement of Defense and Counterclaims). In view of such provisions, the Arbitral Tribunal unanimously decides that the currency of the payment to be made in connection with this Arbitral Award is U.S. dollar.

Chapter X. Summary of the Arbitral Award

[1] As detailed above, in view of all the arguments and evidences brought to this arbitration by the parties, the Arbitral Tribunal has decided:

(i) by majority vote, to consider that the exercise of the Put Option by NRG was valid and legitimate;

(ii) by majority vote, to consider that the exercise of the Call Option by Petrobrás was invalid and illegitimate;

(iii) by majority vote, to reduce the compensatory interests rate applicable to the Put price from 15% a year to 8% a year, annually compounded;

(iv) also by majority vote, to reduce the delinquent interests rate applicable to the Put price from 12% a year to 8% a year;

(v) unanimously, to prohibit accumulation of delinquent interests with the compensatory interests;

(vi) unanimously, to consider NRG in default regarding drawdowns nrs. 7 and 8, applying upon their total amount delinquent interests of 8% a year, by analogy with the provisions of Section 4.5 of the Share Purchase and Sale Agreement;

(vii) by majority of votes, that the delinquent interests regarding drawdowns nrs. 7 and 8 are applicable until May 16, 2002;

(viii) by majority of votes, that the 5% penalty fine established in Section 4.5 of the Share Purchase and Sale Agreement is applicable to drawdowns nrs. 7 and 8;

(ix) unanimously, to reject the pleadings made by Claimants and Respondents in connection with (a) NRG's obligation to pay additional 5% of TermoRio's capital requests; (b) lack of authorization for the issuance of the drawdowns; (c) shareholders' obligation to contribute 30% of the total Project costs with their "own resources"; (d) unjust enrichment alleged by NRG; (e) non observance by TermoRio of the parties share equity percentage in the issuance of the drawdowns; (f) the sale of shares from PRS to Petrobrás; (g) NRG's lost profits from its investment in TermoRio; (h) alleged expenses by NRG in connection with the Project; (i) losses and damages sought by PRS; (j) announcement by NRG of sale of assets; (k) argument that the interests should only be applicable to the difference between the Put price and the Call price; (l) the acquisition by Xcel of the outstanding shares of NRG; and finally (m) the letter sent by NRG to Alstom on April 26, 2002;

(x) unanimously, to adopt U.S. dollars as the currency to be used in the payment resulting from this Arbitral Award.

[2] As a consequence of such decisions, this Arbitral Tribunal orders Petrobrás to pay to NRG the Put price, consistent of: (i) the amount of the shares and credits held by NRG International and NRGenerating; (ii) accrued of the compensatory interest at the rate of 8% (eight percent) *per annum*, to be calculated as of the date of the respective capital contributions and loans until thirty (30) days after the exercise of the Put Option, *id est*, May 17, 2002; (iii) as well as, a penalty fine of 5% (five percent) to be calculated on the previous amounts set for in (i) and (ii) on May 17, 2002; and (iv) the delinquent interest of 8% (eight percent), as of May 17, 2002 until the date of the effective payment. All the above mentioned payments shall be made free of any taxes.

From such total amount, the Arbitral Tribunal grants to Petrobrás the right to deduct an amount corresponding to a 5% penalty upon the total amount of drawdowns nrs. 7 e 8, accrued of delinquent interest of 8% per year calculated *pro rata temporis* for the period from: (i) April 17, 2002, to May 16, 2002, for drawdown nr. 7; and (ii) May 13, 2002, to May 16, 2002, for drawdown nr. 8.

The payment of the final amount shall be made in U.S. dollars, no later than 30 (thirty) days as of the date of this Arbitral Award.

In addition, upon the payment of the Put price, as defined herein, the Arbitral Tribunal orders Petrobrás to provide for the registration before Banco Bradesco, or the competent institution, of the transfer of the shares of TermoRio held by NRG to Petrobrás, as provided by Brazilian law.

The Arbitral Tribunal also declares that NRG had no obligation to make additional capital contribution in TermoRio.

[3] In view of the above mentioned orders, this Arbitral Tribunal decides, by majority of votes, that all the costs of arbitration, including arbitrators fees, administrative expenses, expert fees, NRG's technical assistants fees, being those fees limited to the amount actually charged by the expert, translation costs and hearing expenses, as specified in Chapter VIII, hereinabove, shall be borne jointly by the parties, in the following proportion: 80% for the Claimants: Petrobrás, PRS and TermoRio, and 20% for NRG, since the request made by Claimants was partially granted.

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Finally, this Arbitral Tribunal decides, also by majority of votes, that Claimants shall bear with the legal fees of the Counter-claimants attorneys. Such fees are established at 2.5% of the difference between the Call Option price as claimed by Claimants that is US$ 57,349,037.07 and the amount Petrobrás is required to pay to NRG for the shares and credits, as ordered by this Tribunal.

Decision and award delivered by the Arbitral Tribunal, on March 8, 2004, in the meeting of the Arbitral Tribunal held in Rio de Janeiro, Brazil. The dissenting opinions of the arbitrators, Professor Gustavo José Mendes Tepedino and Professor Hermes Marcelo Huck, as attached hereto form an integral part of this Arbitral Award.

Gustavo José Mendes Tepedino
Arbitrator

Hermes Marcelo Huck
Arbitrator

Luiz Gastão Paes de Barros Leães
Chairman of the Arbitral Tribunal

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DISSENTING OPINION BY PROFESSOR GUSTAVO TEPEDINO

I. Illegitimacy of the Put Option's exercise by NRG; **II.** Effects of NRG's failure to pay drawdowns numbers 7 and 8; **III.** Reciprocal Defeat

I. Illegitimacy of the Put Option's exercise by NRG

With the deep respect that I have for the illustrious arbitrators, I diverge from the majority as to the legitimacy of the Put Option exercised by NRG, and to the illegitimacy of the Call Option exercised by Petrobrás for the following reasons.

It considers, fundamentally, to decide if (i) the *potestative* right ("Direito Potestativo", foreseen in the Brazilian Law as a right which exercise does not depend on the volitional participation of the other party[1]) to the exercise of the Put Option, attributed to NRG by the Share Purchase and Sale Agreement, as a means to attract the great investment expected from NRG in the TermoRio Project, is bonding, exclusively, to the terms established among the parties, as well as the conditions included in

[1] Under Brazilian legal doctrine, "potestative rights" are opposed to "subjective rights", which exercise depends on the compliance of a legal duty by a counterparty. In that sense, the right to require payment of a certain credit is, for example, a subjective right. On the other hand, the right to terminate an agreement for undefined term (*contrato por prazo indeterminado*) is a potestative right – because its exercise does not depend on the volitional participation of the other party and, in that sense, remains on the discretion of its holder. The fact that the exercise of potestative rights remains on the discretion of their holders does not authorize them to exercise such rights in disaccordance with certain imperative principles of Brazilian contractual law, as it will be explained in the text of the Opinion.

Clause 4.1 of the alluded agreement, regardless of any other motivation, and in spite of the circumstances which propitiated the non occurrence of such conditions; or if, on the contrary, (ii) the Put right was established to protect its holder from an eventual economic unfeasibility of the project, circumstance which would justify the functional control of its exercise.

The Put clause creates a *potestative* right for sale of stock, conditioned, however, to future and uncertain events, be it, the non occurrence of specific events within a pre-established period of time. It is worth mentioning that the execution of the Share Purchase and Sale Agreement did not create a *potestative* right to NRG. The creation of the *potestative* right was conditioned, contractually, to future and uncertain events.

As it is known, the conditions consist on accessory elements of juridical acts characterized by their futurity and uncertainty. The uncertainty expresses a hypothetical truth that rests in the existence of a doubt in regard to the occurrence of the event[2]. This characteristic presents itself in an objective form: the eventuality may or may not occur, varying in sense, content and intensity[3].

Therefore, a condition is verified in two classical hypothesis: i) *incertus an incertus quando*, where it is not known "when" and "if" the event will take place; ii) *incertus an certus quando*, in which it is not known "if" the event will occur, but if it occurs, it will happen within a determined

[2] Manoel Antonio Domingues de Andrade, *Teoria geral da relação jurídica*, vol. II. Coimbra: Almedina, 1992, p. 357.
[3] Caio Mário da Silva Pereira, *Instituições de Direito Civil*, vol. I, 20. ed. Rio de Janeiro: Forense, 2004, p. 556.

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period of time or as of a certain date (*I will sell my horse to Ticio if he marries in the last two months of the year*) [4].

