EXHIBIT 5

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. 2

Arbitral Tribunal:

Horacio A. Grigera Naón

Antonio Hierro

José Emilio Nunes Pinto

I. THE PARTIES AND THEIR COUNSEL

1. **CLAIMANT**

HUNTINGTON INGALLS INCORPORATED, a subsidiary of Huntington Ingalls Industries Inc., and successor to Ingalls Shipbuilding, Inc. and Northrop Grumman Ship Systems, Inc. is represented in these proceedings by

SHEPPARD MULLIN RICHTER & HAMPTON

333 South Hope Street, 43rd Floor

Los Angeles, CA 90071-1422

USA

2. **RESPONDENT**

THE MINISTRY OF DEFENSE OF THE BOLIVARIAN REPUBLIC OF VENEZUELA is represented in these proceedings by

DIAZ REUS ATTORNEYS & SOLICITORS

100 S.E. 2nd Street, Suite 2600

Miami, Florida 33131

USA

II. PROCEDURAL HISTORY

2.1. Each of the Parties has timely and properly appointed each one of the party appointed co-arbitrators pursuant to the applicable arbitration clause.

2.2. The International Court of Arbitration (the "ICC Court") of the International Chamber of Commerce, of Paris, France (the "ICC"), 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 A. Grigera Naón 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 to a case management meeting, which was held by telephone on May 24, 2012 with the participation of the Claimant's counsel, representatives of the Respondent, the Respondent's counsel and the members of the Arbitral Tribunal.

2.5. The matters included in the Arbitral Tribunal's agenda were addressed orally by the Parties, each of which had the opportunity to express its views and supporting arguments, to reply to those of the opposing Party and, whenever judged necessary or requested, any such replies were followed by a rejoinder granted by the Arbitral Tribunal.

2.6. At the end of the case management conference, it was decided that each Party would submit, by not later than June 26, 2012, written briefs on the place of arbitration including, but not limited to, any related judicial decisions and legal provisions in support of their respective positions.

2.7. It was then also agreed that the Respondent would submit, by not later than July 17, 2012, its written brief setting forth its jurisdictional objections and supporting grounds, to be responded by the Claimant by not later than July 17, 2012. Further, the issue of the place of arbitration was to be addressed through simultaneous briefs to be filed on August 15, 2012.

2.8. By an electronic message dated June 26, 2012, the Parties requested an extension of time for the filing of the briefs, which was granted by the Arbitral Tribunal by an electronic message of June 26, 2012, until July 26, 2012 and August 16, 2102, respectively.

2.9. On June 11, 2012, by letter addressed to the Parties and their Counsel, the Arbitral Tribunal requested the Claimant to inform the amount in dispute in these arbitral proceedings.

2.10. On July 2, 2012, the Claimant submitted a letter to the Arbitral Tribunal stating the Claimant's position that fees should be charged on the basis of the number of hours spent (in the Claimant's view, an advantage of *ad hoc* arbitrations over institutional arbitrations), and further estimated the amount in dispute in US$275,000,000.00.

2.11. In turn, the Respondent submitted to the Arbitral Tribunal a letter dated July 10, 2012 stating that: (a) as mentioned during the case management teleconference, the Venezuelan Code of Civil Procedure is the law applicable to the dispute and, pursuant to its article 629 , it shall be incumbent upon the Claimant to initially bear the costs of the proceedings; and (b) should there exist any dispute or controversy with respect to such fees and expenses, such dispute was to be decided by the Venezuelan Courts. More generally, the Respondent stated that: (i) the Respondent did not agree with the Claimant's estimated amount in dispute, and (ii) nor did the Respondent agree with the mode of computation of the arbitrators' fees and costs and costs for administering these proceedings.

2.12. On July 24, 2012, the Claimant and the Respondent jointly requested (and the Arbitral Tribunal granted by electronic email of July 25, 2012) an extension for the filing of the written briefs due on July 26, 2012 and August 16, 2012.

2.13. As a result, the new deadlines for the filing of the written briefs were established as follows: (i) August 15, 2012, for the filing of the simultaneous briefs on the place of arbitration and the Respondent's brief on jurisdictional objections; and (ii) August 31, 2012, for the filing of the Claimant's reply to the Respondent's jurisdictional objections brief.

2.14. On August 12, 2012 the Arbitral Tribunal issued Procedural Order No. 1 whereby: (i) the new deadlines for the filing of briefs were ratified; (ii) the ICC Court was appointed as collection agent, depositary and administrator of the advance of funds to cover arbitrators' fees and expenses; (iii) the deadline for the deposit of such advance was fixed; (iv) the total amount of such advance of funds was quantified and

allocated in equal shares between the Parties; and (v) it was established that should one of the Parties fail to pay its share, the other Party would be invited to make such payment in the defaulting Party's place and stead.

2.15. On August 15, the Parties filed their briefs regarding the place of arbitration, and the Respondent filed its brief on jurisdictional objections.

2.16. On August 29, 2012 the Claimant paid its share of the cost advance in compliance with the instructions issued by the ICC Court on August 16, 2012. The Respondent has, however, failed to pay its share.

2.17. On August 31, 2012 the Claimant filed its brief in response to the Respondent's brief raising jurisdictional objections.

2.18. By a letter dated September 11, 2012, the Secretariat of the ICC Court invited the Claimant to substitute for the Respondent and pay the Respondent's share in the fee and cost advance within ten (10) days.

2.19. By a letter dated September 25, 2012, the Secretariat of the ICC Court acknowledged receipt of the deposit by the Claimant of the Respondent's share in the fee and cost advance.

2.20. By a letter dated October 25, 2012 addressed to the Secretariat of the ICC Court, the Respondent challenged the Arbitral Tribunal and proposed the formation by the Parties of a new one to replace the current Arbitral Tribunal.2.21. By a letter dated November 2, 2012 addressed to the Respondent, the Secretariat of the ICC Court granted leave to Respondent to indicate within 7 (seven) days the legal grounds for the challenge against the Arbitral Tribunal in view of the inapplicability of article 14 of the 2012 Rules to the proceedings.

2.22. By a letter dated November 20, 2012, the Respondent provided the Secretariat of the ICC Court with a justification for relying on the ICC Rules to proceed with the challenge.

2.23. By a letter dated November 26, 2012 addressed to the Claimant, the Secretariat of the ICC Court informed the Claimant that the ICC

Rules, as acknowledged by the Respondent, do not apply to the case; therefore, the ICC Court would only be in a position to decide on such challenge if so empowered by the Claimant within a period of 5 (five) days.

2.24. By a letter dated November 29, 2012, the Claimant informed the Secretariat of the ICC Court that it would not agree to have the Court to take a further role in the arbitration beyond being the agent, depository and administrator for the funds advanced.

2.25. By a letter dated December 3, 2012, the Secretariat of the ICC Court informed the Parties that, in the absence of an agreement by the Claimant, the Court was not in a position to process the challenge filed by Respondent against all members of the Arbitral Tribunal.

2.26. By an electronic message dated March 4, 2013, the Arbitral Tribunal granted the Parties leave to file by not later than March 22, 2013 Additional Briefs further addressing the place of arbitration, and which would be deemed a reply by each Party to the opposing Party's Brief dated August 15, 2012.

2.27. Due to the events occurred in Venezuela and following subsequent requests for extensions filed by Respondent and to which the Arbitral Tribunal consented, the Parties submitted their Additional Briefs on April 23, 2013.

2.28. By an electronic message dated April 30, 2013, the Arbitral Tribunal granted the Claimant until May 7, 2013 to elaborate on the purpose of a conference call to discuss the place of arbitration and provide the Arbitral Tribunal and the Respondent with a list of matters to be discussed during such call. Such call had been proposed by the Claimant when submitting its Additional Brief.

2.29. By an electronic message dated May 7, 2013, the Claimant stated that, since it appeared that the Arbitral Tribunal had no further questions on that specific topic, the call needed not be held.

