

IN THE MATTER OF AN *AD HOC* ARBITRATION

BETWEEN:

HUNTINGTON INGALLS INCORPORATED (USA)

(*CLAIMANT*)

vs./

**THE MINISTRY OF DEFENSE OF THE BOLIVARIAN REPUBLIC
OF VENEZUELA (VENEZUELA)**

(*RESPONDENT*)

PROCEDURAL ORDER No. 1

Arbitral Tribunal:

Horacio Grigera Naon

Antonio Hierro

José Emilio Nunes Pinto

The Arbitral Tribunal constituted to decide on the dispute opposing Claimant and Respondent and submitted to an *ad hoc* arbitration does **DECIDE** to issue this Procedural Order No. 1 in the terms spelt out hereinbelow.

1. Purpose

The purpose of this Procedural Order No. 1 is the following:

- (i) to record the procedural steps already taken by the Parties and the Arbitral Tribunal to and including the date hereof; and
- (ii) to decide on certain procedural matters associated with such *ad hoc* arbitration.

2. Procedural History

2.1. Each of the Parties has timely and properly appointed each one of the party appointed co-arbitrators in pursuance of the relevant arbitration clause.

2.2. The International Court of Arbitration of the International Chamber of Commerce, of Paris, France, in its capacity as the appointing authority under the arbitration clause, has appointed the Chairman of the Arbitral Tribunal.

2.3. Hence, the Arbitral Tribunal is formed by Horacio Grigera Naon and Antonio Hierro, as co-arbitrators, and José Emilio Nunes Pinto, as Chairman.

2.4 Upon the appointment of the Chairman, the Arbitral Tribunal invited the Parties and their Counsel for a case management meeting held on May 24, 2012 by telephone with the attendance of Claimant's Counsel, representatives of Respondent accompanied by Respondent's Counsel and the members of the Arbitral Tribunal.

2.5. The matters included in the agenda by the Arbitral Tribunal were presented and submitted by the Parties, each of the Parties having had the opportunity to express their views by means of oral arguments and, wherever applicable, each of them has had the opportunity to submit their arguments followed by the reply by the other Party and, at certain instances and whenever necessary or requested, the Arbitral Tribunal has granted leave to the Parties to a rejoinder.

2.6. At the end of the case management conference, it was decided that each Party should submit by not later than June 26, 2012 written briefs contemplating their arguments with respect to the place of arbitration, including but not limited to any precedent judicial decisions with that same respect and legal provisions that any of the Parties may deem appropriate to substantiate their position.

2.7. At such same time, and in light of the exception of absence of jurisdiction by the Arbitral Tribunal raised by Respondent, it was also agreed that Respondent should submit by not later than July 17, 2012 their written brief with that specific respect to be accompanied by the applicable grounds.

2.8. While the written briefs on the place of arbitration will be limited to a simultaneous filing, the written brief on the exception as to the absence of jurisdiction by the Arbitral Tribunal was to be responded by Claimant by not later than July 17, 2012.

2.9. By an electronic message dated June 26, 2012, the Parties requested an extension of time for the filing of the briefs and, due to the Arbitral Tribunal agreement to such request communicated to the Parties by an electronic message of June 26, 2012, the new dates for filing were postponed into July 26, 2012 and August 16, 2102, respectively.

2.10. On June 11, 2012 by means of a letter addressed to the Parties and their Counsel, the Arbitral Tribunal requested Claimant to inform the amount in dispute in such proceedings.

2.11. On July 2, 2012, Claimant submitted a letter to the Arbitral Tribunal whereby it is stated that it was Claimant's position that fees should be charged on the basis of the number of hours expended, pointing out that, in Claimant's view this was perceived as one of the advantages of an *ad hoc* arbitration over an institutional one, and further informed that the dispute between the Parties amounts to US\$275,000,000.00.

2.12. Conversely, Respondent submitted to the Arbitral Tribunal a letter dated July 10, 2012 whereby it is stated that, as mentioned during the case management conference, the Venezuelan Code of Civil Procedure is the law applicable to the dispute and in pursuance of article 629 thereof it shall be incumbent upon Claimant to initially bear the costs of the proceedings. Furthermore, should there exist any dispute or controversy with respect to such fees and expenses, the Venezuelan Courts shall decide. Generally, Respondent states that (i) Respondent does not agree with the estimate of the dispute as communicated by Claimant and (ii) nor has Respondent agreed to the mode of computation of arbitrators' fees and costs and of the administration of these proceedings.