This last hypothesis is precisely the one being discussed in these proceedings, figuring in the Put Option Section a series of *suspensive* (and not *resolutory*) conditions. In other words, the uncertainty is manifested in the "if" and not the "when". Such circumstance, the association of an uncertain event to a period of time previously established, creates the possibility that the condition be confused with a type of term juxtaposed to the condition. However, from a technical point of view, there are no doubts, in the present arbitration, as to the characterization of the condition linked to the uncertainty of events and the certainty of a future period in which it may occur.

Such is the case, I repeat, of the Put Option, which configures typical hypothesis of *suspensive* condition, in which, according to contractual clause, the right of option is triggered if – and only if – future events foreseen in Clause 4.1 do not occur (*incertus an*) within sixty days from the execution of the Share Purchase and Sale Agreement (*certus quando*).

NRG, I insist once more, did not acquire the Put right with the signing of the contract. On the contrary, it acquired an expectation of right. Based on the contract, NRG trusted that, in the occurrence of certain events, as of a certain date (*incertus se, certus quando*) it could

[4] To see about this subject, remit to Gustavo Tepedino *et alli, Código Civil Brasileiro Interpretado Conforme a Constituição da República*, vol I, Rio de Janeiro: no prelo da Editora Renovar. See also San Tiago Dantas, *Programa de Direito Civil*, Rio de Janeiro, Forense, 2001, p. 257 e ss, and Rose Melo Vencelau, "O negócio Jurídico e suas modalidades", *in A Parte Geral do Novo Código Civil*, Gustavo Tepedino (ed.), 2ªed., Rio de Janeiro: Renovar, 2003, p.179 e ss.

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exercise the Put Option (Article 118, Brazilian Civil Code of 1916, Article 125, Brazilian Civil Code of 2002).

Thus, *data venia* of the illustrious majority, in the interpretation of the items contained in Clause 4.1 relative to volitional participation of NRG, capable of triggering the Put Option, *tertius non datur*: or the Put Option would be dependent on conditioning causes linked exclusively to the wishes of NRG (wanting to celebrate instruments in a specific period of time), hypothesis which would configure a *purely potestative condition* harassed by the Brazilian legislator (Article 115 of the Brazilian Civil Code of 1916, correspondent to Article 122 of the Code of 2002);[5] or such conditions must be interpreted as relating to objective business circumstances, removing from an exclusive and arbitrary discretion of NRG the compulsory sale of all its shares of TermoRio.

According to the Brazilian legal system, any *purely potestative* condition is void and null. Furthermore, any event of which the Put right is dependent on is subject to proper and autonomous validity control. The analysis of Section 4 of the Share Purchase and Sale Agreement reveals unequivocally some conditions, *all suspensive*, attributed to volitional participation of NRG. Such conditions, to be admitted in the Brazilian Law, may not be attributable exclusively to the wishes and desires of NRG (*si volam*). Consequentially, and in honor of the principle of conservation of

[5] Article 115 of Brazilian Civil Code of 1916: "All conditions that are not expressly forbidden by law are, in general, licits. Among the forbidden conditions are included the ones that suppress all the effects of juridical acts and the ones that subject the validity of the legal transaction to the pure discretion of one of the parties". This Article corresponds to Article 122 of the Brazilian Civil Code of 2002: "All conditions that are not contrary to the law, to the public order or to the good practices are, in general, licits; among the forbidden conditions are included the ones that suppress all the effects of juridical acts and the ones that subject the validity of the legal transaction to the pure discretion of one of the parties".

the juridical acts, it is to be extracted from such conditions the finalistic sense capable of making them valid, or be it, *simply potestatives* and not *purely potestatives*.

Such circumstances corroborate the understanding that the Put Option is linked to the protection of the investor taking into account, beyond its wish of remaining in the company (*si volem*), the objective criteria regarding the future of the enterprise.

It is imperious, therefore, to note the fundamental difference between the alluded protection of the economic investment, seeked by the Put Option, and a supposed protection of the capital, independently of its economic and social function (which is linked to the implementation of the project). The protection of the economic investment seeks to preserve the legitimate private economic activity, whereas the purpose of the pure and simple protection of the capital is to guarantee certain profitability, in order to stimulate the circulation of capital, even though with the eminently speculative objective.

In this case, the analysis of the contractual instruments demonstrates, unequivocally, and in a reiterated manner, that the Put was created as a mean to protect NRG's contribution not as speculative capital, but as productive investment, intensely impregnated by the social and economic function which is represented by the construction and development of the Thermoelectric Plant. In other words, the selling option had the purpose of protecting NRG against events which could thwart its expectations in relation to the capability of the project to generate resources, through the signing of contracts which would guarantee the supply of raw material and the economic viability of the enterprise.

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If it is so, into the scene come the interpretative principles that, according to Brazilian Law, serve as control of the private economic activity, implemented by means of contractual relations.

In this direction, all events contemplated by Clause 4.1 seem to converge to the conditioning of the exercise of the Put to the economic unfeasibility of the project, objectively identified in the hypothesis foreseen therein, in such manner that NRG would be protected against events that, thwarting the project, would place at risk its legitimate expectations in regard to the economic and social investment made.

It is up to the interpreter to verify if the economic unfeasibility of the project, whose risk the Put clause finally intended to beat, was part of the contractual scenario, at least by clues or reasonably plausible elements, in the eyes of NRG, manifested to Petrobrás, prior to the exercise of the Put.

Once the conditions for the exercise of the Put were contractually foreseen, one could not demand from NRG ulterior arrangements or acts to constitute in default Petrobrás or give notice as to its intention of selling its shares. From NRG, it is demanded, however, in light of Brazilian Law, contractual behavior compatible with the expectations that NRG itself has generated in the other shareholders. The (it does not seem to be exaggerated to say) unequivocal demonstration that NRG had a robust interest in remaining in the project and that it believed piously in the economic success of the enterprise make juridically demandable, on the part of NRG, attitudes that are not capable of breaking the legitimate expectations seeded by it in the spirit of its consorts. There is not in the records any piece that demonstrate the disbelief of NRG in

regard to the success of the bilateral negotiations in course, recording, on the contrary, an optimistic climate on each part, in the course of meetings, encounters and festive commemorations, which saluted the promising horizon.

On the other hand, with all license of style, I cannot agree, according to Brazilian Law, with the examination of a fault or deceitful intention of a volitional manifestation contractually licit. Such control does not generate any juridical consequence, resulting, always and necessarily in the legitimacy of the act investigated. In other words, considering licit to attribute exclusively to the will of someone the implementation or not of a determined condition, to investigate the subjective motivation becomes idle and, as a consequence, one must not examine the faith (be it good or bad) of the contractor.

Moreover, should it be possible to understand, as the majority of the Arbitral Tribunal, that the exercise of the Put is a right *simply potestative* (and licit, therefore) whose exercise is unlinked to any motivation, the inevitable conclusion is that, once exercised in the contractual term, and in view of the the non occurrence of the events foreseen in Clause 4.1, the Put would be valid and effective. And this conclusion would not be shaken by an eventual objection in the sense that the non occurrence of the conditions contained in Clause 4.1 could be attributed (at least in part) to NRG. After all, if a *potestative* condition (contained in the provision of the Put Option) were found linked to the free will of one of the parts, licit would be that its exercise be made freely. Stated in another form, regarding the conditions attributed to the will of the agent, one is not to cogitate of malice or deceit of the holder of the

potestative right, precisely because it is to his sole discretion deferred the decision as to the occurrence of the future and uncertain event.

In the present case, neither would it be relevant – should it be considered valid the *potestative* right exclusively linked to the will of NRG – , the reasons of economic order which had been determinants for the exercise of the Put right. After all, if the exercise of the Put is foreseen exclusively to protect the capital of the investor within a certain period, it would suffice that the investor, in this case NRG, lose interest in the continuation of the project in order to, legitimally and contractually, oppose itself to the signing of the instruments contained in Clause 4.1, being that the non execution of the agreements would authorize its withdrawal, and, as a consequence, the exercise of the Put. Any investigation in relation to the intentional element, logical and legally, would legitimate NRG's behavior, being despicable to investigate the presence of fault or deceit. All declaration of will shows itself, in this sense, deceitful, since intentionally, without the need of the juridical system occupying itself with such truism.

In addition to all that has been exposed, the linking of the Put Option to the economic feasibility of the project derives from, not only the characteristics of the *potestative* rights submitted to suspensive conditions, as outlined above, but also from the fundamental principles which govern the interpretation of contracts in the Brazilian civil-constitutional order.

