

MEMORANDUM OF DETERMINATIONS

OVERSEAS PRIVATE INVESTMENT CORPORATION

Expropriation Claim of Science Applications International Corporation

OPIIC Contract of Insurance No. E833

Dated as of July 12, 2004

I. INTRODUCTION

On September 4, 2003, Science Applications International Corporation (the “Insured” or “SAIC”) submitted a claim to OPIC for compensation under the expropriation coverage of OPIC Contract of Insurance No. E833 (the “OPIC Contract”) for US\$9,714,875 (the “Claim”). The Insured’s active coverage under the OPIC Contract was for up to US\$15,000,000. The OPIC Contract covered the Insured’s investment in Informatica, Negocios y Tecnologia, S.A. (“INTESA”), a Venezuelan company that was owned by the Insured and the Venezuelan state-owned oil company, Petroleos de Venezuela S.A. (“PDVSA”) and provided technology and information technology services.

OPIC has determined that the Claim is valid based on its review of materials and statements provided by the Insured and the Government of Venezuela (the “GOV”). This memorandum of determinations solely addresses the issue of whether the Insured’s investment in INTESA was expropriated by the GOV. The amount of compensation for the Claim will be determined separately.

II. FACTUAL SUMMARY

In the mid-1990s PDVSA embarked on a plan to cut costs and modernize its operations to compete in the international market more effectively. A significant change made pursuant to this reorganization was the spin-off of PDVSA’s information technology unit into INTESA, a joint venture 40% owned by PDV-IFT S.A., a wholly-owned subsidiary of PDVSA, and 60% owned by SAIC (Bermuda), LTD. a wholly-owned subsidiary of SAIC. The Insured and PDVSA entered into the INTESA joint venture agreement on December 30, 1996 (the “JVA”). In conjunction with the JVA, PDVSA awarded INTESA a five-year services contract for providing a broad range of information technology services (the “Services Agreement”) and SAIC agreed to contribute a license for certain rights to SAIC technology and guarantee certain services

performed by INTESA. The stated purpose of INTESA was (i) to perform all of the information-technology services required by PDVSA and its affiliates pursuant to the Services Agreement including, without limitation, the management, operation, support, maintenance, and enhancement of the information systems and network operations of, and systems development for PDVSA and its affiliates and (ii) in the future, to provide services to other businesses and agencies in Venezuela and elsewhere in Latin America.¹

INTESA incorporated PDVSA's internal information staff and began operating on January 1, 1997. Some of INTESA's projects in the mining, oil, banking, and government sectors included developing and maintaining internet-based petrol purchasing portals, developing administrative systems for various oil projects, and providing Y2K solutions. It also outsourced major information projects to third parties on behalf of such companies as BP, Shell, Ecopetrol, Petrozuata, Sincor, Sidor, Sivensa, Novartis, Banco Mercantil, Corpbanca, and Banco de Venezuela. The PDVSA arrangements accounted for 95% of INTESA's revenues, and 80% of INTESA's employees worked on premises within PDVSA facilities, with INTESA supplying IT equipment for its own and for PDVSA's employees.

The election of Hugo Chavez as President of Venezuela in December 1998 had almost immediate implications for INTESA. The night of his election victory, President Chavez stated that the budget and operations of PDVSA should be subordinated to national, rather than corporate, goals. Chavez promised to reevaluate the policies of the oil company. President Chavez' nationalistic rhetoric directly aimed at foreign investors in Venezuela, and with respect to PDVSA, he pledged to "subordinate it to the Venezuelan state."² In 1999, the status of INTESA was controversial. PDVSA's president even broached the idea of dissolving INTESA and reintegrating its information technology responsibilities. In August and October 1999, President Chávez removed experienced senior PDVSA managers and directors and replaced them with political

¹ See JVA Section 2.2

² See Business News America, *Chávez: Pdvsa is Insubordinate* (Dec. 9, 1998); Marshall DeLuca, *Industry Cautious over Chávez Election*, PenWell Publishing Company Offshore (January 1999); Associated Press, *President-elect vows to shake up oil monopoly* (Dec. 28, 1998); See Latin Am. Energy Alert, *PDVSA Brought to Heel as Work on New Constitution Starts* (Aug. 5, 1999).

allies and former army generals.³ Consistent with this trend, PDVSA ordered a review of INTESA's services in 2000, and renegotiations on the Service Agreement began soon thereafter. By July 2001, disagreement over whether INTESA would receive 100% of PDVSA's information technology outsourcing contracts in 2002 was public knowledge and, at the expiration of the Services Agreement in December 2001, PDVSA refused to renew the Services Agreement immediately. PDVSA chose instead to continue negotiations under a six-month provisional agreement on the same terms as the Services Agreement.

On May 2, 2002, SAIC was notified by PDVSA that it would like to begin formal discussions regarding the termination of the Services Agreement. Pursuant to its terms, the Services Agreement expired at the end of June, although INTESA continued to perform services to PDVSA during the negotiation period.⁴ The Services Agreement was essential to INTESA's continuity, and its termination effectively ended the viability of the joint venture. On June 28, 2002, PDVSA sent SAIC a letter demanding termination of the Services Agreement as of June 30, 2002, conclusion of the share transfer process before December 30, 2002, and continued provision of IT services on an interim basis.⁵ OPIC understands that negotiations between the Insured and PDVSA regarding INTESA took place during the Summer and Fall of 2002. On October 18, 2002, PDVSA sent the Insured a letter containing an ultimatum under which, if the Insured failed to accept a "final" price offer within seven days, PDVSA threatened that:

³ See 14 Octane Week, *New Regime Takes Over Venezuela's Oil Industry; Pledges Cuts*, Feb. 8, 1999; Patrick Crow, *PDVSA Worries*, Oil & Gas J. June 7, 1999, at 30; Latin Am. Energy Alert, *PDVSA Brought to Heel as Work on New Constitution Starts* (Aug. 5, 1999) (noting the appointment of two military officers, Gen. Alfredo Caneiro and Gen. Oswaldo Contreras, along with a close friend, Hector Ciavaldini); Adam Easton & Starr Spencer, *Chávez Names Army Officer to Run PDVSA*, 78 Platt's Oilgram News 5 (Oct. 17, 2000) (noting appointment of General Guaicaipuro Lameda as President of PDVSA).