2.30. By an electronic message addressed to the Parties on May 9, 2013, the Arbitral Tribunal decided not to hold the conference call since it was satisfied with the written submissions already filed.

III. THE PARTIES' BRIEFS

3.1. The Arbitral Tribunal states below the matters to be decided in light of the arguments tendered by the Parties in their Briefs. While it was established by the Arbitral Tribunal that the first Brief should be limited to addressing the place of arbitration, the Respondent raised other matters stemming from these proceedings. The Arbitral Tribunal being satisfied that the Claimant has had the opportunity to comment on all such issues, this Procedural Order shall therefore also address the additional issues brought by the Respondent.

3.2. Hence, the matters to be dealt with by the Arbitral Tribunal in this Procedural Order, in the order formulated in the Parties' submissions, are as follows:

(i) the Respondent's jurisdictional objections;

(ii) the challenge of co-arbitrator Dr. Horacio A. Grigera Naón

(iii) the place of arbitration;

(iv) the applicable law to the arbitral proceedings.

3.3. Prior to proceeding to the analysis of such issues, it is pertinent to reproduce below, in full, the relevant parts of Clause 42 of the Contract (hereinafter, the "Arbitration Clause" or "Clause 42"), which has been the subject of analysis and argument by the Parties in their different submissions to the Arbitral Tribunal:

> ***"CUADRAGÉSIMA SEGUNDA:*** *En caso de una disputa o incumplimiento, o cuestión de interpretación relacionado a este Contrato, "LA CONTRATISTA" y "EL MINISTERIO" se reunirán y negociarán de buena fe para dirimir el asunto amigablemente. Si las partes no pueden dirimir el asunto dentro de treinta (30) días*

continuos después de plantearse la disputa, entonces, a solicitud de cualquiera de las partes, el asunto será sometido a arbitraje de acuerdo con esta Cláusula. En caso de no resolverse con el arbitraje antes mencionado, ambas partes tendrán derecho de acudir por ante los Tribunales competentes de la República de Venezuela

Parágrafo Primero: *Cualquier disputa, demanda, controversia y/o diferencia que surjan de este Contrato o relacionada con la interpretación, incumplimiento, terminación o invalidación del mismo, sera sometido de acuerdo con las reglas estipuladas aquí y subsidiariamente de acuerdo a las reglas del Código de Procedimiento Civil de Venezuela. Las actuaciones de arbitraje, serán realizadas en Caracas, Venezuela, en el idioma Castellano-Inglés. El jurado de arbitraje, consistirá de tres (3) árbitros independientes, quienes deberán ser miembros de la Cámara de Comercio Internacional, fluídos en los idiomas Castellano-Inglés, entendiéndose que cada parte nombrará un árbitro y el tercer árbitro quien presidirá el jurado de arbitraje, sera elegido por los dos (2) árbitros nombrados por las partes para este fin. En caso de que dentro de treinta (30) días continuos después de su nombramiento, los dos (2) árbitros no hayan logrado un acuerdo en relación a la elección del tercer árbitro, éste ultimo será nombrado por la Cámara de Comercio Internacional o cualquier sucesor de estos. Los árbitros actuarán como árbitros de derecho y deberán pronunciar su decisión dentro de un término de tres (3) meses máximo.*

Parágrafo Segundo*: Cualquier arbitraje en virtud de este contrato, sera realizado en Caracas, Venezuela. Las partes acuerdan que en caso de arbitraje, se seguirán las reglas convenidas en el Código de Procedimiento Civil de Venezuela"*

IV. THE ANALYSIS OF THE ISSUES

The Arbitral Tribunal decides to address first the challenge of Dr. Horacio A. Grigera Naón due to the impact of any decision in such connection on the determination of other matters submitted by the Parties.

IV.1 The Challenge of Dr. Horacio A. Grigera Naón

1. In its Brief dated August 15, 2012, the Respondent alleges that the Arbitral Tribunal was unduly constituted since Dr. Horacio A. Grigera Naón, appointed by the Claimant as co-arbitrator, did not fulfill the requirements provided by the Arbitration Clause.

2. By citing the first paragraph of the Arbitration Clause found in a certain contract entered into by Claimant and Respondent on December 18, 1997 for the overhaul and retrofitting works of frigates ARV MARISCAL SUCRE (F-12) and ARV ALMIRANTE BRION (F-22) (the "Contract"), the Respondent contends that Dr. Horacio A. Grigera Naón was not a member of the ICC when appointed.

3. The English version of the relevant wording in the Arbitration Clause on which the Respondent bases its allegations recites as follows: *"[T]he arbitration jury shall consist of three (3) independent arbitrators, who must be members of the International Chamber of Commerce, fluent in Spanish-English [...]"*

4. The Respondent asserts that the Claimant has openly acknowledged both that the co-arbitrator it appointed had been a member of the ICC and that he ceased to be so; consequently, the Claimant would have admitted that Dr. Grigera Naón failed to fulfill an indispensable requirement to serve as co-arbitrator in these proceedings. The Respondent further asserts that the members of the ICC are the only ones having the necessary qualification and experience to serve as international arbitrators.

5. The Respondent alleges that if one of the co-arbitrators fails to satisfy the *sine qua non* conditions set forth in the Arbitration Clause, the

Arbitral Tribunal shall have been wrongfully constituted and, therefore, all proceedings shall have no validity. Moreover, the Respondent further asserts that the presence of a party appointed arbitrator who does not fulfill the requirements imposed by the Arbitration Clause adversely affects the appointment of the Chair of the Arbitral Tribunal since he/she must be appointed jointly by the party-appointed arbitrators.

6. In its Brief dated August 31, 2012 the Claimant alleges that counsel for the Parties agreed that, since arbitrators generally do not join the ICC, the membership requirement should not be read so restrictively. Although the Claimant has not objected to the Respondent making its own selection based on ICC Court membership, there is no logical reason why the Arbitration Clause should be given such a restrictive meaning either. The Claimant further refers to the appointment of arbitrators by the ICC Court on the basis of proposals originated in National Committees of the ICC to state that Dr. Horacio A. Grigera Naón is currently a member of the U.S. ICC National Committee and a Council Member of the ICC Institute of World Business Law and, consequently, the objection raised by the Respondent should be dismissed.

7. The challenge of Dr. Horacio A. Grigera Naón has been directly submitted by the Respondent for the consideration and decision of the Arbitral Tribunal, and not of any other instance or authority. Although the Respondent later challenged all the members of the Arbitral Tribunal before the ICC Court, the latter refused to entertain the Respondent's application because it understood that it lacked the authority to do so since this arbitration is not governed by the ICC Arbitration Rules. After then, the Respondent did not withdraw the challenge of Dr. Horacio A. Grigera Naón before this Arbitral Tribunal, nor did submit it to any other authority or instance. The Claimant has not objected to the decision of this challenge by the Arbitral Tribunal. The Arbitral Tribunal therefore concludes that, pursuant to the submissions of the Parties, it is solely vested with authority to finally decide on such challenge.

8. After considering the arguments tendered by the Parties and in view of the objection to his appointment raised by the Respondent, Dr. Horacio A. Grigera Naón decided to abstain himself from participating in the decision process concerning his challenge, which is decided by the remaining members of the Arbitral Tribunal; thus, by the majority vote.

Decision by the Arbitral Tribunal

9. The majority of the Arbitral Tribunal acknowledges that the Respondent also claims in its objection that the alleged lack of fulfillment by Dr. Horacio A. Grigera Naón of the ICC membership requirement would taint the appointment of the Chair. The Respondent's objection is unwarranted and must be rejected. The Respondent is reminded that, because the party-appointed arbitrators were unable to appoint the Chair, the Chair was appointed by the ICC Court as the appointing authority provided by the Arbitration Clause, and in response to a request filed by the Claimant on March 1, 2012 and a letter from the Respondent dated March 30, 2012.