In other words: the Put was used by NRG at the proper moment, according to Clause 4.1, and annexes, once evidenced the non execution of the *Participation Agreement* and of the *O & M Agreement*, and

as long as its exercise is considered unlinked to any other finalistic element. Such conclusion, however, which gives prestige to the literal intelligence of the juridical acts, may not be accepted in the Brazilian legal system, which requires from the judge the interpretation of the contractual relations according to the social value of the free enterprise, constitutional principle ordained in Article 1, III, of the Brazilian Constitution of 1988, the objective good faith and the social function of the contract. Such concepts refers to general clauses endowed with objective content, not meaning the attribution of discretionary power to the interpreter so that, subjectively, he could interpret them according to his personal perspicacity.

In specific regard to the clause of objective good faith, one is not to confuse it with the notion of subjective good faith and, therefore, it is not equal to lack of malice or the subjective knowledge of a vice of the juridical act[6].

[6] The distinction between objective and subjective good faith is conciliatory in the contemporary study of civil law. Consult, among others, Umberto Breccia, *Diligenza e buona fede nell'attuazione del rapporto obbligatiorio*, Milano: Dott. A. Giuffrè, 1968, pp. 3-6: "*Sembra incontestabile l'esistenza di due concetti positivamente rilevanti, di buona fede. La dottrina si è, infatti, da tempo incaricata di sottolineare la netta differenza che si ravvisa tra le ipotesi in cui ad un soggetto è richiesto di comportarsi 'secondo buona fede' (come avviene con riferimento alla formazione, interpretazione, esecuzione del contratto: art. 1337, art. 1366, art. 1375), e quelle in cui viene in risalto un particolare stato piscologico dell'individuo che l'ordinamento definisce 'in buona fede'. È appena opportuno ricordare che si è distinta, in proposito, una buona fede 'oggettiva' da una buona fede 'soggettiva'. Brevemente, si può dire che, nel primo significato, la buona fede si pone come regola di condotta (e di valutazione di una condotta). Tale regola sembra, anzi, far rinvio, per una sua precisa determinazione, a criteri extragiuridici. In questo senso può affermarsi che la buona fede si configura come comportamento onesto, corretto, leale; e perciò essa implica certamente una valutazione di natura etico-sociale, anche se non sarebbe esatto affermare che si risolve in essa. Nell'altro significato, la buona fede è intesa come convincimento di tenere un comportamento conforme a diritto.*"

Quite to the contrary, the objective good faith, introduced in the Brazilian legal system by force of the Consumer Protection Code[7], and expanded, gradually, through doctrine and jurisprudence, being finally consecrated by the Civil Code of 2002, performs, in contractual theory, three fundamental roles or functions: (i) interpretative function of the contracts; (ii) restrictive function of the abusive exercise of the contractual rights; and (iii) creative function of the secondary and accessory obligations to the principal purpose, such as the duty of information and loyalty[8].

The first function refers to good faith as a hermeneutic criteria, obligating that the interpretation of the contractual clauses always privilege the sense more in conformance with the loyalty and the honesty

[7] It is worth mentioning that the Brazilian Commercial Code of 1850 referred, in its Article 131, to the objective good faith as hermeneutic criteria of mercantile contracts. However, this disposition had an insignificant repercussion and application. Moreover, the Commercial Code did not attribute to good faith the functions of creating accessory duties and limiting the exercise of contractual rights. Notwithstanding these circumstances, the most appropriate interpretation is that the notion of objective good faith, as reflected in the Consumer Protection Code and in the Brazilian Civil Code of 2002, should also apply to mercantile and corporate relationships.

[8] The referred functional tri-partition, inspired in the functions of pretorian Roman law, was modernly suggested by Gustav Boehmer, *Grundlagen der bürgerlichen Rechtsordnung*, invoked by Franz Wieacker, *El principio general de la buena fe*, Madrid: Civitas, 1986, p. 50: "(...) el parágrafo 242 BGB actúa también *iuris civilis iuvandi, supplendi* o *corrigendi gatia*." In Brazil this classification was adopted by authorized doctrine. See, for example, Antonio Junqueira de Azevedo, *Insuficiências, deficiências e desatualização do projeto de Código Civil na questão da boa-fé objetiva nos contratos*, in *Revista Trimestral de Direito Civil*, vol. 1, p. 7: "This same triple function exists for the general good faith clause in the contractual field, since the idea is to help interpretation of the contract, *adjuvandi*, make up some of the faults of the contract, that is, put in what is not included, *supplendi*, and eventually correct something that is not just, *corrigendi*." In the same sense, Ruy Rosado de Aguiar, *A boa-fé na relação de consumo*, in *Revista de Direito do Consumidor*, vol. 14, p. 25, treating specially consumer relations: "In the consumer contractual relation, the good faith exerts three main functions: a) supplies the criteria for the interpretation of what was agreed by the parties, for the definition of what should be understood for timely fulfillment of the installments; b) creates secondary duties or annexes; and c) limits the exercise of rights".

among the parties, which was consecrated by the Article 113 of the Civil Code of 2002, in the following terms: "The juridical act must be interpreted in accordance with good faith and the uses of the place of its celebration". It is required of the interpreter, in effect, loyalty and honesty in relation to the common purposes, the search of the more consenting sense with the goals pursued by the contract.

In regard to the second function, good faith comes to serve as the limit for the exercise of the own rights in the scope of the contractual relation. Therefore, it consists on a criteria for the differentiation between regular exercise and irregular or abusive exercise of rights in face of the other party. Such good faith function was incorporated in Article 187 of the Civil Code of 2002: "Also practices illicit act the holder of a right that, while exercising it, manifestly exceeds the limits imposed by its economic or social purpose, by good faith or good practices".

Finally, good faith exerts the function of source of additional duties, annexed to the principal obligation. Duties which, such as in the present case, are not expressed on the agreement, but come implicitly together with the subjective and *potestative* rights. Such function of objective good faith, although less apparent in the new Civil Code, may be, in accordance with the best doctrine and similarly to the interpretation attributed to the § 242 of the German Civil Code (BGB), deduced from the Article 422 of the Brazilian Civil Code of 2002, which reads as follows: "The contracting parties are obligated to maintain, both in the conclusion of the contract, as well as during its execution, the principles of probity and good faith".

The hermeneutic function performed by the good faith, in certain form, has the ability to better define the outline of both the annexed duties mentioned above (positive function of good faith) and the restrictive degree it imposes in the exercise of the individual rights (negative function), making abusive the exercise which extrapolates such limits.

In other words, the interpreter must integrate to the written contractual rules the duties of loyalty, transparency and information, as well as impose sacrifice to subjective and *potestative* rights of the parties in favor of the common interests pursued by the contract, determiner of its social and economic purposes.

In any manner, it is certain that objective good faith limits itself to the ends foreseen with the contract. Be it in its interpretative function, or in the restriction of abusive conduct, the objective good faith is always in relation to the objective content of the act celebrated among the parties. Specially, the annexed duties created by the good faith, such as the duty of information or the duty of confidentiality, may not, in any way, transcend the common purpose of the contract. Such duties may not serve to protect the private and individual interest of the parties, but only those common interests objectively extracted from the agreement.

It is precisely in the second function performed by the good faith, be it, the restrictive function of individual juridical positions, that limits for exercising rights are identified, thus serving, as criteria for the

differentiation between the regular exercise and irregular or abusive exercise in face of the other party in the contractual relation[9].

In the present case, this aspect is of particular importance, having in mind that the exercise of the Put by NRG, besides possibly being considered formally licit, shall be considered abusive, for breaking of the limits imposed by the objective good faith.

To reach this conclusion one must not verify the subjective or intentional aspect which motivated the exercise of the Put, since the Brazilian Civil Code of 2002, in the course of more updated doctrine, adopts in its Article 187[10], the objective theory for the configuration of the abusive act, reputing as abusive a specific act not in reason of the intention which motivated it (which would configure an emulative act), but in reason of the result obtained, objectively contrary to good faith, to good practices or to the economic and social ends for which the law is destined. In this sense, in the appreciation of the abusiveness, the judge or arbitrator must not limit himself to the consideration of the intentional element or the subjective reasons which could have determined the exercise of the right. His duty consists of examining, in light of material and objective data, if the harmful act overflows effectively the just measure that the holder of the right must observe during its exercise.