⁴ Under the Services Agreement the parties had agreed that during the period of disentanglement that (i) they would fully cooperate to facilitate a smooth transition of the terminated services from INTESA to PDVSA; (ii) INTESA would continue to provide services to PDVSA for up to six months; (iii) INTESA would deliver to PDVSA at its request all data of PDVSA and all documentation and data related to or used in the provision of the services to PDVSA; and (iv) INTESA would be obligated to transfer to PDVSA certain assets and properties in return for appropriate consideration. Adherence to these provisions of the Services Agreement, including the transfer of certain assets of properties, were required regardless of whether or not PDVSA planned to purchase SAIC's interest in the INTESA.

⁵ See Letter from Ivan Crespo, PDVSA, to Pablo Orsolani, INTESA (June 28, 2002).

“We will consider that the share valuing process specified in article 12.2 of (the “JVA”) has exhausted itself and that neither party is interested in purchasing or causing the other party to purchase the shares SAIC holds in INTESA; and

PDVSA has been given by law the faculty, right and responsibility to pursue, organize and plan its operations (declared of ‘Utilidad Publica’ and thus of concern to the ‘National Interest’) as per such policies and strategies as it or its Shareholder (i.e., the Venezuelan State) adopt in the protection or furtherance of that National Interest.”⁶

On November 20, 2002, the Insured informed OPIC of PDVSA’s threat of expropriation through an invocation of the “national interest.”⁷ Also in November 2002, Venezuelan labor unions began organizing for massive strikes to protest President Chavez’s rule. On November 29, 2002, PDVSA and INTESA agreed on a “Contingency Plan” to maintain critical services during the National Strike. On December 2, 2002, a general nationwide strike was declared in Venezuela to protest Hugo Chavez’s government. PDVSA employees declared their support of the strike on December 3, 2002. The extent of participation in the strike by INTESA employees remains unclear, although the strike severely hindered the ability of INTESA employees to fulfill their jobs. The strike negatively impacted Venezuela’s economy, in particular the oil and gas industry. On December 8, 2002, President Chavez issued an emergency decree to protect the national oil industry’s infrastructure and to maintain control and regular operations through the use of the National Armed Forces. On the same day, the Ministry of Energy and Mines issued a resolution enabling the Ministry to adopt adequate and necessary measures to guarantee the supply, transportation, distribution, commercialization, and retail sale of hydrocarbons and by-products. On December 11, 2002, Ali Rodriguez, President of PDVSA, ordered the deactivation of the remote access service at INTESA, which enabled INTESA employees to service client needs remotely. Mr. Rodriguez

⁶ Letter to Dr. J. Robert Beyster, SAIC from Oswaldo M. Contreras, PDVSA regarding Threat to Abandon Valuation Process (Oct. 18, 2002).

⁷ See Letter to Juan Carlos Rivera-Montes, Investment and Insurance Officer, Overseas Private Investment Corporation from Susan M. Frank, Deputy General Counsel, SAIC regarding Threat of Expropriation by Venezuelan Government-Owned Entity (Nov. 20, 2002).

ordered “we urgently require: (1) The deactivation of all RAS access codes to PDVSA....; (2) These codes are to be activated only after an authorization has been issued by me; (3) That the Application and Net Maintenance and Monitoring Services be guaranteed on site once the RAS access codes have been deactivated.”⁸

As the strike continued in December 2002, the National Armed Forces took over various PDVSA sites, including the premises leased from PDVSA by INTESA. Eventually, the National Armed Forces took over the majority of PDVSA’s facilities, from production to distribution. Approximately 18,000 of PDVSA’s work force of 33,000 either left the company or were dismissed for participating in the strike. President Chavez’s strategy during the strike in combating political opposition to his administration was to minimize the effects of the opposition by using the military to retake oil installations in hopes of reactivating the industry. To implement that strategy during the strike, the GOV declared *force majeure* under its oil contracts on December 5, 2002 and dismissed most of the PDVSA workforce. The Venezuelan military seized operations of INTESA and blocked employees’ access. At such time, talks between the Insured and PDVSA collapsed. The Venezuelan military effectively shut down PDVSA’s computer systems, and PDVSA operated manually until its computer systems were properly restored. President Chavez stated publicly in January of 2003, “INTESA executives didn’t want to cooperate...We’ll have to rescind the [INTESA] contract...We’re nationalizing the brains of our oil industry.” Other than their general declaration of support, however, INTESA denies that its employees participated in the strike.

On January 2, 2003, as massive demonstrations and disruptions continued, Pablo Orsolani, President of INTESA, met with PDVSA to discuss the access prohibitions imposed on INTESA and to request payment of November 2002 invoices submitted by INTESA.⁹ Also on that day, an INTESA Board Member informed PDVSA that INTESA would terminate services on January 22, 2003, in accordance with Section 2.04 of the Services Agreement, should PDVSA not pay for overdue invoices (in the approximate

⁸ Letter to Pablo Orsalini, President of INTESA, from Ali Rodriguez, President of PDVSA, December 11, 2002.