10. Nonetheless, despite the remark made by the Respondent in its March 30, 2012 letter, the ICC Court appointed the Chair who, at such time, was not a member of the ICC Court. The appointment by the ICC Court was made in strict accordance with article 2(2) of Appendix II of the ICC Rules that prevents the ICC Court from appointing Vice-Chairmen or members of the ICC Court as arbitrators. This provision was already in the 1998 ICC Rules and is repeated in article 2(2) of Appendix II of the 2012 ICC Rules as well. Therefore, based on the language and spirit of the ICC Rules the Parties, in providing the ICC Court as the appointing authority, should know and could not expect the ICC Court to appoint one of its members as the Chair.

11. According to Article 9(3) of the 1998 ICC Rules, "*where the Court was to appoint a sole arbitrator or the chairman of the Arbitral Tribunal, it shall make the appointment upon a proposal of a National Committee of the ICC that it considers to be appropriate*". Article 9.6 of the ICC Rules provides for the direct appointment of party arbitrators by the ICC

Court also in interaction with ICC National Committees and on the basis of their proposals.

12. Thus, prospective arbitrators eligible for appointment by the ICC Court are associated with the ICC National Committees and not with the ICC Court, and their names are communicated to the ICC Court by any such Committees. Based on such structure, Dr. Horacio A. Grigera Naón and the Chairman of the Arbitral Tribunal are currently members of ICC National Committees, to wit: Dr.Horacio A. Grigera Naón, as pointed out by the Claimant, of the U.S. National Committee and the Chairman, of the Brazilian National Committee. Likewise, Dr. Antonio Hierro, the Respondent's party-appointed arbitrator, is a member of the Spanish National Committee.

13. Furthermore, the ICC Court also sponsors certain regional arbitration groups dedicated to discuss any topics related to international and ICC arbitrations within that given region. One of those regional groups refers to Latin America, which includes not only Latin American but also Iberian lawyers. The members of those regional groups are invited to join them by the ICC Court and they meet annually. The Arbitral Tribunal informs the Parties that its three members are since its creation and currently fellow members of the ICC Latin American Arbitration Group.

14. I Thus, although the language of the Arbitration Clause contains the requirement that the members of the Arbitral Tribunal must be members of the ICC, such wording can only be understood in the proper context.

15. The ICC is a world business organization, while the ICC Court is the arbitration body attached to the ICC, as per article 1(1) of the Rules. Perhaps, in drawing up the Arbitration Clause, the Parties had in mind the ICC as the world business organization contemplating various business segments and activities other than arbitration rather than the ICC Court. Indeed, the Arbitration Clause may not be narrowly construed as only alluding to the ICC Court or its members. The provisions of the ICC Rules referred to herein, including any impediments to serve as arbitrator, must necessarily be the proper parameter for construing and

interpreting the aforementioned requirement in the Arbitration Clause. Moreover, the relationship between the ICC Court and the ICC National Committees for the appointment of arbitrators and their respective roles whenever it is the ICC Court's duty to do so cannot be disregarded and should be considered paramount in the interpretation and construction of the Arbitration Clause. Although the ICC Court members are independent, it must be stressed that their appointments come from ICC National Committees for election by the ICC World Council. Hence, since the appointment of ICC arbitrators and ICC Court members is based on a process in which the ICC (through its National Committees) and the ICC Court are jointly and inextricably involved, such process establishes a key link between such individuals with both the ICC and the ICC Court.

16. Last but not least, the imposition of such requirement is not a matter of formality only. In creating it, the Parties had in mind the establishment of a condition to secure the selection of individuals who are capable of conducting international arbitrations and who are skilled and experienced and, to that end, decided to restrict the selection of the arbitrators to those affiliated with the ICC. In the case under analysis, all the three members of the Arbitral Tribunal, but particularly Dr. Horacio A Grigera Naón – also a former ICC Court Member and a former Secretary General of the ICC Court -, whose appointment is at issue, are generally identified as ICC arbitrators and they all presently sit and have sat as arbitrators not only in a very significant number of ICC cases, but also in arbitral cases under other institutional and ad-hoc international arbitration rules. Moreover, the exercise of the right to challenge arbitrators is not available to the Parties for an indefinite period of time. If the circumstances are such that entitle any of the Parties to exercise it, such right must be exercised within a reasonable period of time upon the challenging party having knowledge of the grounds on which it intends to base such challenge. Otherwise, the delay or the postponement in exercising the right afforded to the Parties adversely affects the conduct of the arbitral proceedings and gives rise to an instability that is detrimental to the discharge of the duties by the

arbitrators and the satisfaction of the intent of the Parties in submitting the dispute to arbitration. Thus, the time elapsed between the appointment of the co-arbitrator and the opportunity to exercise the challenge afforded to the Respondent is unreasonable under any applicable standards, and such challenge may not then, in addition to the reasons stated above, be upheld.

17. In view of the foregoing, the Arbitral Tribunal, by the majority vote of its members, with the abstention of Dr. Horacio A. Grigera Naón, rejects the challenge formulated by the Respondent in respect of Dr. Horacio A. Grigera Naón, and further confirms that it was properly constituted in accordance with the Arbitration Clause.

IV.2 The Claimant's Lack of standing

18. In its Brief of August 15, 2012, the Respondent claims that the Claimant has no standing to appear before the Arbitral Tribunal. In support of its arguments, the Respondent draws to the attention of the Arbitral Tribunal the fact that, under Clause 34 of the Contract, neither the Contract nor the rights derived therefrom may be transferred to a third party without the prior consent of the Respondent. In support of its allegation, the Respondent describes the various corporate changes that have occurred since the execution of the Contract until the current date, although the Claimant rectified such description in its Briefs. The Respondent alleges that by virtue of such corporate changes assignment and transfer of the Contract and contractual rights have taken place without the Respondent expressly consenting to those, as required by the aforementioned Clause 34.

19. In its August 15, 2012 Brief (*see footnote #1 thereof)*, the Claimant provided the Arbitral Tribunal with an explanation of the corporate changes that took place along time . In its August 31, 2012 Brief (*see footnote #1 thereof)* , in addition to claiming that all such changes have never been objected by the Respondent , the Claimant alleges that the Contract and the rights stemming therefrom have not been transferred or assigned to a third party in breach of its Clause 34 .

Decision by the Arbitral Tribunal

20. In contracts such as the Contract, the insertion of provisions that prevent the Parties from assigning and transferring it and rights thereunder to any third party is usual. Its purpose is to secure the actual performance of contractual obligations by the party contractually responsible from the outset for such performance.

21. The spirit of Clause 34, however, is twofold. On the one hand, it expresses the intention of the Parties that the overhaul and retrofitting services of the two (2) frigates are actually performed by the Claimant due to the Claimant's experience and expertise in that specific field. On the other hand, as the letter of said Clause clearly expresses, the ban on assignment and transfer is a matter of compliance with legal provisions of the Bolivarian Republic of Venezuela (the "Republic"), *i.e.* the selection of the Claimant results from a given public bidding process. Hence, the ban created contractually in this very case is aimed at preventing the performance of the job by a party that did not participate in such public bidding process.

22. Nonetheless, while the Arbitral Tribunal recognizes and understands the rationale behind such contractual provision, such ban is to be considered within the appropriate legal context.

23. Under no circumstance may "*assignment and transfer*" be treated interchangeably with "*change of control*". While the former refers to a conduct intended to change the ownership of contractual rights through their transfer to a person foreign to the original contractual relationship, the latter refers to a corporate change whose effects take place by operation of law. The changes, in the case of change of control, occur upstream and target the shares held by shareholders, but not the assets of the entity whose shares are changing hands. This means that the Contract remains with the signatory party, irrespective of whether its name or ultimate control changes or not. The corporate changes referred to by the Claimant, such as a spin off, may not be treated as an assignment or transfer under Clause 34. This Clause is not intended to

prevent the accommodation of corporate interests, especially when the ultimate ownership remains unchanged. Such corporate change normally occurs, as in the case of the spin-off under analysis, at a higher level, *i.e.* the ultimate controlling shareholder remains unchanged after a lateral movement of assets.