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[9] In this sense, see, among others, Pierre Widmer, *Bonne foi et abus de droit – Principe? Protée? Panacée? (Une tentative de synthèse impossible)*, in *Abus de droit et bonne foi*, Fribourg: Éditions Universitaires Fribourg Suisse, 1994, p. 343: "(...) *l'interdiction de l'abus de droit apparaît tout naturellement comme une barrière érigée contre la violation (manifeste?) des règles de la bonne foi.*"

[10] José Carlos Barbosa Moreira affirms that the article 187 of the Brazilian Civil code points in a categorical form in order to characterize objectively of the figure. ("Abuso do Direito", in *Revista Trimestral de Direito Civil*, vol. 13, 2003, PADMA, Rio de Janeiro, p. 97 e ss).

In one word, exercise legitimately a right is not only limit oneself to the formal structure, but also fulfill the axiological-normative fundament which constitutes this same right, upon which will be assessed the validity of its exercise[11].

For this purpose, see the statement 37 of the "Jornada de Direito Civil" promoted by the Center of Studies of the Federal Justice Council, in the Superior Court of Justice, on September 2002: "The civil liability arising from an abusive exercise of a right does not depend on fault, and is founded solely on the objective-finalistic criteria". (*in* Ruy Rosado de Aguiar Júnior (ed.), *Jornada de Direito Civil*, Publicação do Conselho da Justiça Federal, Brasília, 2003, p. 58).

See, also, the lesson of Ruy Rosado de Aguiar Júnior:

> "The concept of abuse of right sheltered by the Code has no intentional element. It is known that our old doctrine only admitted the abuse when demonstrated that the holder of the right exceeded himself with the intention to harm third parties, with the malignant purpose of causing damage to the other. This merely subjective

[11] Heloisa Carpena, *Abuso do Direito no Código de 2002*, "Relativização de direitos na ótica civil-constitucional", in *A parte Geral do Novo Código Civil*, Gustavo Tepedino (ed), Rio de Janeiro: Renovar, 2ª ed., 2003, p. 377 e ss. Verify, also, the teachings of Antônio Castanheira Neves: "(...) a behavior that has the appearance of juridical lawfulness – for not opposing the formal defining structure (legal or conceptually) of a right, to which it externally corresponds – and, in the meantime, violates or does not abide by, in its concrete and material form, the normative intention that materially fundaments and constitute the invoked right, or from whose realized behavior is said exercise, is what juridical should be understood as abusive exercise of a right." (*Questão de facto questão de direito ou o problema metodológico da juridicidade: ensaio de uma reposição crítica*, vol. 1: *A crise*, Coimbra: Almedina, 1967, p. 524).

> requirement was abandoned to say that the abuse of right corresponds to the exercise of a right beyond good faith, the limits imposed by its economic and social ends and by good practices."[12].

Since the objective good faith is one of the gauging parameters of abusiveness of the exercise of a right, and having in mind that good faith is linked and limits itself to the objective scope of the contract, the abuse of right by violation of good faith only occurs if it is proved that the exercise of a right confronted, in any manner, the objective interest of the contract. It is worthwhile to mention: the exercise of a right in the private and economical interest of the holder, even if in harm of the individual interest of the other party, does not constitute, by itself, abuse of right. In order to have abusive exercise of a right (by breach of good faith) it is necessary the violation of the common interest pursued by the contract through activity that, although licit, overpasses the axiological limits of the right (established, in the concrete case, as of the agreement made by the parties), derived from the economic and social purpose of the contract.

It is not for any other reason that the various doctrines of the abuse of right progress in the direction of the necessity of the axiological appraising of the exercise of a specific juridical position, not only the subjective rights, but also the *potestatives* interests or beyond individual rights – in light of the values consecrated by each civil-constitutional order. In fact, the theory of the abuse of right applies as well to other

[12] Ruy Rosado de Aguiar Júnior, *O novo código civil e o código de defesa do consumidor – pontos de convergência*, in Revista de Direito Renovar, nº 26, 2003, p. 9 e ss.

individual prerogatives, such as liberties, faculties, functions or powers, considering that all of them posses axiological foundation. Thus also, in the present case, the *potestative* right to the exercise of the Put.

The same axiological charge which serves, in the internal plane of the contractual relation, to value the legitimacy of the exercise of the individual juridical positions, serves as parameter for the establishment of the juridical content of the so-called social function of the contract.

In fact, Article 421 of the Brazilian Civil Code of 2002 states that "the freedom to contract will be exercised in reason of and within the limits of the social function of the contract". Much has been speculated as to the reach of this ruling. This is because, in a certain manner, the Civil Code of 2002 did not offer other coordinates, other lights so that the interpreter could come to a conclusion of what exactly is the *social function*. One was afraid that the social function could vary at the flavor of the ideology of each one. It is interesting to note that, at the end of the XIX century, when it became effective, the German Civil Code (BGB) innovated by absorbing the legislative technique of the general clauses, but suffered, in certain manner, this same problem. The objective good faith clause of the BGB, so invoked by the doctrine for more than 30 years, remained during all this time without any efficacy, lacking normative concretion. Only in the years 40, the German legal writers and courts accomplished defining the content to be given for good faith, establishing the dogmatic basis for the subject, used until today. This is also the problem of the general clauses in Brazil: the existing fear, as much in the formation as in the technique, of the subjectivity it could raise to the interpreters, and the

consequential lack of concrete efficacy verified in several cases[13]. Presently, it is necessary to give these general clauses (in first place, the social function) a content compatible with the legal system, which cannot be any other than those informed by the constitutional values and principles.

It is important to observe that the social function here, is no longer an element external to the contract (as, in the past, it was sustained under the aegis of authoritative States), which meant only the power of the State to restrain, based on the legislation in effect, the freedom to contract. As in the property right, the Constitution wanted to make the social function an internal element of the legal institutions of private rights.

In this manner, no longer does one care only for the respect of restrictions and exogenous limits that the public authorities come to impose on contractual activity (*dirigismo contratual*). The private autonomy is found protected in the Constitution only to the extent that it meets superior axiological principles as the social solidarity, the substantial isonomy and the dignity of the human being[14]. Meaning to say that these

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[13] Notorious example is the indifference of the Brazilian courts to the properties' social function, that, in spite of being referred to in all the Brazilian Constitutions as of 1946, only with the constitutional text of 1988 (Articles 182 and 186) started to present concrete parameters of application. Also in the ineffectiveness remained for a long period of time the so-called social function of the enterprise, mentioned in the Articles 116 and 154 of the Corporations Law (Law 6.404, of December 15, 1976), without any allusion to objective criteria or specific sanctions.

[14] In this way, the fundament of each act of private autonomy now depends on an examination of merit of tutorship of the interests concretely pursued in view of the consecrated values in the constitutional text. This is the lesson of Pietro Perlingieri, *Manuale di diritto civile*, Napoli: Edizioni Scientifiche Italiane, 2000, p. 333: "(...) *l'individuazione del fondamento costituzionale dell'autonomia negoziale non può essere disancorata dalla natura degli interessi per i quali essa è in concreto esplicata. Poiché ogni interesse è correlabile ad un valore, l'analisi degli interessi consente d'individuare quali fra essi estrinsecano valori che hanno nella Carta costituzionale il loro riconoscimento e la loro tutela.*"

principles forge the concept of social function, orchestrating all contractual positions.

According to the Brazilian Constitution, and now to the Civil Code of 2002, the social function becomes a determining factor and limiting element of the freedom to contract, to the effect that this is only justified in the persecution of the fundaments and the objectives of the Brazilian Republic. Therefore, the social function of the contract must be understood as the duty imposed on the contracting parties to meet – side by side with the own individual interests pursued by the agreement – socially relevant extra-contractual interests, worthy of juridical tutelage, which relate to the contract or are affected by it. One associates, therefore, to the social function of the contract the objective good faith which finds its mediate fundament in the social function of the freedom to contract, which breaks with the individualistic and whimsical logic of the contractual theory of the XIX century, conforming the private economic activity to the constitutional principles.

Having in mind the arguments highlighted above, one cannot prescind, in the interpretation of the contractual relations, of the values and principles consecrated in the Constitution as fundaments and objectives of the Brazilian Republic, as well as the general clauses of good faith and social function of the contract.

Hence it is mandatory to impose the link between the exercise of the Put and the social and economic function of the contracts celebrated by the parties, binding them to the objective good faith clause that, in its turn, determines the duty of preserving the common objectives pursued at the time of the signing of the contract.

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Therefore, it is necessary to conclude that the Put was irregularly exercised, since, in spite of all the divergences raised in these proceedings, one finds undisputed the non-occurrence of events which created for NRG the just fear of economic unfeasibility of the project in progress. It is plausible, according to proof brought to the proceedings by NRG that the non signing of the *Participation Agreement* and the O & M *Agreement* owes itself, at least in part, to the conduct of Petrobrás during the negotiations. However, there are not in all the proceedings any element or indication that such delay created in NRG the impression that the project – and the achievement of the common interests related to it – would not be possible, in order to make its Put legitimate.