⁹ INTESA Summary of Events, p. 16.

amount of US\$12,000,000) for services provided in November 2002.¹⁰ PDVSA had accepted and validated these invoices prior to the start of the strike. On January 8, 2003, PDVSA required that INTESA surrender further access and administration codes, this time related to the operating system and data base levels regarding the “SAP” platform.¹¹ On January 12, 2003, INTESA employees (over 1,000) signed a resolution to cease providing PDVSA’s information technology services for many reasons, including the prohibitions on their access to PDVSA work sites, the disabling of INTESA’s remote access, the intimidation of INTESA employees by the Venezuelan military, and alleged illegal working conditions. On January 13, 2003, INTESA’s Board of Directors invoked *force majeure* under the Services Agreement as a result of their employees’ inability to continue providing services to PDVSA due to the reasons cited the day before in the INTESA employee resolution.¹²

On January 19, 2003, President Chavez announced in a television address that a group of approximately 100 INTESA employees under the leadership of INTESA’s Socorro Fernandez joined military personnel and engaged in a “high intelligence civil and military operation” to transfer INTESA’s operation back under the umbrella of PDVSA. By February 2003, it was clear that President Chavez’s presidency had survived the strike. It was soon thereafter PDVSA announced that it would take advantage of the walkout by employees to restructure itself, and President Chavez promised that private firms that supported the crippling two-month opposition strike would not be allowed to participate in the oil industry in the future. President Chavez pledged on national television: “We will never again hand over the brain center of the company [PDVSA] to transnational power.” INTESA was slated to be dissolved by the end of March, and negotiations between the Insured and PDVSA resumed. The Insured disclosed in its annual report that due to “an embargo and general work strike...and other reasons...” INTESA had suspended operations and would be classified as a discontinued operation. By June 2003, PDVSA had either internalized or outsourced all the responsibilities

¹⁰ Letter to Ali Rodriguez, PDVSA, from Joe Walkush, INTESA.

¹¹ Letter to Pablo Orsolani, INTESA, from Ali Rodriguez, PDVSA.

¹² Minutes of the Special Meeting of the Board of Directors of INTESA.

previously performed under the Services Agreement and had negotiated the debts of INTESA with its suppliers.

III. DETERMINATIONS UNDER THE OPIC CONTRACT

As a condition to receiving compensation for a loss covered by Section 4.01 of the OPIC Contract, the Insured must show that expropriatory acts attributable to GOV have directly deprived the Insured of fundamental rights in INTESA and have continued for at least six months. The Insured must also show that certain exclusions and limitations set forth in the OPIC Contract do not apply. OPIC has determined that the Insured has made the required demonstration and consequently is entitled to compensation under the OPIC Contract.

A. The actions taken by the government of Venezuela in relation to the Insured's investment in INTESA constitute total expropriation within the meaning of the OPIC Contract.

The Insured's claim satisfies each of the four requirements for a finding of "Total Expropriation" under Article 4 of the OPIC Contract.

1. The expropriatory acts are attributable to a foreign governing authority.

The first step in assessing the elements of an expropriation claim involves determining whether the alleged expropriatory acts are attributable to a foreign governing authority. Specifically, Article 4.01(a) of the OPIC Contract requires that the expropriatory acts be attributable to "foreign governing authority which is in de facto control of the part of the country in which the project is located." The Insured has provided evidence of several expropriatory acts that the GOV directly initiated in its sovereign capacity, and are therefore directly attributable to a foreign government authority, as required by Section 4.01(a) of the Insured's OPIC Contract. The acts listed include:

- The December 11, 2002 order from PDVSA, implementing a presidential emergency decree, that INTESA terminate its remote access capabilities;
- Numerous public statements by President Hugo Chavez specifically acknowledging the nationalization of INTESA by the GOV;¹³
- The seizure by Venezuelan National Guard troops and PDVSA security officers of INTESA assets, their harassment and intimidation of INTESA employees, and the denial of workplace access to INTESA employees, beginning in mid-December 2002;

The Insured has also provided evidence supporting the conclusion that the Venezuelan tax authority's assessment from December 12 and 20, 2003 of US\$40,000,000 in tax claims should be considered expropriatory. The nature of the tax allegations was questionable, and the GOV seized and denied access to INTESA's leased premises in the Pequiven Tower containing the information that INTESA needed to respond to the tax assessment. The timing and scope of the December 2003 tax assessment are indicative of an overall strategy on the part of the Chavez administration to frustrate the Insured's ability to properly carry out its duties with respect to INTESA, further President Chavez' stated goal of nationalizing INTESA, and create a pretext for denial of compensation owed to the Insured.

Based on the record supporting the Claim, OPIC agrees with the Insured's attribution of the expropriatory acts to the GOV. The GOV's responsibility for the acts listed above is described below.

a. The December 11, 2002 termination of INTESA's remote access capabilities is attributable to the GOV.

¹³ Translation of the transcripts of President Chavez's statements to be made available/attached as an exhibit.

As evidence of the GOV's responsibility for the termination of INTESA's remote access capabilities, the Insured has provided extensive correspondence related to the events of early December 2002, as well as statements by President Hugo Chavez describing his participation in the decision to terminate INTESA's remote access capabilities. OPIC agrees that the termination of remote access is attributable to the GOV under Article 4.01(a) of the OPIC Contract.

In three separate national addresses, President Chavez took direct responsibility for the termination of remote access, stating variously that "we are already disconnecting" INTESA's remote access; that "we have blocked [them] so they have no access from the outside, into the systems;" and that "people of INTESA... started to shut down the networks and the systems by remote control. We had to isolate [them]." On a more general level, President Chavez stated that "[d]uring those days in December, at the beginning of the terrorist sabotage, I devoted many days to work with the problem of PDVSA, directly with [PDVSA President] Ali Rodriguez and the Minister [of Mines and Energy] Rafael Ramirez." In sum, President Chavez' statements provide direct evidence of his role in making key PDVSA decisions and ordering the termination of INTESA's remote access capabilities.