24. As a matter of fact, the change of control is not contemplated by Clause 34, nor the language of such Clause refers to any movement other than a voluntary assignment and transfer of the Contract.

25. The record of this case clearly shows the frequent appearance of the Parties in Court proceedings in the United States without the lack of standing under Clause 34 ever been raised or argued. Furthermore, despite the corporate changes that took place, including changes of corporate names, the Claimant has performed the services contracted and not a third party foreign to the contractual relationship. Indeed, before its August 15, 2012 Brief, the Respondent never raised the alleged infringement by the Claimant of Clause 34.

26. In view of the foregoing, the Arbitral Tribunal rejects the Respondent's lack of standing claim and affirms that the Claimant has legal standing to be a party in these arbitral proceedings against the Respondent and to appear before this Arbitral Tribunal.

IV.3 The Respondent's Jurisdictional Objection

27. The Respondent's August 15, 2012 Brief deals in more detail with an exception first raised by the Respondent during the teleconference held by the Parties and their counsel with the Arbitral Tribunal members. In such Brief the Respondent alleges that the Arbitral Tribunal lacks jurisdiction to conduct the present arbitral proceedings and to decide on the merits of the disputes submitted to its consideration.

28. The Respondent claims that once the 2003 arbitration proceedings (the "2003 Arbitration") were terminated by a certain termination order issued on November 27, 2008 (the "Termination Order") without deciding the dispute between the Parties on the merits, Clause 42

requires the Claimant to bring its claims before the Courts of the Republic.

29. As a matter of fact, the last sentence of Clause 42 clearly states, in its English version, that "*should the matter still not be resolved through arbitration, the parties shall be entitled to resort to the competent Courts of the Republic of Venezuela*".

30. The Respondent concludes that the Contract merely requires that the Parties try to arbitrate. Should the arbitration fail to settle their dispute, then the Contract releases them from any obligation to further arbitrate and allows them to have recourse to the jurisdiction of Venezuelan Courts.

31. Accordingly, the Respondent alleges that the Parties are only required under the Contract to arbitrate once, and further asserts, in support of its position, that such statement is consistent with Clause 40 of the Contract directing the Parties to resort to the Courts of Venezuela whenever unable to resolve amicably doubts and controversies arising thereunder. Based on such interpretation, the Respondent argues that the Claimant must bring its claims before the Courts of Venezuela.

32. In its August 31, 2012 Brief in response to the Respondent's jurisdictional objections , the Claimant provides the Arbitral Tribunal with a summary of the proceedings before the Court of Appeals of the Fifth Circuit of the United States.

33. The Claimant alleges that the Respondent requested the Court of Appeals to order the Claimant to arbitrate in Caracas, but did not interpret the Contract and its provisions as precluding a second arbitration.

34. The Claimant also asserts that the Respondent did not interpret that the Termination Order to preclude a new arbitration under the Arbitration Clause, since along with the submission of the Termination Order to the Court of Appeals on December 30, 2008, the Respondent explained that such Termination Order was highly relevant and, further,

that such Court should order arbitration between Claimant and the Respondent in Caracas, Venezuela.

35. The Claimant points out that in almost a decade of litigation, the Parties never disagreed about resolving their dispute through arbitration, notwithstanding the fact that the Respondent never accepted the validity of the arbitral tribunal that heard the 2003 Arbitration. After the issuance of the Termination Order, the Respondent sought a fresh arbitration in Venezuela, as indicated to the U.S. Courts and the ICC. The Claimant highlights that when the U.S. Court ordered arbitration, but outside Venezuela, the Respondent argued that the Court had in effect denied its request for arbitration pursuant to the agreement of the Parties.

36. Furthermore, unlike what happened in the 2003 Arbitration, in these arbitral proceedings both Parties selected their party-appointed arbitrators. Upon the two party-appointed arbitrators being unable to agree on the appointment of the Chair, the Claimant applied to the ICC Court to make such appointment and, although presenting its own interpretation of the Arbitration Clause in regard to the qualifications to be met by arbitrators appointed thereunder, the Respondent did not object to the ICC making the appointment. The Claimant concludes its analysis by stating that, even if the Contract afforded the Respondent an option to litigate, the Respondent has not contested that it is a party to a valid and enforceable agreement to arbitrate.

Decision by the Arbitral Tribunal

37. In connection with the Respondent's contentions on this matter, it should be first pointed out that the Arbitral Tribunal has already found that the Claimant has legal standing to appear in these arbitral proceedings and, therefore, that the Arbitral Tribunal has rejected the objection brought by the Respondent in such regard.

38. As a second step, the grounds invoked by the Respondent in support of its objection need to be clearly identified.

39. *Inter alia,* one of such grounds is that the challenge of Dr. Horacio A. Grigera Naón based on the allegation that he is not presently a member of the ICC. This matter has been already disposed of by the majority of the Arbitral Tribunal, which has rejected such challenge and allegation.

40. The Respondent also claims that this new arbitration is impossible because of the Termination Order and, consequently, that the Parties are entitled to resort to the Courts of Venezuela under Clause 42.

41. In the Arbitral Tribunal's view, the language of Clause 42 does not mean that because of the Termination Order, the only option left to the Parties was to bring their dispute to the Venezuelan Courts, thus depriving the Arbitration Clause of further validity, enforceability or effects, or that such language precluded the Parties from resorting to other arbitral proceedings under the Arbitration Clause. Rather than imposing a prohibition or creating an obligation, such language confers *a right* upon the Parties to resort to the Courts of Venezuela should such circumstance occur. The right conferred upon the Parties by Clause 42 is not foreign to the Venezuelan legal system. The fourth paragraph of article 20 of the Arbitration Act of 1998 (the "Arbitration Act") literally states that: *[u]pon expiration of the term for the making of the advance of funds, should this not be made, the Arbitral Tribunal may terminate its functions,* ***and the parties shall be free to resort to the judges of the Republic or to renew the arbitration proceedings****" (emphasis added).* Undoubtedly, the language provided by the Arbitration Act may not be construed as creating an obligation but, instead, as granting the parties the right to opt for the most suitable means to settle their dispute.

42. The reference contained in Clause 42 to *"both parties"* means that the Claimant in the first arbitral proceeding may choose at a subsequent stage the route it considers preferable, *i.e.* either to institute new arbitral proceedings or, alternatively, to resort to the national courts of Venezuela. The letter of Clause 42 shall not then be construed as imposing any sort of consensus as to the alternative chosen, nor should

it be deemed to mean that one party may object the decision made by the opposing party as to the chosen route, or that said opposing party may legitimately refuse to participate. Indeed, this is a right that may be exercised by the claiming party, and any of them may, during the life of the Contract, hold such position, including when a responding party assumes the role of claimant by submitting a counterclaim.

43. Upon executing the Contract, the Parties agreed to submit any future disputes or controversies arising during the life of their contractual relationship to arbitration. The negative effect of the arbitration clause prevents the Judiciary from deciding such disputes. This is the general rule stemming from the letter of Clause 42 and also consecrated in Article 5, first paragraph of the Arbitration Act which states that "*[b]y virtue of the arbitration agreement the parties assume the obligation to submit their disputes to the decision of the arbitrators and waive [the right] to present their claims before the judges. The arbitration agreement is exclusive and excludes the ordinary jurisdiction*". Such negative effect is exceptionally excluded by the Arbitration Clause in the also exceptional circumstance that arbitration instituted under it proves unsuccessful in resolving the Parties' disputes.

44. In sum, in front of the alternatives provided by the Contract made available to it, the Claimant finally and legitimately opted, in accordance with the letter and spirit of Clause 42, for instituting new arbitral proceedings. Any other construction would deprive the letter of such Clause of any meaningful effect (*effet utile*), an outcome that would run against basic principles of contract construction and interpretation, including under Venezuelan law (Article 1160 of the Venezuelan Civil Code, requiring that contracts be interpreted in accordance with good faith and fairness (*equidad*) principles, all of which militate in favor of interpreting and construing contractual provisions to ensure their application and effects in accordance with their reasonable and legitimately expected meaning).