2.13. On July 24, 2012 by means of a joint petition, Claimant and Respondent requested an extension for the filing of the written briefs due on July 26, 2012 and August 16, 2012 which was found agreeable by the Arbitral Tribunal and communicated to the parties by an electronic message of July 25, 2012.

2.14. Hence, the new deadlines for the filing of the written briefs are as follows: (i) August 15, 2012 for the filing of the briefs regarding the place of arbitration and by Respondent to file its exception as to the absence of jurisdiction by the Arbitral Tribunal and (ii) August 31, 2012 for the filing of Claimant's reply to Respondent's petition on the exception as to the absence of jurisdiction by the Arbitral Tribunal.

2.15. At this instance and due to the decisions to be passed by the Arbitral Tribunal with respect to the procedural and jurisdiction matters raised by the Parties, and the work and time to be encompassed by such decisions, the Arbitral Tribunal must decide on the advance of funds to cover its own fees and the advance necessary to cover any expenses incurred by its members in connection with the arbitral proceedings.

3. Decisions passed by the Arbitral Tribunal

3.1. Ratification of Deadlines for Submission of Written Briefs

The Arbitral Tribunal does hereby ratify the deadlines established by the exchange of correspondence between the Parties and the Arbitral Tribunal and which shall be those dates referred to in item 2.14 (i) and (ii) hereinabove.

3.2. Decision on Advance of Funds to cover Arbitrators' Fees and Expenses

Whilst the submission of written briefs by the Parties is pending, the Arbitral Tribunal understands it is necessary and appropriate to decide on the amount of fees to be advanced by the Parties as well as the funds to cover the related expenses.

As a matter of principle, the advance of funds to cover fees and expenses of the arbitrators is to be shared in equal portion by the Parties while the final allocation shall be decide by the Arbitral Tribunal upon passing the final award.

The Arbitral Tribunal draws the attention of the Parties to the fact that any decision, such is the case of the decisions on procedural and jurisdictional

matters, shall only be passed upon such advance being secured by both Parties. Hence, should any of the Parties fail to comply with their advance obligation within the deadline established by the Arbitral Tribunal, there shall be an opportunity for the counterparty to cover the other Party's portion. Hence, should Claimant fail to meet such advance requirement, the case may be suspended or terminated by a decision of the Arbitral Tribunal. Conversely, should failure to contribute their share on the advance amount so determined be Respondent's failure, Claimant shall then be invited to contribute, at such instance, Respondent's share. In case of failure by Claimant, the case may then be identically suspended or terminated by a decision of the Arbitral Tribunal.

In appraising the proposal submitted by Claimant as to the mode of computation of the fees due by the Parties to the Arbitral Tribunal, the latter understood that the establishment of an hourly fee is incompatible with the complexity of the case. Furthermore, the determination of an hourly fee mechanism would require an estimate of the amount to be deposited by the Parties.

The Arbitral Tribunal acknowledges the high degree of confidentiality encompassed by the matters discussed in such proceedings and, therefore, has had so far very little knowledge of the case and no access to its supporting documentation, including the Agreement entered into by the Parties under which the dispute now arises.

Hence, the Arbitral Tribunal is adamant in stating that it has no reasonable means, nor grounds to appraise and determine any sort of estimate of hours to be incurred in discharging of its duties.

The general principle in *ad hoc* arbitration is that, where an appointing authority shall have been determined by the Parties, the Arbitral Tribunal may apply the methodology and mode of computation of advance of funds to cover arbitrators' fees and expenses. This same principle is contained in article 43(3) of the 2010 UNCITRAL Arbitration Rules.

By applying by analogy the principle referred to in the preceding paragraph, the Arbitral Tribunal notes that the Parties have established the International Court of Arbitration of the International Chamber of Commerce as the appointing authority for this very case. It seems then fair to the Arbitral Tribunal to rely not only on the mode of computation of arbitrators' fees adopted by the ICC Court and, further, to calculate the amount of the advance in accordance with the practice of the Court and based on its scale of fees.

The Arbitral Tribunal draws the attention of the Parties to the fact that such scale of fees is made known to the general public as an annex to the ICC Arbitration Rules. Moreover, in order to facilitate the determination of the

amount of fees to be advanced, ICC Court of Arbitration makes available a calculator on its website (www.iccwbo.org) that based on the input required thereby (*amount in dispute and number of arbitrators*) is able to calculate automatically the minimum, average and maximum amounts of arbitrators' fees.