OPIC's conclusion that the decision to terminate INTESA's remote access is attributable to the GOV under Article 4.01 of the OPIC Contract is based on public statements made by President Chavez on national television, which are consistent with actions taken, and statements made, by other high officials of the GOV and its instrumentalities.

b. The GOV was involved in harassment of INTESA employees, the exclusion of INTESA employees from their workplaces, and the seizures of INTESA assets and premises.

The Insured has provided extensive documentary evidence showing GOV involvement in seizures of INTESA assets and premises, as well as in the harassment of

INTESA employees by the Venezuelan military and barring them from their workplaces. These evidentiary sources include statements made contemporaneously by INTESA employees describing the role of National Guard representatives in detaining and intimidating INTESA employees, barring INTESA employees from their workplaces, and seizing INTESA vehicles and premises. The INTESA employee resolution signed on January 12, 2003 (referenced in Section II above), directly supports the argument that INTESA workers were unable to access their workplaces, and GOV forces harassed and intimidated them. The contemporaneous nature of these statements supports their reliability, as does the fact that their authors made such statements in spite of the risk of retaliation from GOV authorities.

Daily logs of work drafted by INTESA employees pursuant to the Contingency Plan and sent to PDVSA representatives also support the Insured's assertion that the GOV prevented INTESA employees from carrying out their duties. These logs provide detailed descriptions of the work conditions at all INTESA premises. These daily logs reflect the termination of remote access capabilities, blacklisting of INTESA employees, and the seizure of INTESA premises by National Guard troops.

Judicial inspections of PDVSA facilities at which INTESA had offices and assets provide particularly strong evidence. These judicial inspections, which judicial officers wrote, describe identical patterns of conduct by National Guard troops or PDVSA security personnel. National Guard troops or PDVSA security personnel refused INTESA representatives and judicial representatives access to the INTESA premises, stating specifically that they were under orders to deny access to INTESA employees. These evidentiary sources show that the GOV was actively involved in planning and implementing actions taken against INTESA and its employees.

c. President Chavez made public statements regarding the nationalization of INTESA.

President Chavez's nationalistic rhetoric regarding INTESA was aimed directly at foreign investors in Venezuela. The Insured has provided OPIC with excerpts from seven separate speeches by President Chavez in which he referred variously to the "take ... over," "nationalization," "Venezolaniz[ation]," and "recuperat[ion]" of INTESA assets and PDVSA's "brain." Additionally, the Insured provided OPIC with a video compilation of excerpts from President Chavez' speeches. These public statements by the Venezuelan head of state provide incontrovertible evidence that the actions carried out by agents of the GOV against INTESA's employees were deliberate, systematic, and at the direction of President Chavez.

2. The GOV's nationalization of INTESA is a violation of international law.

Section 4.01(b) (as amended by § 10.02) requires that the acts of expropriation violate international law without regard to the availability of local remedies.¹⁴ According to the Restatement (Third) of Foreign Relations Law of the United States (the "Restatement of the Foreign Relations Law"), a state is responsible under international law for injury resulting from:

- (1) a taking by the state of the property of a national of another state that
 - (b) is discriminatory, or
 - (c) is not accompanied by provision for just compensation;
- (2) other arbitrary or discriminatory acts or omissions by the state that impair property or other economic interests of a national of another state.

¹⁴ The GOV has complained that OPIC reached this determination without requiring SAIC to exhaust available remedies in Venezuela. See letter dated May 7, 2004 from Thomas B. Wilner, Shearman & Sterling LLP, to Mark A. Garfinkel, Vice President and General Counsel of OPIC. OPIC's handling of the SAIC claim in this respect is consistent with the standard contracts that OPIC has used for the past 30 years. See reply of Mark A. Garfinkel, dated May 24, 2004.

The U.S. government expropriation coverage issued by OPIC and predecessor agencies permits the insured to make its case to the insurer as to whether the investor has suffered an expropriation under international law without exhausting any other remedies that may be available against the foreign government, including local remedies. Upon expiration of a contractually provided waiting period, the insured has a claim for compensation from OPIC. See Proposed Insurance Contracts, 50 Fed. Reg. 20945, 20947 (1985).

OPIC finds that the GOV is responsible for injury sustained by the Insured. As discussed below, the standards contained in Sections 712(1) and (3) of the Restatement of the Law of Foreign Relations provide independent bases for finding that the Venezuelan Government's expropriation of the Insured's investment in INTESA violated international law.

a. The GOV actions constituted an uncompensated taking of the Insured's property.

Under Section 712(1) of the Restatement of the Law of Foreign Relations, a governmental taking of the property of a national of another State is deemed to violate international law if the taking is uncompensated or if it is discriminatory. In this case, not only was the GOV's taking of the Insured's property uncompensated, but there is also evidence that the taking was discriminatory. The issue of discrimination is discussed below at Section III.A.2.b.i.

The Draft Convention on the International Responsibility of States for Injuries to Aliens (1961) defines a taking of property as "unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner will not be able to use, enjoy, or dispose of the property within a reasonable time after the inception of such interference." This definition would encompass not only direct takings of tangible property, such as facilities and assets, but also unreasonable interference with various forms of property, including contractual rights or other benefits of an investment.

Based on the evidence it has reviewed, OPIC concludes that President Hugo Chavez, the National Guard, the PDVSA Presidency, and the Venezuelan tax authorities interfered unreasonably with the Insured's use, enjoyment, or disposal of its investment in INTESA. The termination of INTESA's remote access capabilities was the governmental action that most clearly meets the definition of an "unreasonable interference . . . as to justify an inference that the owner will not be able to use, enjoy or dispose of the property within a reasonable time after the inception of the interference."