45. It is to be noted that the 2003 Arbitration did not settle the merits of the dispute. The 2003 arbitral tribunal based the Termination Order on article 31, second paragraph of the IACAC Rules because of the long suspension of the arbitral proceedings initially decreed by a US Court of Law on account of a pending mediation between the Parties, and thereafter because of a pending US Court decision on the validity of a settlement agreement resulting from such mediation that would put an end to the dispute on the merits (and thus render the 2003 Arbitration moot) should such agreement be found valid.

46. A possible interpretation of Clause 42 is that the right of the Parties to resort to the Venezuelan Courts would be triggered upon an arbitral tribunal constituted under the Arbitration Clause being definitively unable to settle the merits of the dispute for reasons it cannot overcome. Such interpretation is to be understood in the light of the letter and spirit of Clause 42 and Treaties in the field of arbitration to which both Venezuela and the USA are parties, i.e., the Inter-American Convention on International Commercial Arbitration of Panamá of 1975 (the "Panama Convention") and the 1958 United Nations New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention").

47. Both Conventions have provisions indicating that arbitration agreements must be interpreted and construed in favor of their validity or enforceability (Panama Convention, Article 1; New York Convention, Article II (3)). This latter provision clearly mandates any New York Convention member country court of law to refer a matter to arbitration unless it makes a finding that the clause is "*null and void, inoperative or incapable of being performed*".

48. The Respondent has not introduced any persuasive allegation, argument or evidence that the Arbitration Clause is null, void, inoperative or incapable of being performed within or without these arbitral proceedings. However, its interpretation of such Clause would mean that the Arbitration Clause would be automatically deprived of

further effects or enforcement although no arbitral tribunal was prevented from reaching the stage of hearing the dispute at stake on the merits for reasons beyond it or the Parties' control, an interpretation that, for other reasons set forth above, the Arbitral Tribunal has rejected already.

49.As indicated above, the Termination Order was issued by the 2003 Arbitration arbitrators, not for considering that the Arbitration Agreement became null, void, inoperative or incapable of being performed, or because continuing the arbitration had been rendered impossible, but for reasons of procedural convenience, including the arbitrators' convenience, since those arbitral proceedings had been for long suspended. Of course, none of those circumstances concern the Arbitration Clause or exist today in connection with the present arbitration.

50.In any case, the Respondent's interpretation would not only run counter the Treaty provisions mentioned above but would be incompatible with the intention of the Parties, clearly evidenced through the Arbitration Clause, to entrust to arbitration the resolution of their disputes. Had not the Parties intended to privilege arbitration over any other dispute resolution methods to settle their differences, they would not have agreed to arbitration at all.

51. Since the full operation of the letter of Clause 42 confers upon the Parties a right, rather than an obligation, to be exercised at their will, and also for the other reasons set forth above, the allegation by the Respondent that only the Courts of Venezuela are now competent to resolve the Parties' dispute now subject to the present arbitration is rejected by the Arbitral Tribunal.

52. The Respondent also refers to the lack of jurisdiction of U.S. courts to issue an order to compel the Parties to arbitration.

53. Actually, in this very case, the U.S. Courts acted as "*juge d'appui*" i.e., to provide assistance and supervision of the arbitral proceedings

(and it is unquestionable that such Courts have jurisdiction to compel the Parties to arbitration in strict accordance with their prior agreements reflected in the Arbitration Clause). Nonetheless, once such order is issued, any matters related to the development of the proceedings must be deferred to the Arbitral Tribunal that will decide in strict accordance with the agreement reached by the Parties.

54. The fact argued by the Republic that the U.S. courts may have gone beyond their jurisdiction in determining the conditions under which the arbitration should take place does not taint the validity and enforceability of the compelling order. In any event, arbitrators are not bound by court decisions in connection with matters falling exclusively under their arbitral jurisdiction.

55. Consequently, the allegation that the U.S. courts lacked jurisdiction to issue such compelling order is hereby rejected by the Arbitral Tribunal.

56. Lastly, the Respondent claims that the Contract is of a public interest nature under Article 151 of the Constitution of the Republic and that, despite the Arbitration Clause, the dispute should be exclusively decided by the Venezuelan Courts.

57. However, the history of the judicial proceedings before the U.S. Courts disavows such allegation. In several instances, the Respondent expressed its willingness to submit the dispute giving rise to the present proceedings to arbitration, without alleging any Venezuelan constitutional law defenses or reservations.

58. Furthermore, the alleged public interest nature of the Contract has never been raised by the Republic during the U.S. court proceedings. Indeed, save certain exceptions specifically identified under Venezuelan law, any matters that may be settled by the parties may be freely arbitrated.

59. The Venezuelan legal system provides for arbitration in different texts. First and foremost, article 253 of the Constitution makes an

express reference to the alternative dispute resolution methods as being comprised by the system of administration of justice. On the other hand, article 258 of the Constitution states that *"the law shall encourage arbitration, conciliation, mediation and other alternative means for resolving conflicts".* Moreover, as indicated before, Venezuela is a signatory party to the Panamá Convention and the New York Convention and has further promulgated its Arbitration Act based on the UNCITRAL Model Law. Last but not least, the only general exceptions where arbitration would not be applicable are those laid down by article 47 of the Venezuelan Private International Law Act and, of interest for this case, the ones referred to by article 3 (b) of the Arbitration Act. The dispute opposing the Parties in this case does not fall within any of those exceptions.

60. Therefore, the Arbitral Tribunal rejects the exception of lack of jurisdiction raised by Respondent and affirms its full jurisdiction to hear and decide the dispute brought by Claimant.

IV.4 Applicable Laws

61. In its Brief of August 15, 2012, the Respondent alleges that Venezuelan law governs both the procedure and the merits. In particular, the Respondent argues that the provisions of the Venezuelan Civil Procedure Code apply to these proceedings.

62. Although the Claimant has not expressed its views nor has it rebutted the Republic's arguments as to applicable law in such respect, the Arbitral Tribunal considers that such matter must be decided at this juncture to dispel any doubts on the applicable law.

63. Since Clause 40 of the Contract provides that *"El presente Contrato sera regido por las Leyes Venezolanas"* the Arbitral Tribunal concludes that the provisions of the Contract and those of the substantive laws of Venezuela govern this case as to the merits.

64. Further, the Respondent argues, on the basis of Clause 42, first and second paragraphs, that the provisions of the Venezuelan Civil Procedure Code dealing with "*arbitramento*" govern these arbitral proceedings.

65. The Arbitral Tribunal considers that what is at stake and has to be decided in this connection is the curial law of these arbitral proceedings, i.e., the procedural provisions governing the conduct of this arbitration by and before this Arbitral Tribunal or, in other words, the relationship between the Parties and the Arbitral Tribunal and in between the Parties within the four corners of the arbitral procedure. By deciding this issue the Arbitral Tribunal does not make any determination, nor advances any opinion, regarding the legal regime concerned with the external supervision of these arbitral proceedings or other matters external to it.

66. The Contract was entered into in December 1997, and the Parties indeed made an express reference to the Civil Procedure Code which contains certain provisions governing arbitration. Nevertheless, Venezuela enacted in 1998 the Arbitration Act which is based on the UNCITRAL Model Law; thus, the execution of the Contract preceded the coming into force of the Arbitration Act and of the 1999 Constitution of the Republic.

67. Pursuant to article 7 of the Civil Code of Venezuela, a law may only be derogated by another law. The first test is satisfied, since the Arbitration Act is a law of the same hierarchy of the Civil Procedure Code and may therefore supersede the latter text.