In addition, there is no evidence that, at a certain moment of the negotiations, NRG had manifested to Petrobrás such concern, linking its stay in the project to the immediate signing of the alluded agreements. This would serve to demonstrate the concerns NRG had with the future of the economic investment realized in TermoRio and its determination to exercise the Put as a means to protect itself against the failure of the project. On the very contrary, in the course of the negotiations which preceded and succeeded the exercise of the Put, NRG demonstrated, according to proof in the proceedings, animus to continue investing in the project. And it even transmitted to Petrobrás clear indications that it had no intention of exercising the Put or, graver still, that it had no concerns over the future of the project. It should be emphasized that one day prior to the exercise of the Put, on April 16, 2002, NRG forwarded a letter to TermoRio with the following content:

"Dear Paulo Roberto, as you are aware the entire American Independent Power Producers business has been under duress since the September 11 terrorist activity and the subsequent Enron debacle. As Dave Peterson and I have explained in our last two visits, our company is also under significant duress and we are seeking your help with TermoRio. We would need a 60 day waiver as we sort through this difficult environment. *We truly value our partnership with you and hope that we can move forward with the project*".

And, even after the exercise of the Put, NRG behaved as if it still had interest in continuing in the project, as may be observed in the letter dated April 18, 2002, addressed to TermoRio:

"Dear Paulo Roberto, as indicated in our previous telephone conversation, NRG, without waiving any of its rights or remedies under the SPA, is willing to negotiate in a short period of time the *60 day waiver offered by Petrobrás*. It is NRG's objective and my personal endeavor to reach a successful outcome for all parties regarding this issue. Looking forward to hearing from you".

Therefore, as may be observed, even after the exercise of the Put, NRG still maintains (or, *rectius*, led to believe, in face of the other party, by force of its own conduct, that it still maintained) interest in the project, since it continues to refer to a 60 day *waiver*, not mentioning not even one sole time the non signing of the agreements and the insecurity that this could be creating.

Two factors may be highlighted from here: (i) the declaration of the will of NRG in regard to its firm purpose of continuing as a shareholder of TermoRio; (ii) the request to postpone payment of drawdown number 7 due to economic difficulties.

What importance has the first fact (*"We truly value our partnership with you and hope that we can move forward with the project"*), before a *potestative* right of NRG? After all, if the *potestative* right does not extinguish itself or loose its force before the occurrence of the event to which it is conditioned, what importance has NRG to raise to Petrobrás the impression and the confidence that it would continue in the project? The answer is in the Brazilian legal system that, informed by the Theory of Trust, associates the behavior of one of the parts to the legitimate expectation created in the other part.

In fact, the Theory of Trust, as an expression of the objective good faith and the constitutional principle of social solidarity, prevents that one part come to break the legitimate trust that it created in the other through its own behavior. This is the contemporaneous expression of the adage *nemo potest venire contra factum proprium*, or in other words, "to no one is permitted to come against his own acts". In fact, the contradictory

behavior is being systematically repressed by the highest Brazilian courts[15].

And what importance has the second fact ("*We would need a 60 day waiver as we sort through this difficult environment*"), also this one insufficient, to all evidence, to dissolve the unilateral and exclusive *potestative* right of NRG? In light of the Brazilian legal system, there is, here, a typical hypothesis of the abusive act, in which its holder makes use of a licit juridical position to obtain diverse end of that the system intends to reach by its exercise (the axiological-normative fundament described above). The exercise of the Put was assured for the protection of NRG before an eventual business insecurity, should the negotiations directed at the signing of the contracts did not obtain success, being intolerable the utilization of this juridical power to (force, in an illegitimate manner, to) obtain a postponement of payment not agreed to and that had been denied by the other partners.

Neither is there objection that the exercise of the option to sell by NRG cannot be considered abusive since taken to course within the agreed period. Now, if the Put was exercised after its limit date, this would simply be illegal, never being able to speak of abusiveness. The abusive act can only be considered as such when it seems licit in view of a contractual

[15] See, as an example, the rulings issued by the Federal Supreme Court, in judging the Recurso Extraordinário 86787/RS, and by the Superior Court of Justice in examination of the Recursos Especiais 95539/SP and 47015/SP. In the international doctrine, see José Puig Brutau, *La doctrina de los actos propios, in Medio siglo de estudios jurídicos*, Valencia: Tirant Lo Blanch, 1997, pp. 94-96; António Manuel da Rocha e Menezes Cordeiro, *Da boa fé no direito civil*, Coimbra: Almedina, 1997, pp. 742-770; Alejandro Borda, *La teoria de los actos propios*, Buenos Aires: Abeledo-Perrot, 1986; and, among Brazilian legal writers, Judith Martins-Costa, *A boa-fé no direito privado*, São Paulo: Revista dos Tribunais, 2000, pp. 461-472, and Anderson Schreiber, *Venire contra factum proprium – A proibição de comportamento contraditório no direito brasileiro*, Rio de Janeiro: Renovar, 2004.

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or legal source. That is to say, if the period for the exercise of the Put created the legitimate expectation as to its realization, the contractual behavior of NRG, which used them for dilatory purposes, as well as the business circumstances mentioned above, tried to undo such expectation, creating the confidence in Petrobrás as to its non exercise. In that sense, the Put exercise, in the present case, violates the objective good faith and other mechanisms of judicial control imposed by Brazilian civil-constitutional order on the contracting parties' activity.

Such juridical control mechanisms – it is important to note – are not peculiar to Brazilian Law, revealing, on the contrary, a tendency of the contemporaneous juridical diplomas. In effect, the objective good faith is foreseen in Article 1.7 of the UNIDROIT Principles of International Commercial Contracts, of 1994, which brings the following wording:

> "(1) Each party must act in accordance with good faith and fair dealing in international trade. (2) The parties may not exclude or limit this duty".

The *Code Civil du Québec*, in its Article 1.375, also consecrates the objective good faith, in the following terms:

> "La bonne foi doit gouverner la conduite des parties, tant au moment de la naissance de l'obligation qu'à celui de son exécution ou de son extinction".

Also see Article 6 of the *Code Europeen des Contrats*:

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"1. Chacune des parties est libre d'entreprendre des tractations en vue de conclure un contrat sans qu'on puisse lui imputer la moindre responsabilité au cas où le contrat n'est pas stipulé, sauf si non comportement est contraire à la bonne foi. 2. Agit à l'encontre de la bonne foi la partie qui entreprend ou poursuit les tractations sans l'intention de parvenir à la conclusion du contrat. 3. Si au cours des tractations les parties ont déjà examiné les éléments essentiels du contrat, dont on prévoit l'éventuelle conclusion, celle des parties qui a suscité auprès de l'autre une confiance raisonnable quant à la stipulation du contrat, agit à l'encontre de la bonne foi dès lors qu'elle interrompt les tractations sans motif justifié. 4. Dans les cas prévus aux alinéas précédents, la partie qui a agi à l'encontre de la bonne foi est tenue de réparer le dommage subi par l'autre partie au maximum dans la mesure des frais engagés par cette dernière au cours des tractations en vue de la stipulation du contrat, ainsi que de la perte d'occasions similaires causée par les tractations pendantes".

The Portuguese Civil Code brings the following rule:

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> "Art. 334. The exercise of a right is illegitimate when its holder manifestly exceeds the limits imposed by good faith, good practices or by the economic or social purpose of such right".

Confer, still, the provision in the Swiss Civil Code:

> "Art. 2 – 1. Chacun est tenu d'exercer ses droits et d'exécuter ses obligations selon les règles de la bonne foi; 2. L'abus manifeste d'un droit n'est pas protégé par la loi."

At last, the well known paragraph 242 of the BGB:

> § 242. "Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern."

Much importance loses, in this scenario, the stormy discussion regarding contractual default of the parties, since before this – that is, prior to investigating eventual contractual fault – one verifies the loss of legitimacy of the exercise of the Put in face of its complete lack of entailment from the purposes pursued by the contract, which constitutes the objective conception of the abuse of right. If such circumstances are true, as they seem, the Put appears irregular and, as a consequence, the Call exercised by Petrobrás shows itself legitimate.