By denying INTESA its remote access capabilities, the GOV denied INTESA the ability to perform the fundamental information-technology services required by PDVSA, which was INTESA's stated purpose under the JVA, and destroyed the value of INTESA's shares prior to the implementation of the JVA transfer and disentanglement provisions. The shutting down of remote access was of particular consequence (and debilitating to INTESA) during the December 2002 strike as during that time the break down of transportation infrastructure in Venezuela and Government intervention made it nearly impossible for any INTESA employees to reach their offices at PDVSA. Subsequent acts served to confirm the GOV's deprivation of the Insured's investment in INTESA. These subsequent acts included the denial of hundreds of INTESA employees' access to their workplaces, the intimidation and harassment of INTESA employees, the seizure of INTESA assets and premises, and the assessment of dubious tax claims worth U.S. US\$40,000,000.

In spite of its taking of the Insured's investment in INTESA, the GOV has not provided the Insured with just compensation, nor has it proposed in good faith a reasonable mechanism for compensating the Insured.¹⁵

b. The GOV actions constituted arbitrary or discriminatory acts that impaired the Insured's investment in INTESA.

Under Section 712(3) of the Restatement of the Law of Foreign Relations, a state is liable for injury to the national of another state if the state engages in "arbitrary or discriminatory acts or omissions ... that impair property or other economic interests of a national of another state."

¹⁵ "Just compensation" is an amount equal to the value of the property paid at the time of taking, or within a reasonable time thereafter with interest from the date of taking. See Restatement (Third) of the Foreign Relations Law of the United States ("Restatement") § 712 (2002).

i. The GOV's expropriation of INTESA was discriminatory.

Paragraph (f) of the Restatement of Foreign Relations Law clarifies that “[a] program of taking that singles out aliens generally, or aliens of a particular nationality, or particular aliens, would violate international law.”

The GOV's actions satisfy the standards of Section 712(3) of the Restatement of the Law of Foreign Relations. President Chavez' explanations of the GOV's expropriation made clear the discriminatory nature of the expropriation of INTESA by emphasizing the Insured's United States nationality and by alleging that the creation of INTESA represented a “transfer ... [of] the control of strategic areas to enemies of the homeland,” and a “grant ... to the CIA [of] all of the information technology operations of PDVSA.” President Chavez also explained the expropriation of INTESA in light of an alleged “conspiracy against Venezuela, that comes from Washington, that is financed by Washington, that is promoted by Washington.” Statements by the Venezuelan Minister of Mines and Energy justifying the expropriation of INTESA based on alleged espionage also confirm the discriminatory nature of the GOV's actions.

ii. The GOV's expropriation of INTESA was arbitrary.

The GOV's control of PDVSA actions also resulted in arbitrary treatment of INTESA throughout December 2002 and January 2003. Even after PDVSA specifically required INTESA to provide remote access servicing of PDVSA's IT functions during the national strike, the President of PDVSA ordered INTESA to terminate the very remote access codes that were necessary to continue operations. Furthermore, even after the President of PDVSA demanded that INTESA provide service at PDVSA's various locations, PDVSA security personnel and National Guard troops then acted to frustrate INTESA's ability to comply with that demand by systematically barring INTESA employees from their workplaces at those locations.

As required under Restatement § 712(3), the Insured's investment in INTESA was “impaired” by the GOV's discriminatory acts, as explained in Sections III.A.2.b.

iii. The national strike does not justify the GOV's actions.

President Chavez and other high officials of the GOV have sought to justify their expropriation of INTESA in light of the national strike that was occurring during late 2002 and early 2003. These officials have also made serious allegations of sabotage and espionage by INTESA employees.

Turning to the GOV's allegations of sabotage, OPIC concludes there is no evidence to support these allegations of sabotage. The record in this case is voluminous, comprising hundreds of pages of letters and e-mail exchanges between and among INTESA and PDVSA personnel, as well as technical support logs and daily reports made in December 2002 and January 2003 by INTESA personnel. These materials also reflect good relations between INTESA employees and PDVSA's own IT managers, as evidenced -- for example -- in the statement of PDVSA manager Marco Mogrovejo that, "I would like to emphasize that we have always had the support of INTESA's technical personnel." There is also evidence that INTESA's President provided PDVSA's President with technical data specifically refuting the allegations of sabotage, and requested -- without success -- explanations for the actions ordered by the PDVSA Presidency.

OPIC also finds that Venezuela's own actions in December 2002 do not support its allegations of sabotage by INTESA. PDVSA insisted repeatedly that INTESA provide full services despite PDVSA's non-payment of invoices and PDVSA's interference with INTESA's operations, including its denial of INTESA's remote access capabilities. OPIC considers that PDVSA's repeated demands that INTESA continue to maintain PDVSA's IT services -- demands that INTESA appears to have endeavored to satisfy -- are at odds with the GOV's claims of sabotage.

The extensive record in this case contains no information that might serve to substantiate Venezuela's claims that INTESA sabotaged PDVSA's operations or served as a vehicle for espionage by the CIA or any other U.S. intelligence agency.

3. The GOV's actions directly deprived the insured of fundamental rights in the insured investment.

Section 4.01(c) of the OPIC Contract requires that the act of expropriation "directly deprive the Insured of fundamental rights in the insured investment." According to the OPIC Contract, rights are "fundamental" if without them the Insured is substantially deprived of the benefits of the investment.