68. The second test requires establishing whether both texts overlap as to their subject matter. Since the Arbitration Act regulates entirely the matters dealt with in Articles 608-629 of the Venezuelan Civil Procedure Code on arbitration (referred to as "*arbitramento*") , it is necessary to establish whether those provisions of a procedural law nature are actually applicable to arbitral proceedings arising out of the Contract.

69. In order to make that determination, the very nature and scope of both texts deserve special consideration. While the Civil Procedure Code

regulates the judicial civil and commercial proceedings in general, with only certain of its provisions concerning arbitration, the Arbitration Act exclusively deals with arbitration in its various aspects. Furthermore, arbitration is defined by the Constitution as part of the administration system of justice; thus, it is to be concluded that the Arbitration Act is a law of a special nature (*"lex specialis"*).

70. Generally, it is undisputed that a special law, when it regulates entirely a given matter that had been regulated earlier and comes into force at a subsequent point in time, takes precedence over the previous legal text. Therefore, the Arbitral Tribunal is of the view that the provisions of the Civil Procedure Code relating to arbitration or *arbitramento* have been derogated by the Arbitration Act, and no longer apply, a conclusion also consistent with Article 258 of the Constitution mentioned before.

71. It should be also observed that article 1 of the Arbitration Act states that it shall be applicable to commercial arbitration. Even if the dispute submitted to the Arbitral Tribunal opposes the Ministry of Defense, as an instrumentality of the government of the Republic, to a private party, its subject matter is purely of a commercial nature. The Ministry of Defense contracted with the Claimant the overhaul and retrofitting services of the two frigates and assumed the obligation to pay the contracted for consideration. There is not any trace of the exercise by the Republic of its *"ius imperium"* in connection with the Contract. Indeed, any State, its entities, agencies and instrumentalities may enter into commercial transactions with private parties without thereby enjoying any privilege or special prerogative in the performance of the contract or changing the commercial nature of the transaction. Even from that standpoint, the conclusion of the Arbitral Tribunal is in the sense that the Arbitration Act shall apply, since, in accordance with its Article 1, the contractual relationship between the Parties under the Contract is exclusively commercial.

72. It is equally noteworthy mentioning that article 2, last sentence, of the Civil Procedure Code of Venezuela as well as article 1 of the Arbitration Act require the due observance of any treaties or international conventions ratified by the Republic. While the provisions of the Civil Procedure Code referred to above do not incorporate the principles subscribed to by the Republic by adhering to the New York and Panamá Conventions (and such provisions, at least when viewed from the perspective of international arbitral proceedings, have been rendered obsolete by such Conventions or are incompatible with their text or spirit) the Arbitration Act provisions are in significant part inspired by such Conventions, a circumstance reinforcing and attesting to the nature of "*lex specialis*" of the Arbitration Act.

73. Certain Arbitration Act provisions derogate from or regulate in an entirely different way matters covered by the Civil Procedure Code, or deal with matters not dealt with in such Code.

74. For example, Articles 7 and 25 recognize the principle of *Kompetenz-Kompetenz* whereby the Arbitral Tribunal is the primary judge of its own competence and is empowered to decide on the existence or validity of the arbitration clause. Moreover, its Article 7 recognizes the severability of the arbitration clause from the underlying contract. The past procedural rules required a "*compromiso*" to be executed by the parties (*see article 608 of the Civil Procedure Code)*. The Arbitration Act eliminates such requirement in line with modern laws on arbitration. According to Article 629 of the Civil Procedure Code, the provision of funds to cover arbitral costs was to be exclusively borne by the claiming party. Article 20 of the Arbitration Act, however, states that such costs, including arbitrators' fees, are to be borne by both parties. Article 33 (1) further states that, in the absence of payment of any advance on costs and fees, the mission of the arbitrators is terminated while Article 629 of the Civil Procedure Code remands the dispute to the court judge should there exist no agreement as to the amount of fees.

75. The above conclusions of the Arbitral Tribunal are substantially those of the *Tribunal Supremo.* The judgment nº 1067, of November 3, 2010 of its Constitutional Chamber makes express references to the provisions of the Arbitration Act rather than to those of the Civil Procedure Code, which leads the Arbitral Tribunal to concluding that the latter's provisions on arbitration are no longer in force and effect.

76. Lastly, the application of the provisions of the Arbitration Act as the curial law of these arbitral proceedings' i.e., to the extent they concern the conduct of this arbitration as defined before, does not violate the principle of sanctity of contracts *("pacta sunt servanda")* despite the Parties having established in Clause 42 that those of the Civil Procedure Code were to be applicable. The Arbitral Tribunal highlights that after the execution of the Contract and its Arbitration Clause, the legal framework governing arbitration in Venezuela was improved by adopting a legal text consistent with the practice of international arbitration and incorporating the most modern principles of arbitration and legal norms largely finding their source in the letter or the spirit of Treaties ratified by the Republic.

77. Changes in the law is a phenomenon that may affect any contract and, in certain cases, when such changes jeopardize the parties' interests, the contractual arrangements so established provide for remedial steps. In this case, however, the change of law provides an improved framework for the conduct of arbitral proceedings in accordance with the legitimate expectations of parties seeking, in good faith, the application of those rules which are better adapted to the private means of dispute resolution they contracted for.

78. On the other hand, the Arbitral Tribunal notes that the Respondent's submission of its jurisdictional objection to the Arbitral Tribunal constitutes recognition by Respondent of this Arbitral Tribunal's *Kompetenz-Kompetenz* powers set forth in Article 7 of the Arbitration Act. Furthermore, the Respondent refers expressly to such *Kompetenz-Kompetenz* on page 23 of its own Brief.

79. Thus, the Arbitral Tribunal decides that, in lieu of the provisions on arbitration found in the Civil Procedure Code, these arbitral proceedings shall be governed by the Arbitration Act as their curial law to the extent the Arbitration Act contains procedural rules relevant for the conduct of this arbitration by this Arbitral Tribunal and adapted to the international nature of the present case.

80. It is undisputed – and the Arbitral Tribunal acknowledges - that this is an "*ad hoc*" arbitration. It may be the case – as it happens with any curial law –that in the course of this arbitration the Arbitral Tribunal may be confronted with matters or issues not covered or insufficiently regulated by the Arbitration Act or, since the Arbitration Act does not differentiate between international and domestic arbitrations, not appropriately dealt with by its provisions when an international arbitration is at stake. In such case, the Arbitral Tribunal decides to apply on a subsidiary or complementary basis, but also as part of this arbitration's curial law, the 1976 UNCITRAL Arbitration Rules. Those Rules are consistent with the Model Law, both the Model Law and the UNCITRAL Arbitration Rules are the outcome of the collective work of experts appointed by States from all over the world within the context of a United Nations body, a feature ensuring the neutrality, adaptation to the needs of international arbitration and evenhandedness of such Rules, and hence there suitability to complement or supplement the provisions contained in any law that is based on such Model Law, such as the Arbitration Act. The Arbitral Tribunal underscores that, although the Arbitration Rules of UNCITRAL were revised in 2010, the Arbitral Tribunal has chosen the application of those in effect since 1976 because the revised version was not in effect when the request of arbitration was filed in the present case.

IV.5 Place of Arbitration

81. In its Brief of August 15, 2012, the Respondent objects to the U.S. courts decision fixing Washington, DC, as the place of arbitration; i.e.,

the place where the arbitral proceedings are to actually take place (*[l]as actuaciones de arbitraje serán realizadas en Caracas, Venezuela....*", (Clause 42, First Paragraph)). According to the Respondent, such decision would be in breach of article 150 of the Venezuelan Constitution. The Respondent contends that within the context of the US Court proceedings - Washington, DC - was agreed as place of arbitration outside Venezuela, but the Respondent challenges before this Arbitral Tribunal the validity and enforceability of such agreement. The Respondent argues that the place of arbitration, as agreed contractually is the city of Caracas, Venezuela, and requests a declaration by the Arbitral Tribunal in such sense.