It is noteworthy mentioning that the practice of the Court whenever an award as to jurisdiction is required by the Parties to establish the amount of advance at the minimum amount determined by the calculator. This takes into account the complexity of the case and that the award to be dictated by the Arbitral Tribunal may or may not determine the continuation of the proceedings in light of the decision so passed. Should the award be positive as to the jurisdiction of the Arbitral Tribunal, the latter may, depending on the complexity of the merits of the case and the time estimated for the presentation of the case and its evidentiary phase recalculate the fees owed by the Parties to the average amount to be determined by the calculator and establish the additional deposit of the balance. In other words, the amount advanced initially shall be computed for the determination of the revised amount of fees owed by the Parties to the Arbitral Tribunal as advance of fees.

On the other hand, upon awarding the case, the Arbitral Tribunal will allocate the total costs, including arbitrators' fees and expenses, between the Parties in accordance with the reasoning spelt out in the final award or, as the case may be, in an award by consent of the Parties.

Based on the foregoing and assuming that the Arbitral Tribunal is formed by three members, the total aggregate amount of the advance due by the Parties is of US\$291,351.00 corresponding to three times the average amount of fees calculated on the basis of the amount in dispute i.e. US\$97,117.00 per arbitrator.

As far as advance of funds to cover arbitrators' expenses is concerned, the Arbitral Tribunal reminds the Parties that due to the nature of the *ad hoc* arbitration no institutional fees are to be charged. Hence, the Arbitral Tribunal establishes the initial and provisional amount of US\$15,000.00 to cover any costs and expenses incurred by the Parties during this phase until the notification of the award on the procedural and jurisdiction matters.

Therefore, the total amount to be advanced by the Parties is of US\$306,351.00, corresponding to a share of US\$153,175.50 per Party, and which shall be deposited in full with the administrator appointed hereunder by not later than August 30, 2012.

Lastly, since the *ad hoc* arbitration implies no institutional support and is managed and administered by the Arbitral Tribunal, it seems fair for the Arbitral Tribunal to appoint a collection agent, depositary and administrator

to collect the funds, administer them, including withdrawing those from the relevant account to be established to pay off fees to the arbitrators or any advances thereof as well as to reimburse any expenses incurred by them.

In view of the foregoing, the Arbitral Tribunal appoints the International Court of Arbitration of the International Chamber of Commerce to discharge of those duties. Hence, the Parties shall contact the Court, in its headquarters in Paris, France to arrange for the execution of the relevant collection agent, deposit and administration agreement, and establish jointly the appropriate measures to secure the deposit of the amounts determined hereby by the Arbitral Tribunal. The Parties shall share in equal portion the fees due to the International Court of Arbitration of the International Chamber of Commerce as compensation for the rendering of such services.

Hence, following are the decisions passed by the Arbitral Tribunal in the context of this Procedural Order No. 1:

(i) to ratify the deadlines for the submission of written briefs by the Parties, as detailed in item 2.14 (i) and (ii) above.

(ii) to appoint the International Court of Arbitration of the International Chamber of Commerce as the collection agent, depositary and administrator of the total aggregate amount contributed as advance of arbitrators' fees and expenses.

(iii) to direct the Parties to enter into the deposit and administration agreement with the International Court of Arbitration of the International Chamber of Commerce within a period of time capable of permitting the deposit of the advance amount on August 29, 2012, and the relevant fees shall be borne in equal share by both Parties.

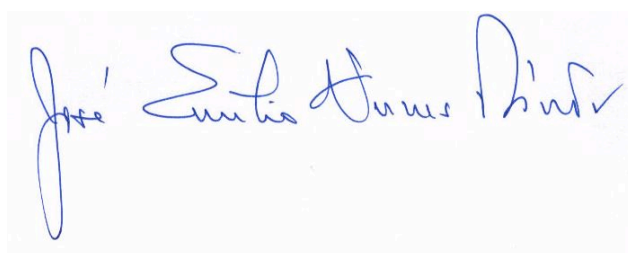
(iv) to determine to each Party to advance by not later than August 30, 2012 the amount of US\$153,175.50 to cover the arbitrators' fees and expenses.

(v) to determine a Party to deposit the share allocated to the other Party as advance of funds, should the latter fail to do so within the

maximum period of ten (10) days following the stated date for deposit under the penalty of the case being closed by the Arbitral Tribunal.

This Procedural Order is executed by the Chairman of the Arbitral Tribunal, the prior consent of the Co-arbitrators thereto having been properly secured.

This Procedural Order is issued by the Arbitral Tribunal on this 12th day of August 2012 in the place of residence of the Chairman of the Arbitral Tribunal while pending decision on the place of arbitration.

A handwritten signature in blue ink, reading "Jose Emilio Amador Buitrago". The signature is written in a cursive style with a checkmark at the end.