The Iran-US Claims Tribunal has commented on the meaning of a "deprivation of fundamental rights in an investment," stating that:

A deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected. . . . [A] conclusion that the property has been taken by the government, thus requiring compensation under international law... is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. The intent of the government is less important than the effects of the measures on the owner, and the form of the measure of control or interference is less important than the reality of their impact.¹⁶

According to the JVA, the purpose of INTESA is: (1) to perform IT services required by PDVSA pursuant to the Services Agreement, and (2) to provide services to other businesses and agencies in Venezuela and Latin America in the future. The Insured

¹⁶ See Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, AWD 141-7-2 (June 29, 1984), reprinted in 6 Iran-U.S. Cl. Trib. Rep. 219.

had a fundamental interest in effectuating INTESA's purpose. The Insured also has a fundamental right to earnings generated by INTESA. Moreover, under the JVA share transfer provisions, the Insured had a fundamental right to fair compensation under Section 12.2 of the JVA. The GOV's actions deprived the Insured of its fundamental interest in effectuating the purpose of INTESA, its right to earnings generated by INTESA, and its right -- in light of PDVSA's decision to terminate INTESA -- to compensation under the JVA share transfer provisions. Specifically, by terminating INTESA's remote access capabilities and thereby depriving INTESA of its ability to provide IT services to PDVSA, the GOV denied the Insured its fundamental interest in effectuating INTESA's purpose and fundamentally undermined INTESA's value and the value of the Insured's shares in INTESA.

The GOV's actions taken subsequent to the termination of remote access capabilities accelerated the Insured's loss of its contractual rights under the JVA to effectuate the JVA's purpose and receive payment for the full value of its shares. By harassing INTESA employees, by blacklisting and barring INTESA employees from their workplaces, by changing locks and by seizing INTESA assets and premises, the GOV destroyed the value of INTESA and the Insured's interest therein, in addition to the Insured's right to be compensated for its INTESA shares. The GOV further undermined these same interests when it levied almost U.S. US\$40,000,000 in questionable tax claims against INTESA and then seized the very records INTESA needed to defend itself against these claims, thereby imposing on INTESA contingent liabilities that could result in a complete forfeiture of its investment.

The GOV's actions not only destroyed INTESA's ability to function as an ongoing concern but also prevented the Insured from exercising its rights under the JVA. The GOV's actions therefore meet the requirements of Section 4.01(c) of the OPIC Contract.

4. The GOV's actions have not been remedied and the expropriatory effect has lasted over six months.

Section 4.01(d) of the OPIC Contract requires that “the violations of law are not remedied (§ 9.01.9) and the expropriatory effect continues for six months.” In order to resolve whether the GOV's actions satisfy this standard, it is necessary to determine the date on which the expropriatory effect commenced.

The date on which the expropriatory effect began is December 11, 2002, the date on which President Rodriguez ordered the termination of INTESA's remote access functions. Without remote access servicing capabilities, capabilities which PDVSA managers described as “necessary to continue operations” and a “fundamental element to guarantee the minimum level of service,” INTESA was no longer able to function as a viable, ongoing IT support company. In view of the refusal of the PDVSA Presidency to permit reactivation of remote access codes, there was no reasonable prospect of a restoration of INTESA's operational capacity after that date. Furthermore, Venezuelan President Chavez has publicly announced that the termination of remote access capabilities was the seminal event in the “nationalization” and “venezolanization” of INTESA.

To date, the GOV's expropriatory acts against the Insured have not been remedied. The GOV and PDVSA have refused to pay the Insured for its shares in INTESA and to cooperate with the Insured's attempts to mitigate damages by, for example, putting INTESA into bankruptcy as required by Venezuelan law. The GOV's actions have destroyed the value of the Insured's interest in INTESA.

B. No exclusions or limitations apply to the Insured's claim.

The OPIC Contract exclusions do not apply to the Insured's claim. Section 4.03(a) provides that compensation is not payable in instances of “provocation” by the investor. Section 4.03(b) as amended by Section 10.03, provides that compensation is

not payable in instances in which the expropriatory action is taken by a foreign governing authority in a commercial capacity, except to the extent that the action “could not have been justified under the terms of any contractual arrangement.”

1. Article 4.03(a) Analysis

As regards Section 4.03(a), the record does not support the inference that the “preponderant cause [of the expropriation] is unreasonable action attributable to the Insured, including corrupt practices.” During negotiations with the Insured and INTESA in 2002, PDVSA negotiators alleged that the prior President of PDVSA and the PDVSA Board of Directors did not select the Insured pursuant to a transparent and open bidding process. The Insured has provided evidence refuting this allegation, including documents issued by Luis Giusti, who was President of PDVSA at the time of the Insured’s selection, as well as an affidavit from former PDVSA Vice President Luis Pacheco. Indeed, subsequent statements by President Chavez and the Venezuelan Minister of Mines and Energy lend support to the view that the allegations in the Comptroller’s report were fabricated in order to provide a pretext for the termination of the Services Agreement and the JVA. Both President Chavez and Minister Ramirez confirmed an explanation provided by PDVSA negotiator Luis Pacheco that the termination of the Services Agreement and the JVA were motivated by alleged ties among the Insured, INTESA and the CIA, not by alleged improprieties in PDVSA’s selection of the Insured as a joint venture partner.

Furthermore, as discussed above at Section III.A.2.b.iii, the record does not support the conclusion that INTESA engaged in sabotage, as alleged by President Chavez and other GOV officials.

2. Article 4.03(b) and 10.03 Analysis

OPIC concludes that there is sufficient evidence of GOV involvement to conclude that the expropriatory acts were attributable to the GOV under OPIC Contract Article 4.01. This conclusion is supported by President Chavez’s public acceptance of

responsibility for the termination of INTESA's remote access capabilities, the barring of INTESA employees from their workplaces, the harassment and intimidation of INTESA employees, the seizure of INTESA assets and premises, and evidence of involvement by National Guard troops. The direct evidence of a governmental plan to expropriate INTESA, including through acts initially ordered by PDVSA President Ali Rodriguez, renders the exclusion under Article 4.03(b) (as amended by Article 10.03) inapplicable.