82. In its Brief dated August 15, 2012, the Claimant argues that the Respondent freely selected Washington, DC as the place of arbitration and should, therefore, be held to its own selection. The Claimant claims that the U.S. Court order established a deadline for the Parties to report their agreement on such issue, but did not require the Parties to reach any agreement in that respect. In the Claimant's view, had the Parties failed to reach an agreement, the Court would then have made a selection. The Claimant states that the Respondent is re-litigating an issue that it has already exhaustively litigated in the United States.

83. One of the arguments brought by the Claimant to challenge Caracas, Venezuela, as the place of arbitration is based upon the impracticability doctrine, as understood by the U.S. Courts. The Claimant analyzes this doctrine, provides a list of events that would render a contract clause unenforceable, and seeks support in the opinion of experts for its view that arbitration in Venezuela would be impracticable. According to the Claimant, it would be impracticable for it to submit to an *ad hoc* arbitration under the control of the Venezuelan judiciary in light of the hostility of the local regime to US interests and parties, the tense diplomatic relations between both countries, as evidenced, among other things, by the US ban of military equipment or technology exports to Venezuela. The Claimant also argues, on the basis of the US Federal

Arms Control provisions, that export restrictions no longer permit it to take to Caracas evidence in support of its case.

84. In sum, on one hand, the Claimant claims that circumstances in Venezuela changed since the execution of the Contract and that the new scenario would be adverse and detrimental to the conduct of the proceedings there. On the other hand, the Claimant also alleges that the US Courts decided that the arbitral proceedings should be held outside of Venezuela and that the Respondent agreed to arbitrate its disputes arising out of the Contract in Washington D.C., USA. The incidence of a new agreement by the Parties as to the place of arbitration has to be considered even if the Republic contests its validity under constitutional provisions.

85. The Respondent rejects the above Claimant's position and argument.

86. In their Additional Memorials, the Parties reiterated arguments already made before the US Courts or even earlier before this Arbitral Tribunal and essentially referred back, through cites and excerpts, to their previous submissions. While the Arbitral Tribunal finds unnecessary to reproduce herein or specifically refer to any such arguments or the contents of such r Additional Memorials of April 23, 2013, all of them have been properly and thoroughly analyzed by the Arbitral Tribunal when making its findings and reaching its conclusions.

Decision by the Arbitral Tribunal

87. The Arbitral Tribunal observes that the determination of the place of arbitration became an issue in the judicial proceedings before the U.S. courts as a result of the impracticability question raised by the Claimant described above. Clause 42, first paragraph of the Contract clearly states that "*arbitral proceedings shall take place in Caracas, Venezuela*". Such was the agreement reached by the Parties upon the execution of the Contract. Indeed, once an agreement is reached by the parties, they must abide by it. Nevertheless, it is conceivable that upon the

occurrence of certain exceptional events evidencing that because of changed circumstances the parties are confronted with a new situation that could not be reasonably foreseen when the original agreement was reached, such agreement may be subject to review and, if certain conditions are met, also to modification.

88. It is noteworthy mentioning that, after the execution of the Contract and the termination of the preceding arbitration, the Parties litigated extensively before the U.S. Courts. The Respondent has alleged that it was forced to accept the jurisdiction of the U.S. Courts and, further, to choose a place outside Venezuela for holding this arbitration.,

89. However, the participation of the Respondent in the U.S. Court proceedings does actually demonstrate that it took an active role in litigating the case. Further, the Respondent's referral in its Additional Memorial to issues and arguments already discussed at length by the Parties leads to the inevitable conclusion that the Respondent attempts to re-litigate in this arbitration the case already adjudicated by the U.S. Courts. Finally, irrespective of the allegations brought by the Respondent at this stage, it is undisputable that in their litigation before the US Courts, the Parties consented to the arbitral proceedings taking place outside Venezuela, and it was the Respondent's initiative to choose Washington, D.C. to such effect.

90. The Respondent's argument that the change of the place where the arbitration is take place would require the legislative approval cannot be taken for granted .at this point. The Arbitral Tribunal, earlier in this Procedural Order, has expressed its understanding that the Contract at issue reflects a commercial relationship between the Respondent and the Claimant, without any trace of its being subject to the *ius imperium* of the Republic. Furthermore, the existence of a similar case under the auspices of the ICC that was arbitrated outside Venezuela, first in New York and subsequently in Madrid, disavows the allegation of unconstitutionality of arbitration proceedings being held outside Venezuela insofar as, despite the arbitration being challenged, no claim

has been brought by the Republic as to the place of proceedings nor has the Republic alleged that the place of arbitration had been chosen in violation of the Constitution.

91. Be that as it may, as aforesaid, irrespective of the place being Washington, D.C. or elsewhere, the Republic actually chose a place outside Venezuela and consented to holding these arbitral proceedings outside its territory, without raising the unconstitutionality issue. Therefore, such argument cannot be reasonably upheld by the Arbitral Tribunal. 92. The Claimant and the Respondent have conflicting views on the meaning of such choice. The Respondent claims that it was forced by the U.S. Court to choose a place and the Claimant claims that the Parties were ordered to agree on a place. The Claimant further states that had they failed to agree, the U.S. Court would have determined the place where the arbitral proceedings would be held. Nonetheless, despite its allegations in this arbitration, the Republic chose Washington, D.C. and expressed its agreement to that city.

93. Indeed, the behavior of the Parties before the U.S. Courts does correspond to an amendment of the arbitration clause. This is the reason why the Respondent also claims that the validity of such change would have required legislative approval.

94. Consent of the Parties is of the essence of arbitration. In the case at stake, the Republic consented to such change and indicated its choice for Washington, D.C. This is what the U.S. Court decision means. There is no room available to the Parties to re-litigate before this Arbitral Tribunal if the proceedings will be held outside or within the territory of the Republic. The U.S. Court, in a reasoned decision, clearly stated that the arbitral proceedings shall be held outside the territory of the Republic. Such decision has the force and effects of *res judicata.* Further, any attempt by the Republic to challenge such decision in this arbitration should prove unsuccessful also in light of the *venire contra factum proprium* doctrine.

95. This conclusion n is consistent with the Arbitration Act. As aforesaid, under article 3(b) thereof, *a contrariu sensu*, the disputes arising between private parties and the Republic which do not fall within the scope of the *ius imperium* are arbitrable. In this case, the Arbitral Tribunal has determined that the relationship between the Parties is purely of commercial nature and the arbitrability of the dispute is not at issue. On the other hand, article 9 of the Arbitration Act empowers the Arbitral Tribunal to decide where the proceedings shall take place, exception made when there might exist an agreement between the Parties in a different sense. The importance of such provision of the applicable law is twofold: (i) there exists no ban on the power and authority of the Arbitral Tribunal to determine where such proceedings will take place because the Republic is a party, since the dispute before this Arbitral Tribunal is arbitrable according to article 3(b), and (ii) there is no agreement between the Parties in a different sense that would prevent the Arbitral Tribunal from freely choosing the place of arbitration outside of Venezuela pursuant to article 9 of the Arbitration Act and the US Court has already determined through a decision binding on both Parties that the arbitral proceedings in this case shall be held outside the Venezuelan territory.

96. Nonetheless, the choice of Washington, D.C. is disputed by the Republic, despite its having been chosen by the Parties before the US Court. In any case, as indicated above, the Arbitral Tribunal has authority to choose the location where the proceedings shall be held outside of Venezuela. In making such determination, the Arbitral Tribunal's objective is to safeguard both the neutrality and integrity of the arbitration. The Arbitral Tribunal is very much aware of its duties in such regard, which include ensuring the *effet utile* of its decisions and awards. For these reasons the Arbitral Tribunal finds appropriate that the arbitral proceedings be not held in the country of any of the Parties, which therefore excludes any place in the territories or under the jurisdiction of Venezuela and the United States.

97. Hence, the Arbitral Tribunal decides that the arbitral proceedings shall be held in the City of Rio de Janeiro, Brazil.