The effects of the Put were suspended by a preliminary order of the judiciary of Rio de Janeiro. NRG continued as shareholder of

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TermoRio, (circumstance that, by the way, does not depend on the regularity or irregularity of the exercise of the Put) it should, therefore, effect payment of the outstanding *drawdowns*, according to the terms of Clause 9.5 of the Capital Funding Agreement and the judicial decision. It did not effect them; stopped investing in the project. With this action created the occasion for the Call due to Clause 8.1 of the Capital Funding Agreement. Thus, the Call was exercised regularly. After the Call all obligations of NRG in the project cease.

As to the damages that befell the Call, they cannot be imputed to NRG. The reason for that is that, even though proven, damages may only be reimbursed, according to Brazilian Law, if causality is established between the damaging effects and the harmful activity.

In effect, in order to trigger the civil liability, it is necessary to prove that the certain and currant damages are necessarily connected to the conduct of such person who is pursued liable. In fact, Article 1,060 of the Brazilian Civil Code of 1916, disposes *in verbis*:

> "Article 1.060. Even if the non performance results from deceit of the debtor, the losses and damages only include the effective losses and the profits dismissed by direct and immediate effect of it".

The mechanism, corresponding to Article 403 of the Civil Code of 2002 (which maintains the same understanding), also applies to extra-contractual liability, as already decided by the Federal Supreme Court in

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the trial of the Extraordinary Appeal 130.764 -1/PR, being the relater Justice Moreira Alves, on May 12, 1992[16].

In the interpretation of the expression "direct and immediate damage", used by the Brazilian Civil Code, the Federal Supreme Tribunal adopted the so-called sub-theory of necessity, defended by Agostinho Alvim, for whom "the expression direct and immediate means the necessary causal connection".[17] In other words, the damage must be a necessary consequence of the conduct. To reinforce his positioning, the referred author used the eloquent example quoted by Pothier:

> "(...) if the buyer, after receiving the purchased item, verifies that the same has a hidden defect and, taking it in hand goes to the seller, in order to obtain another, and if the case may be, on the way he is run over by a vehicle, will the seller of the item be responsible for this damage? No he will not. But the reason is not due to the fact that he is distant, this damage of the first cause (the non performance of the obligation), and, yes, the interference of another cause (...) suppose, for this case, the fault of the victim, or the driver of the vehicle".

[16] RTJ, vol. 143, p. 270.
[17] Agostinho Alvim, *Da inexecução das obrigações e suas conseqüências*. São Paulo: Saraiva, 1972, 4ª ed.. p. 369-370.

And the same author concludes reminding that the image of Pothier, comparing the although remote or indirect damage to the direct, for the purpose of indemnification, does not want, properly, to exclude all the indirect damages, even because, in the formula that he proposes as synthesis of his doctrine, what he requires is the necessary casual connection between the non performance and the damage, "removing those which may have other causes". Finally: "the indirect or remote damages are not excluded, just for this; by rule, are not subject to indemnification, because they are no longer necessary effect, due to the appearance of concomitant cause. Should these not exist, those damages are subject to indemnification"[18].

This is the orientation adopted not only by the Federal Supreme Court, but also substantially by all Brazilian courts, although at times, in the decisions of the latter, nominal references to "adequate cause" or to "efficient cause" may be found[19].

In this manner, the meticulous examination of the not always homogeneous terminology adopted by the Brazilian courts in relation to causality allows us to conclude that "the duty to repair arises when the damaging event is a necessary result from a certain cause. One can identify, therefore, in the same causal series, indirect damages, subject to reimbursement, as long as being a direct consequence (the adjective may be here employed), since necessary, of an illicit act or activity objectively considered)"[20].

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[18] Agostinho Alvim, *Da inexecução das obrigaçoes e suas conseqüências*, cit., p. 369-370.
[19] To see about this subject, remit to Gustavo Tepedino, "Notas sobre o Nexo de Causalidade", *in Revista Trimestral de Direito Civil*, vol. 6, 2001. PADMA, Rio de Janeiro, pp. 3-19.
[20] Gustavo Tepedino, *Notas sobre o Nexo de Causalidade*, cit, p. 8.

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The Call had, in the present case, a double function. On the one hand, it appears as penal clause, pre-liquidating the losses and damages that the parties could come to suffer. On the other hand, it had the prerogative of stopping the contractual losses imputable to NRG. Or be it, as Petrobrás, with the Call, manifested its wish to acquire shares and credits from NRG, it assumed the risks that, from its decision, may result regarding future losses. After the Call, therefore, there is no causal connection between the damages occurring to TermoRio or its shareholders and the exercise of the Put by NRG. It is as if Petrobrás, with the Call, pursued, by itself, the extinction of the contractual relation, conforming with the compensatory penal clause built in to it and assuming the risks in relation to the success or failure of the project.

From the moment of the Call, exercised by the exclusive determination of Petrobrás, the losses suffered, even if proven, cannot be imputed to NRG, whose shares and credits were claimed. Consequently, there is no causal connection between the exercise of the Put and the fact that the shareholders were not able to obtain a *bridge loan* for the project, assuming TermoRio with its new shareholders composition the responsibility for attracting capital from that date on. In this manner, the Call is an autonomous cause capable of interrupting the effects produced by the Put. After the Call all obligations on the part of NRG equally ceased for contributing capital to TermoRio.

II. Effects of NRG's failure to pay drawdowns numbers 7 and 8

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I deeply diverge from the majority of the Arbitral Tribunal as for the decision regarding the effects of NRG's failure to pay drawdowns numbers 7 and 8.

The Arbitral Tribunal decided unanimously that NRG should have paid drawdowns numbers 7 and 8 and, as it did not, NRG was considered to be in default. For that reason, the Arbitral Tribunal decided that NRG must reimburse Petrobrás for the losses incurred by it. In order to calculate the amount NRG must pay to Petrobrás, the majority of the Arbitral Tribunal, by analogy to Section 4.5 of the Share Purchase and Sale Agreement, stated that NRG owes, for drawdowns numbers 7 and 8, delinquent interests of 8% per year calculated *pro rata temporis*, from the day each drawdown was due to May 16, 2002, when Petrobrás exercised the Call Option.

That is to say, the Arbitral Tribunal condemned Petrobrás to pay delinquent interests until the date of the effective payment, while it condemned NRG to pay delinquent interests only until May 16, 2002, and not until the effective date of payment to Petrobrás of the amounts the Arbitral Tribunal considered due by NRG.

This conclusion is unacceptable. Even if one considers, as I did in my dissenting opinion, that the exercise of the Call Option is valid, thus capable of producing effects (contrarily to what the majority of the Arbitral Tribunal has decided), its exercise by Petrobrás would not be able to suppress the legal effects of illicit acts practiced by NRG *before* the exercise of the Call Option.

The Call Option may, as explained in my dissenting opinion, serve as an autonomous cause able to interrupt the effects produced by

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the Put in the causal chain in relation to facts that happened *after* the exercise of the Call. This circumstance, however, cannot be used to limit the effects resulting from events that occurred *before* the exercise of the Call (non payment of drawdowns numbers 7 and 8) and that were unanimously considered illicit by the Arbitral Tribunal.

Furthermore, such solution is contrary to the principle of isonomy, provided for in Article 5th of the Brazilian Constitution of 1988, one of the most important principles that inform free enterprise ("livre iniciativa"). According to such principle, the consequences related to the disrespect of contractual duties, by two companies, arising from the same contract cannot differ, in a way that the incidence of delinquent interests upon the amounts due by one of them (NRG) will occur in a shorter period of time than the one related to the other company (Petrobrás).

III. Reciprocal Defeat

I also diverge from the majority, as to the conviction of the defeat onus since I understand that Claimants and Respondents, in equal measure, were winners and defeated.

Pursuant to Section 6, item [2] of the Terms of References, the applicable procedural rules are the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL Rules, as already defined in the Arbitral Award).

According to Article 40 of the UNCITRAL Rules, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the Arbitral Tribunal may apportion such costs between the parties if it

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determines that apportionment is reasonable, considering the circumstances of the case. The same applies according to Article 40 (2) with respect to the costs of legal representation and assistance.

Thus, the Arbitral Tribunal can take into account the circumstances of the case and is free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

The discipline of defeat is informed, fundamentally, by the finalistic sense of the attribute to the defeated party of the onus relative to the mobilization of resources and the structure of a Tribunal for the examination of a pleading, at the end unfounded. Or, in other words, whoever is considered destitute of certain pretension must bear the cost corresponding to the expenses that the respective pleading represented in the exercise of the jurisdictional power or of the arbitration.

The pleadings of Claimants and Respondents are, thus, measured economically, being necessary to verify, from that point on, which amount of each pretension, of Claimants and Respondents, was found valid by the decision, establishing, with such parameters, the onus of defeat and the payment of the attorneys' fees.