Article 4.03(b), as amended by Article 10.03, provides certain limitations on the types of actions that may be attributed to foreign governing authorities. Together, Articles 4.03(b) and 10.03 state that:

No compensation for expropriation shall be payable if:

the actions of a supplier, creditor, lessor, shareholder, director, or manager of, or purchaser from, the foreign enterprise... are attributable to the foreign governing authority, whether by virtue of the foreign governing authority's ownership interest in, control over or other relationship with such supplier, creditor, etc., or otherwise (such supplier, creditor, etc., hereinafter a 'government-related entity'), and the expropriatory act or series of acts involves action or inaction by such government-related entity, unless, in the case of total expropriation satisfying the requirements of §4.01 and subject to the exclusions of §4.03 and limitations of §5.04, The Insured has demonstrated to OPIC's satisfaction that such action or inaction could not have been justified under the terms of any underlying commercial arrangement...

The Insured has demonstrated to OPIC's satisfaction that such action or inaction could not have been justified under the terms of any underlying commercial arrangement.

Under the facts of the Claim, this provision applies to PDVSA, which was the Insured's joint venture partner, owning 40 percent of INTESA's shares. PDVSA was also INTESA's primary customer, providing 95 percent of INTESA's revenues, as well as a supplier to INTESA of certain telephone and utility services necessary to INTESA's

performance under the Services Agreement. Together, OPIC Contract Articles 4.03 and 10.03 indicate that the mere fact of the GOV's ownership and control of PDVSA does not render PDVSA's actions attributable to the GOV. However, if the Insured demonstrates to OPIC's satisfaction that PDVSA's actions could not be justified under the terms of any underlying commercial arrangement, then these actions may be attributable to the GOV.

OPIC concludes that the December 11, 2002 termination may be attributed to the GOV because this order "could not have been justified under the terms of any underlying commercial arrangement" within the meaning of Article 10.03. As reflected in written statements by both INTESA and PDVSA managers, the termination of remote access could not have been commercially justified because it ran counter to commercial arrangements negotiated by PDVSA and fundamentally undercut PDVSA's ability to function. Evidence that the order to terminate remote access actually harmed PDVSA's commercial interests supports a conclusion that the order to terminate remote access was non-commercial in nature.

In late November 2002, PDVSA had negotiated a Contingency Plan with INTESA that explicitly required INTESA to continue to maintain critical services to PDVSA through use of remote access capabilities. Accordingly, Dr. Rodriguez' sudden repudiation of this key term of the Contingency Plan without consultation with either PDVSA or INTESA IT managers elicited an alarmed response from these managers. The most telling evidence of the non-commercial nature of Dr. Rodriguez' order is the opposition that it generated among PDVSA managers. For example, correspondence from PDVSA IT Manager Carlos Martinez to PDVSA President Rodriguez underscores the negative impact of Dr. Rodriguez' directives on PDVSA's own ability to function. In an e-mail to PDVSA and INTESA employees dated December 12, 2002, Mr. Martinez emphasized that remote access had been deactivated pursuant to Dr. Rodriguez' instructions and stated his intention to reverse that decision in light of the "negative impact on the business and INTESA's capability of keeping the computing platform working without this access." He asked employees to provide examples of specific cases that demonstrated the operational problems caused by the termination so that he could

present those examples to Dr. Rodriguez in an effort to reverse his December 11 order.¹⁷ In other e-mails, Mr. Martinez of PDVSA emphasized “the negative implications of this measure as it will be of great impact on the operational continuity of all applications” and the “negative impact on the business and INTESA's capability of keeping the computing platform working without this access.” Similarly, PDVSA’s SAP Application Manager, Marco Mogrovejo stated: “[T]he Remote Access Service (RAS) is a fundamental element to guarantee the minimum level of service,” and “not having remote access has deteriorated to a great extent the quality of the contingency service that had been provided to date.”

Dr. Rodriguez’s order was absolute and irrevocable. Dr. Rodriguez insisted on an absolute ban on all remote access codes used for the PDVSA system and rebuffed PDVSA IT management and INTESA requests to permit remote access to a small group of pre-approved INTESA employees. The correspondence on this topic reflects the urgency with which both INTESA and PDVSA managers regarded this request. All attempts to restore remote access were ultimately unsuccessful because Dr. Rodriguez further ordered the disconnection of the 800 number phone lines that supported the RAS system. Dr. Rodriguez’ refusal to permit any and all remote access – even for a limited group of INTESA employees – seriously harmed PDVSA because it deprived PDVSA of INTESA’s services. This decision caused significant harm to PDVSA and INTESA and destroyed INTESA’s functional capacity. While the order to terminate remote access cannot be justified under any commercial arrangement between INTESA and PDVSA, it could be explained if the purpose were to destroy any and all commercial arrangements between the two entities.

For the foregoing reasons, Dr. Rodriguez’ order to terminate remote access would fall within the exception allowing compensation for acts by state-owned entities that are, *inter alia*, purchasers, suppliers and/or shareholders, provided that such acts “could not

¹⁷ E-mail from Carlos Martinez Mavellan to PDVSA and INTESA IT employees (December 12, 2002, 9:51 a.m.).

have been justified under the terms of any underlying commercial arrangement” within the meaning of Article 10.03.