IV.6. Language of the Arbitration

98. During the teleconference jointly held by the members of the Arbitral Tribunal, the representatives of the Respondent and counsel to the Parties, the Respondent alleged that the language of the arbitration should be Spanish, especially because the proceedings were to take place in Caracas, Venezuela. The Claimant did not agree and alleged instead that the English language should control especially because the Contract and other supporting documents were written in English although the Contract provides that in cases of discrepancy the Spanish language version should prevail. Since the Arbitral Tribunal requested the Parties to submit Briefs on the matters decided through the present Procedural Order, it was then agreed by counsel for the Respondent that although their Briefs were to be presented in Spanish, as a matter of courtesy only, the Claimant's counsel would also be provided with a translation into English, on the understanding that such act of courtesy would not be deemed as a waiver of the Respondent's claim to have Spanish as the controlling language.

99. The first paragraph of Clause 42 indicates that "*[a]rbitration shall take place in Caracas, Venezuela, in Spanish-English*" (See the Spanish text above).

100. A first reading of that portion of the Clause may lead to the conclusion that the initial intention of the Parties was to have the proceedings conducted in both languages. However, the positions assumed by both of them during the teleconference authorizes the Arbitral Tribunal to conclude that, even assuming that such was the Parties' initial intention, they moved away for it to respectively claim the use of their own native language.

101. However, this same first paragraph of Clause 42 also states that "*[t]he arbitration jury shall consist of three (3) independent arbitrators,*

who must be members of the International Chamber of Commerce, ***fluent in Spanish-English*** *[...]".* (emphasis added, see the Spanish text above)

102. While it seems appropriate to require the arbitrators to be fluent in both languages assuming proceedings to be conducted in Spanish-English, such provision does not settle the dispute. The very scope of the contractual clause remains undefined and does not help to resolve the disagreement on the language of the arbitration as expressed by the Parties during the teleconference.

103. Article 10 of the Arbitration Act states that "*the parties may freely agree on the language or languages that shall be used in the arbitral proceedings. In the absence of such agreement, the arbitral tribunal shall determine the language or languages that must be used in the proceedings. This agreement shall be applicable, except if they have agreed otherwise, to all written submissions by the parties, to all hearings and the award, decision or communication of any other nature to be issued by the arbitral tribunal. The Arbitral Tribunal may determine that documents submitted to it are accompanied by a translation to the language or languages agreed by the parties or determined by the arbitral tribunal".*

104. Thus, in light of the lack of agreement between the Parties as to the controlling language of the proceedings, it shall be incumbent upon the Arbitral Tribunal to decide on such matter, in accordance with the Contract and article 10 of the Arbitration Act.

105. On such basis, the Arbitral Tribunal is of the view that Spanish and English shall be the controlling languages of the proceedings. Each Party shall then be free to choose one of these languages to submit its pleadings, and any supporting documents in their original language without a translation into English or Spanish, as the case may be. The Arbitral Tribunal shall hold the hearings in both languages and

testimonies and any written statements shall be admitted in the Spanish or English language, at the Parties own choosing.

106. Any procedural orders, decisions and other communications, including the award, to be issued by the Arbitral Tribunal shall be written in both languages.

107. In view of the determination by the Arbitral Tribunal contained in the preceding paragraph, this Procedural Order is its last decision written in English only.

IV.7 Deadline for Making the Award

108. The last sentence of the first paragraph of Clause 42 states that *"[t]he arbitrators shall act as arbitrators-at-law and shall pronounce their decision within a maximum of three (3) months".*

109. This matter has not been the subject of the Briefs submitted by the Parties, nor has the Arbitral Tribunal requested them to provide it with their respective positions in that respect. However, this is a procedural matter that has to be decided without delay due to its impact on the arbitral proceedings as a whole and the questions already raised since the appointment of the Arbitral Tribunal and subject to its decision even before this case reaching the stage of briefing the Arbitral Tribunal on the merits of this case.

110. The only trace of agreement between the Parties in the text of the Contract is the amount of time, *i.e.* three (3) months for the award to be made by the Arbitral Tribunal. The language of said contractual provision does not indicate, however, the starting date for counting the three (3)-month period (*"dies a quo"*). Therefore, it is of paramount importance to determine the starting point for the calculation of such three-month period.

111. The main source available to the Arbitral Tribunal to deal with such omission is the relevant provisions of the Arbitration Act.

112. Pursuant to article 22 of the Arbitration Act, "*[i]f the arbitration agreement fails to indicate the end of the period of duration of the proceedings, this will be of six (6) months counted from the date of constitution of the Arbitral Tribunal. This lapse may be extended by such Arbitral Tribunal one or more times, ex officio or by the parties or their counsel with sufficient powers. To the aforementioned lapse of time the days during which the arbitration is suspended or interrupted for legal reasons shall be added to it*".

113. The Arbitration Clause establishes a lapse of time for rendering the award, *i.e.* three (3) months. In view of the foregoing, by applying the provision contained in article 19 of the Arbitration Act the Arbitral Tribunal shall be deemed constituted upon the acceptance by each one of the arbitrators. Since the co-arbitrators have been appointed by the Parties and accepted to exercise their functions on different dates, the initial date for counting would be when the Chairman accepted his appointment after the co-arbitrators accepted theirs.

114. However, a challenge raised by the Respondent as to co-arbitrator Dr. Horacio A. Grigera Naón, was pending until being decided by this Procedural Order. Such challenge, if admitted, due to its nature, would have determined the partial reconstitution of the Arbitral Tribunal. In view of the preliminary questions, primarily jurisdictional issues, brought by the Parties to the attention of the Arbitral Tribunal, the starting date of the three (3)-month period may only be counted from the date this Procedural Order is communicated to the Parties.

115. Consequently, the Arbitral Tribunal decides to maintain the period of time agreed by the Parties for the rendering of the final award on the merits of the case, on the understanding that, in accordance with article 22 of the Arbitration Act it may, in light of the circumstances and development of the proceedings, extend it one or more times *ex officio* by equal and subsequent periods of three (3) months, unless a different agreement as to a longer period is reached hereafter by the Arbitral Tribunal with the Parties.

DISPOSITIVE SECTION

Based on the foregoing arguments, the Arbitral Tribunal **DECIDES** as follows:

(1) By the majority vote of its members, to **REJECT** the challenge opposed by the Respondent against the appointment of Dr. Horacio A. Grigera Naón.

(2) By unanimous vote of its members:

(a) to **REJECT** the claim submitted by the Respondent and affirm the legal standing of the Claimant to appear before the Arbitral Tribunal.

(b) to **REJECT** the exception of lack of jurisdiction of the Arbitral Tribunal and affirm its full jurisdiction to hear and decide the case.

(c) to **REJECT** the claim submitted by the Respondent as to the application of the Civil Procedure Code of Venezuela to the conduct of the proceedings.

(d) to **AFFIRM** that the Arbitration Act of 1998 shall be the applicable law to the proceedings and, on a subsidiary or complementary basis, the UNCITRAL Arbitration Rules of 1976.

(e) to **REJECT** the claim submitted by the Claimant as to where the arbitral proceedings shall take place.

(f) to **AFFIRM** that with a view to safeguard the integrity of these arbitral proceedings and for management or other convenience reasons, including neutrality, these arbitral proceedings shall take place in the City of Rio de Janeiro, State of Rio de Janeiro, Brazil.

(g) to **REJECT** the claims of the Parties as to the language of the arbitration.

(h) to **AFFIRM** that both Spanish and English shall be the controlling languages of the arbitral proceedings as specified in this Procedural Order.

(i) to **AFFIRM** that the period of three (3) months for the rendering of the award on the merits shall be computed from the date this Procedural Order is communicated to the Parties, the Arbitral Tribunal always having the right under the Arbitration Act to extend it one or more times *ex officio*.

(j) that all other claims by the Parties are hereby expressly rejected.

Date: July 16, 2013.

Horacio A. Grigera Naón

Antonio Hierro

José Emilio Nunes Pinto