Moreover, as states the specialized doctrine, it is this objective criteria that, in most of the cases, due to the economic equivalent of the pleadings in conflict, must serve as the sole parameter for judgment. It is worth to check the lesson of the most important Brazilian author in this matter, Professor Celso Agricola Barbi:

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"The legal rule is simple and comes from the principle that, in case the Claimant wins only in part, he will be, automatically, defeated in part, the same occurring with the Respondent. In such cases, each party shall bear the judicial costs as well as the legal fees, according to the proportion of the relevant losses. Thus, if the Claimant pleas for 100 and obtains 70 and loses 30, shall pay 30% of the judicial costs and the legal fees. And the Respondent will pay 70% of the costs and the legal fees.

As both Claimant and Respondent are, reciprocally, creditor and debtor of such amounts, the judge, when establishing them will make the compensation among the debts".

Side by side with this fundamental criterion of the economic value of the pretensions of each of the parties, must the Arbitral Tribunal, based on the broad freedom conferred by Article 40 of the UNCITRAL Rules, consider, also, the cost eventually arising from the nature and the complexity of the pleadings of each of the parties; or, still, must consider the repercussion of the behavior of each party in the expenses incurred in the course of the proceedings. Precisely because of this, and for this purpose, the UNCITRAL Rules determine, as mentioned above, that the Arbitral Tribunal is free to decide in which proportions shall each party bear the costs of the arbitration. Such "freedom" may not be, obviously, understood as an attribution to the arbitrators of unlimited and arbitrary

powers. On the contrary, it must be understood that *the arbitrators are free to apply the principle of reasonableness in light of objective criteria,* based on the economic value of the pretensions being litigated, in the complexity of the pleadings, in the expenses incurred by the Arbitral Tribunal and, last but not least, in the behavior of the parties.

Practice shows that, in international arbitrations, when the decision does not reflect a full acceptance of the pleadings of the parties, the arbitrators often rule reciprocal defeat. In fact, only a decision that declared a claim founded or unfounded in its totality, with none or insignificant defeat for one of the parties, would justify the attribution to the other party of the onus of defeat, as proclaimed, for example, in the arbitral precedents of the International Chamber of Commerce. As follows:

> "The arbitral tribunal finds that it is fair that *each party pay the half of the costs for this arbitration,* comprising the cost of the expertise and that they each bear their own legal costs incurred in their defense. This is *because neither party has totally won their case,* in any case, the arbitral tribunal enjoys a broad discretion in this matter". (Case nº. 6197, 1995, in *Collection of ICC Arbitral Awards,* 1996-2000, p. 179).

And still:

> "Costs. [65] Both parties' claims are dismissed in part. The Arbitral Tribunal decides therefore that

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> the costs of the arbitral proceedings ...will be borne by the claimant for one half and by the respondents for the other half, and that each party will bear the whole amount of its counsel fees and other expenses". (Case n°. 7181, 1992, in *Collection of ICC Arbitral Awards,* 1996-2000, p. 65).

In the present arbitration, there is clear identity of nature between the pleadings formulated by Claimants and Respondents, equaling, also, in complexity. On the other hand, there is no doubt that Claimants and Respondents, through their illustrious attorneys, acted with equal boldness, probity and good faith, offering evidences of impeccable, ethical and responsible professional conduct.

Therefore, only the economic criterion alluded to above may serve as safe and objective parameter for the allocation of the onus of defeat and the attorneys' fees. And based on the economic criterion, it is mandatory to recognize that the parties were defeated in equal proportion.

In fact, the requests presented by the Claimants during the arbitration procedure comprise the payment to the Respondents of approximately US$ 58,000,000.00 relative to the call price, from which would be reduced US$ 6,390,000.00, relative to losses and damages pleaded by PRS, plus approximately US$ 21,000,000.00 of losses and damages claimed by Petrobrás and an additional 10% of all financial contributions that Petrobrás made on behalf of NRG, which amounts to

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US$ 218,603,722.26, resulting in a final payment to NRG of the amount of less than 10 million Dollars.

On the other hand, the requests presented by NRG reached the amount of approximately US$ 165,000,000.00 to be paid by Claimants, in the terms of the memorial presented on February 16, 2004, there including the pursued amount of the put option corresponding to US$ 103,743,252.48, and the pleading of losses and damages which total US$ 60,441,888.78.

It is not correct to object that the dismissal of one of the pleadings of the Claimants, considered as a main claim by the Arbitral Tribunal, could serve to determine, on its own, a complete defeat. Technically, it is the relation between the value of the conviction and the economic advantage pursued by each of the parties that determines the onus of defeat.

In that connection, see Craig, Park and Paulsson:

> "In one unpublished mayor arbitration lasting many years and where hundreds of millions of dollars were in dispute, the Claimants obtained an award in its favor, but for a far smaller amount of damages than claimed. The Tribunal stated that: 'Despite the magnitude of the efforts and the resources deployed by the parties neither one nor the others has really obtained a victory'. Accordingly, the tribunal found it equitable to divide equally the arbitration expenses, and to provide that each side would

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support its own legal fees. In other similar cases a tribunal might find that arbitration costs 'follow the event' but that each side would bear its own party costs". (W. Laurence Craig, William W. Park and Jan Paulsson, *International Chamber of Commerce Arbitration,* Oceana Publications, Inc., 2000, 3rd ed., p. 396).

Such is, in sum, the widely diffused understanding in international arbitrations. See, as another example, Case No. 7661, of the ICC:

"Costs of arbitration. [52] Both parties claim that the other should pay all the costs of this arbitration as well as of their defense. The Arbitrator is of the opinion that the fact that the claimant prevails should not result in an award on costs in its favour. As was noted already before, only the strength of the contract has caused this success, which is no reflection of either party's behaviour, which has been reproachable both towards each other with regard to their contractual relationship and procedurally during this arbitration. [53] Therefore, the Arbitrator finds no justification to award so-called legal costs, nor to allocate the ICC's administrative costs and the Arbitrator's costs and fees, and decides that these should be borne by the claimant and the defendants

equally". (Case nº. 7661, 1995, in *Collection of ICC Arbitral Awards*, 1996-2000, p. 149).

In present case, the Arbitral Tribunal established condemnation at a value which is situated in a substantially intermediary position between the final amount the Claimants wanted to pay and the one the Respondents wanted to receive. As can be observed, according to the economic criteria, it is not possible to say that there is a successful party in this arbitration. Neither party has achieved absolute success in the sense used in Article 40.1 of the UNCITRAL Rules. At the same time the Arbitral Tribunal recognized, by majority, the validity and efficacy of the exercise of the put option taken to term by NRG, it deliberated, to condemn NRG in the losses and damages resulting from the nnn payment of drawdowns numbers 7 and 8, as well as decided, by majority, the reduction of the interests established in Clause 4.3 of the Share Purchase and Sale Agreement for the calculation of the put. Finally, the Arbitral Tribunal deemed unfounded all requests of additional losses and damages formulated by both Claimants and Respondents.

Moreover, it is worth observing that both parties brought to the proceeding several and complex arguments that, even not being related to the main controversy (Put Option *versus* Call Option), have equally mobilized the Arbitral Tribunal. Such circumstance evocates the principle in accordance to which the complexity to be used as a parameter for the determination of the defeat onus is not only the one from the so-called main pleadings, but also the one represented by the amount and quality of

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the arguments brought by both parties that demand the attention of the Arbitral Tribunal, being submitted to its decision.

See exemplary decision:

> "Neither party has contributed in any way to lessening the number or complexity of the issues to be resolved by the Tribunal on the contrary, each has contributed to inflate this arbitration in particular by raising numerous procedural matters. Therefore the Tribunal has no difficulty in deciding that each party shall bear an equal share of the costs of the arbitration, including all the costs relating to the sampling and the testing of samples in this arbitration; likewise, each party shall bear the legal costs, including lawyers' fees that it has incurred in its defense". (Case n°. 6955, 1993, in *Collection of ICC Arbitral Awards*, 1996-2000, p. 299).

Due to all the reasons stated above, I understand that, in the present arbitration, the reciprocal defeat is clearly characterized, in view of the amount of the conviction imposed on the Claimants, which is situated in a substantially intermediary position between the final amount the Claimants wanted to pay and the amount that the Respondents wanted to receive.

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Considering all these circumstances, I understand that the procedural cost and the attorneys' fees shall be shared by the Claimants and Respondents, in equal proportions and that each party shall bear its own costs for legal representation and assistance.