3. Article 5.04 Analysis

Section 5.04 of the OPIC Contract identifies three limitations on compensation. First, the Insured may not request compensation that exceeds the active amount of its coverage on the date the expropriatory effect commenced. The Insured has met this requirement. Second, the Insured’s compensation is limited if INTESA was insolvent on the date the expropriatory effect commenced. INTESA was not insolvent on December 11, 2002, which is the date the expropriatory effect commenced. Finally, the Insured may not receive more than 90 percent of its claimed compensation. Again, the Insured’s application reflects this limitation.

C. The Insured has complied with its duties under the OPIC Contract.

As required under Articles IX and X of the OPIC Contract, the Insured has complied with its duties and obligations under the OPIC Contract. The Insured’s duties have been satisfied as follows:

- Ownership and Eligibility (§ 9.01(2), as amended by § 10.05): The Insured has at all times remained the beneficial owner of the insured investment through SAIC (Bermuda), Ltd. and the beneficial owner of more than 50% of the total interest in INTESA. The Insured’s ownership interest in shares by class has varied over time and the Insured has not always had at least 50% of each class of stock due. However, the Insured has retained the degree of beneficial interest in INTESA required by the OPIC Contract. In addition, the Insured has met the U.S. citizenship provision of § 9.01(2)(a) (as amended). The Insured is a U.S. corporation.
- Self-Insurance (§ 9.01(3)): The Insured continues to bear the risk of loss of at least 10% of the book value of its investment in INTESA.

- Assignment (§ 9.01(4)): The Insured has not assigned its OPIC Contract, or any of its rights.
- Premiums (§ 9.01(5)): The Insured has paid all OPIC insurance premiums in a full and timely manner. At the time when the Venezuelan Government expropriated the Insured's investment (*i.e.*, mid-December 2002 through January 2003), the Insured maintained coverage in the active amount of up to US\$15,000,000, effective through March 29, 2003. The Insured subsequently renewed this level of coverage through September 29, 2003.
- Accounting Records (§ 9.01(6)): The record shows that the Insured has maintained accounting records in the manner required by OPIC. As required, all financial statements have been prepared in U.S. dollars in accordance with generally accepted accounting principles in the United States, including principles of currency conversion.
- Reports and Access to Information (§ 9.01(7)): The Insured has furnished all information requested by OPIC. In particular, the Insured has submitted responses to OPIC's Self-Monitoring Questionnaire, which the Insured provided annually.
- Compulsory Notice (§ 9.01(8)): The Insured has provided OPIC with notice of all developments that could potentially give rise to a claim under the OPIC Contract. In November 2002, the Insured informed OPIC in writing of a letter from General Oswaldo Contreras invoking PDVSA's right to take actions against INTESA "in the national interest," which raised the possibility of a governmental expropriation of the Insured's interest in INTESA. The Insured and OPIC engaged in telephone consultations between December 2002 and May 2003.

- Preservation, Transfer and Continuing Cooperation (§ 9.01(9)): The record shows that the Insured has complied with its obligation to take reasonable measures to preserve its property. The Insured invested significant resources in negotiating a renewal of the Services Agreement and thereafter negotiating a transfer of its shares. Prior to and during the national strikes, even while working to ensure that INTESA met PDVSA's requirements, the Insured executives expressed concerns to the PDVSA Presidency and other top management officials regarding PDVSA's failure to pay INTESA invoices and the actions taken by the Presidency that deprived INTESA of its operational capacity. When the Venezuelan military began seizing INTESA assets and blocking INTESA employees from their workplaces, the Insured had INTESA obtain judicial inspections in an effort to create a record of its remaining assets. PDVSA opted to proceed through court actions rather than the JVA or Services Agreement dispute resolution procedures. PDVSA repudiated contractual dispute resolution procedures by bringing judicial actions, including lawsuits that sought to force INTESA to transfer assets to PDVSA -- many of which had already been seized by the GOV and PDVSA. Many of these lawsuits remain pending in Venezuela. The Insured has helped fund and direct INTESA's responses to legal actions by PDVSA that would harm INTESA's interests.
- Other Agreements (§ 9.01(10)): The Insured has not entered into any agreement with any foreign governing authority with respect to compensation for any acts within the scope of the Insured's OPIC Contract.
- Modification of Project Agreements (§ 9.01(11), as amended by § 10.04): The Insured has not agreed to materially modify any of the project agreements that fall under the purview of the OPIC Contract.
- Worker Rights (§ 9.01(12), as amended by § 10.04): The Insured has not taken any actions that prevented the employees of INTESA from exercising their right

of free association and their right to bargain collectively. The Insured has also not violated any labor law identified under § 9.01(12) of the OPIC Contract.

- Intermediate Subsidiary (§ 10.07): The Insured has warranted that the SAIC (Bermuda), Ltd. was established for the sole purpose of undertaking the project and that it has remained so limited throughout the period of the OPIC Contract.
- Free Transfer of Interest (§ 10.10): No liens or encumbrances prevent the transfer of the Insured's interest in INTESA. INTESA's shareholder information appears in the company's official shareholder registry, which properly reflects its current shareholder ownership. In light of the expropriatory acts taken by the GOV, it is possible that PDVSA shareholders will seek to block transfer of the Insured's shares. Attempts by PDVSA to frustrate the operation of Article 8.02 and 10.10 would not affect OPIC's determination in this case.
- Spanish Language JVA (§ 10.11, as amended): The Insured attached to the Claim a copy of the Spanish-language version of the JVA with PDVSA. Although the Insured has not complied with this provision of the OPIC Contract, this factor is not material and does not affect OPIC's determination.

IV. CONCLUSION

For the foregoing reasons, OPIC concludes that the Claim is valid. The amount of compensation for the Claim will be determined separately.

OVERSEAS PRIVATE INVESTMENT CORPORATION



By: _____
Peter Watson
President and Chief Executive Officer
July 12, 2004