Rio de Janeiro, March, 8, 2004

Gustavo Tepedino

ARBITRATION PANEL

PETRÓLEO BRASILEIRO S/A. – PETROBRÁS
TERMORIO S.A.
PRS – ENERGIA LTDA.

and

NRG INTERNATIONAL HOLDINGS (N° 2) GMBH
NRGENERATING LUXEMBOURG (N° 2) S.A.R.L.

STATEMENT OF DISSENTING VOTE BY ARBITRATOR PROFESSOR HERMES MARCELO HUCK ON THE AWARD RENDERED BY THE ARBITRAL TRIBUNAL ON MARCH 8TH, 2004, REGARDING SECTION II.H– "THE PURCHASE PRICE ON THE 'PUT OPTION' AND INTEREST DUE" AND SECTION II.I, "CONSEQUENCES OF THE EXERCISE OF THE PUT OPTION DURING THE ARBITRATION", IN FINE.

First dissent

After my first dissent from the opinion rendered by the majority of the arbitrators, namely, Professors Luiz Gastão Paes de Barros Leães and Gustavo Tepedino, I hereby state my opinion with respect to determination of compensatory interest and delinquent interest that are to be added to the Put price, to be paid by Petróleo Brasileiro S.A. – Petrobrás

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("Petrobrás") to NRG International Holdings (N° 2) GmbH ("NRG"). This Tribunal has ruled that the Put, as exercised, is valid and effective and ordered payment thereof, increased by a contractual fine of five percent on the amount due, as well as compensatory and delinquent interests both at the annual rate of 8%.

I disagree with the interest rates as established. Section 4.3 of the Share Purchase and Sale Agreement provides that, once the Put is exercised, the share purchase price (which comprises the amounts paid as equity investments and amounts transferred as loans) shall be increased by an additional amount calculated at the rate of 15% per annum. Section 4.5 of that same contract further provides that, should the Option price fail to be paid within the 30-day period immediately following occurrence of the Put, Petrobrás would be subject to payment of a fine corresponding to 5% on the amount due, all increased by delinquent interest at the rate of 1% per month.

The majority ruling entered by the Arbitral Tribunal was to reduce the additional amount agreed, construed as compensatory interest, as well as the delinquent interest set forth in the contract – both to 8% per year – and to keep the 5% fine. In a nutshell, the decision is based on the rationale *("ratio legis")* that grounded the Brazilian Usury Act, thus imposing limits to interest rates as a matter of public interest, and on the fact that the interest rates established under the contract would exceed those in force in the international market and those adopted in arbitral precedents.

However, that does not seem to be the most appropriate approach. For those very same reasons argued on the Arbitral Award, one should conclude that the Usury Act does not apply to the case at issue. Indeed, as indicated in the award, the limit established by the Usury Act both for compensatory and delinquent interests – whether or not grounded on contract – relates to the Brazilian currency (rather than United States Dollar or any other foreign currency). The fact that this arbitration is to be governed by Brazilian law does not mean that the Arbitral Tribunal shall be bound to determination of the maximum interest rate admitted in law, moreover when dealing with international contracts. Besides, interest rates cannot be construed – either from a logical, economic or legal standpoint – separately from the currency to which it is bound. Currency and interest are inseparable. The interest rate in effect in Brazil and pursuant to the Brazilian laws is – as the very Tribunal has admitted – bound to the

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Brazilian currency and may only be deemed a legal rule of public interest if directly applicable thereto.

Thus, starting from this assumption, that is, non-applicability of the Usury Act to international contracts in foreign currency, it does not seem to me that it might be possible to impose to the case at issue the limits set forth thereunder for interest rates, much less to elect other rates that, in the eyes of the arbitrator, would be more appropriate in the light of the international scenario. The aforesaid assumption leads necessarily to the conclusion that there is no limit imposed by law to determination of compensatory and delinquent interest rates in the case at hand, and, therefore, the legal theories of the freedom of will and *pacta sunt servanda* should prevail in this case

At this point, it is quite clear that the Usury Act does not apply to international contracts, particularly those involving foreign currency, as well as Brazilian law does not have any legal provision to restrain the will of the contracting parties, as far as determination of interest rates goes. The parties are therefore free to negotiate and agree with respect to the rates that seem most appropriate in view of the peculiarities of each deal. Much more than an international practice, determination of interest rates for each contract reflects the specific expectations and risks therein involved.

This was precisely what happened in the case now under arbitration. NRG and Petrobrás have freely established rates for remunerating and delinquent interests in the contract. In the rounds of negotiations that preceded the deal, both companies have certainly relied on the advisory of their counsel and specialists, as it is always the case with large companies negotiating complex transactions that involve significant amounts. It would not be admissible to assume that either party involved in the deal was not aware of the interest rates prevailing in the international market. These are companies with high international exposure, known to be well-advised and experienced in large multinational business and undertakings. When the parties established the interest rates, they must have done so in order to adjust such consideration to the fair expectation that they had about the deal they were about to consummate. Besides, it should be noted that when NRG joined Petrobrás - the largest Brazilian company – to exploit a major energy plant, it did not aim at earning the modest income usually offered by the international financial market. That

is certainly the reason why the interest rates were established on the levels reflected on the contract.

Accordingly, it does not seem possible for the arbitrator to intervene in the parties' will, freely stated in the agreement, and review a contract provision to change interest rates previously set. Such a solution would only be appropriate were the parties' will in violation of limits imposed by the law, that is, had the law previously intervened in the private domain to impose limits to the legal theory of the parties' freedom of will. But, as we have seen, the Usury Act does not apply to the case under review and the Brazilian legal system has no other limit to determination of interest rates in situations such as the one at hand.[21]

Within such context, I dissent from the majority of my peers and vote to uphold the interest rates established in the Share Purchase and Sale Agreement, in compliance with the legal principle of obedience to the contract ["*pacta sunt servanda*"] a principle that "*is a touchstone for business legal security*" (Orlando Gomes, *Contratos*, 12ª ed., Rio de Janeiro, Forense, page. 38). With all due respect, the majority decision handed down by the Arbitral Tribunal violates such legal principle, insofar as it imposes on the parties a solution that is not contemplated by law and unduly interferes on the parties' freely expressed will.

In my opinion, by reducing the interest rates established in the contract, the Tribunal would, as already mentioned, unduly interfere in the parties' will and admit that Petrobrás and NRG have not been capable of or prepared for looking after their own interests and agreeing what seemed to be the most appropriate under a contract.

Evidently, this case does not involve any party without actual negotiation capabilities, which might justify some interference on the part of the arbitrator to review the contract. On the contrary, both Petrobrás and NRG are large corporations, fully aware of the reality of the industry in which they are engaged and both with broad negotiation power, as well as full knowledge of the common usage of their own business. Given this scenario

[21] "In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction". Uncitral Arbitration Rules (1976), Article 33.3

and absent any legal rule to impose limits to the legal theory of freedom of will, the latter ought to prevail.

In view of the foregoing, I hereby state my dissent and vote to uphold the interest rates established in the contract entered by the parties, that is, 15% per annum, as additional amount (or remunerating interest) and 12% per annum as delinquent interest, which rates are to be adopted for determination of the Put price to be paid by Petrobrás to NRG, apart from any remaining costs and fees awarded by the Arbitral Tribunal.

Second dissent

After my second dissent from the majority decision, I hereby state my opinion with respect to majority decision imposing on NRG the burden of a fine equivalent to 5% to be incident over the amount resulting from drawdowns nrs. 7 and 8, since the Tribunal considered NRG in default of such payments due on April 17, 2002 and May 13, 2002, respectively, after the exercise of the Put Option. It is my opinion that a fine is not applicable in such situation. The agreements executed by the parties did not determine any punitive amount to be added to the principal debt in case of a non-payment of any drawdown. In case of default as a consequence of the non-payment of a drawdown, the parties agreed to offer a Call Option to Petrobrás, to be exercised at a certain discount price. There is no provision determining a fine to be added to the amount of na unpaid drawdown. On the other hand, Petrobrás did not ever claim the payment of such fine. And finally, it seems abusive to impose a penalty equivalent to 5% of the whole amount. It is also important to bear in mind that non-payment of drawdown nr. 8 should only be considered a default after 10 days of its due date, i.e., on May 23, 2004, which is, after the exercise of the Call Option, when Petrobrás could not expect payments of the drawdowns by NRG, as decided by the Tribunal. Since there is no contractual provision, nor the Claimants did request it, I cannot agree with the decision adopted by my peers to apply a 5% penalty fine, for I consider it to be also an *extra petita* decision adopted by the Arbitral Tribunal.

Rio de Janeiro, March 08th, 2004.

HERMES MARCELO HUCK