

**INTERNATIONAL CENTRE FOR SETTLEMENT OF
INVESTMENT DISPUTES**

ITALBA CORPORATION,

Claimant,

v.

THE ORIENTAL REPUBLIC OF URUGUAY,

Respondent.

ICSID Case No. ARB/16/9

CLAIMANT'S REPLY MEMORIAL

May 12, 2017

HUGHES HUBBARD & REED LLP

One Battery Park Plaza
New York, NY 10004
United States of America

FERRERE ABOGADOS

Juncal 1392
Montevideo, C.P. 11000
Uruguay

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I. INTRODUCTION

1. Italba Corporation (*Italba*), a company incorporated under the laws of the State of Florida in the United States of America (the *U.S.*), submits this Reply Memorial (*Reply*) in further support of its right to full reparation from the Oriental Republic of Uruguay (*Uruguay*) based upon Uruguay's breach of the Treaty Concerning The Encouragement And Reciprocal Protection of Investment Between Uruguay and the United States (the *Treaty*).¹ In its Memorial, Italba demonstrated that Uruguay unlawfully expropriated Italba's investment through its non-compliance with and frustration of a final judgment (the *TCA Judgment*) of its own highest administrative court (the Tribunal de lo Contencioso Administrativo (*TCA*)) that reinstated the wrongly revoked telecommunications licenses of Italba's Uruguayan subsidiary, Trigosul S.A. (*Trigosul*).²

2. Italba also demonstrated that Uruguay, through the conduct of its telecommunications regulator, the Unidad Reguladora de Servicios de Comunicaciones (*URSEC*),³ breached the Treaty's guarantees of fair and equitable treatment, non-discrimination, and full protection and security because: (a) over the course of seven years, URSEC repeatedly failed to issue Trigosul a license conforming to regulations promulgated in March 2003, as

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1. Treaty Between the United States of America and The Oriental Republic of Uruguay Concerning the Encouragement And Reciprocal Protection of Investment (signed on Nov. 4, 2005; entered into force on Nov. 1, 2006) (*Treaty*) (C-001). Italba's Reply is submitted pursuant to the Tribunal's Procedural Order No. 1, as amended by the Tribunal's letter of April 28, 2017, and pursuant to Rule 31 of the International Centre for Settlement of Investment Disputes Rules of Procedure for Arbitration Proceedings (*ICSID Arbitration Rules*), and responds to the Counter-Memorial of the Oriental Republic of Uruguay (Jan. 30, 2017) (*Counter-Memorial*). It is accompanied by documentary exhibits C-001 through C-275 and legal authorities CL-001 through CL-155, the statements by seven fact witnesses (including supplemental witness statements from Dr. Gustavo Alberelli and Mr. Luis Herbon), and four new expert reports, respectively addressing: (a) the handwriting on the Data Transmission and Equipment Loan Agreement (Dec. 2010) (C-057); (b) the authenticity of certain emails produced by Italba; (c) technical telecommunications issues; and (d) relevant points of Uruguayan corporate law, as well as a supplemental report on quantum by Compass Lexecon (*Second Dellepiane Report*). In accordance with Procedural Order No. 1 (¶ 18.5.2), dated July 29, 2016, all of Italba's Exhibits and Legal Authorities are numbered using the format provided therein (e.g., C-001 and CL- 001, respectively).
 2. Claimant's Memorial (Sept. 16, 2016) (*Memorial*) ¶¶ 177-80.
 3. *Id.* ¶¶ 114-15, 122-50, 167-75.

mandated by Uruguayan law, despite having provided Italba repeated assurances that a license would soon be forthcoming,⁴ and even while the agency responded to similar requests from many of Trigosl's and Italba's domestic and foreign competitors;⁵ and (b) in January 2011, URSEC summarily revoked Trigosl's license to operate on its allocated frequencies, claiming that Trigosl's offices in Montevideo had been abandoned, even though Trigosl had properly notified URSEC of a change of address months earlier.⁶ Finally, Italba has established that its damages, based upon the value of the investment expropriated in 2015 and business opportunities crushed by Uruguay's prior unlawful conduct, amount to USD \$61.1 million (including pre-award interest based on the cost of capital), as calculated in the supplemental valuation report submitted with this Reply.⁷

3. In response, Uruguay has accused Italba of attempting to perpetrate a fraud on this Tribunal and swindle the State out of tens of millions of dollars through a criminal enterprise based on forgeries and lies.

4. *First*, Uruguay argues that Italba has misrepresented itself as the owner of Trigosl because, at Trigosl's inception, Dr. Gustavo Alberelli (the President and Chief Executive Officer of Italba) and his mother were listed as the company's co-owners.⁸ In the event that Italba does own Trigosl, Uruguay claims to be entitled to deny Italba protection under the Treaty on the theory that Dr. Alberelli, an Italian citizen, controls Italba, and Italba is a shell company with no business of its own.⁹

4. *Id.* ¶¶ 30-34, 52.

5. *Id.* ¶¶ 155-66.

6. *Id.* ¶¶ 53-54, 63-67.

7. *Id.* ¶¶ 176, 212; Second Dellepiane Report Table 1.

8. *See* Counter-Memorial ¶ 56.

9. *Id.* ¶¶ 62, 69-83.

5. *Second*, Uruguay argues that Italba’s claims are time-barred because URSEC terminated Trigosl’s license in 2011, more than four years before a notice of dispute was sent in this case, and because URSEC’s subsequent refusal to implement the TCA Judgment annulling its termination of the license was merely a continuation of Uruguay’s prior conduct.¹⁰

6. *Third*, Uruguay denies Italba’s allegations on the merits, arguing: (a) Uruguay did not expropriate the license because it fully complied with the TCA Judgment; (b) even if it did not comply with the TCA Judgment, there can be no expropriation because the license was precarious in nature and terminable at will without compensation, and therefore worthless; (c) Trigosl deserved to be terminated in the first place because it failed to exploit the license; and (d) Trigosl’s complaints about URSEC’s failure to issue a conforming license are unfounded because no such conforming license was necessary under Uruguayan law.¹¹

7. *Finally*, on damages, Uruguay repeats its argument that Trigosl’s license was worthless and also argues that Italba’s claim for lost business opportunities prior to the termination of Trigosl’s license is built on foregeries and lies.¹²

8. This Reply will demonstrate that Uruguay’s Counter-Memorial is long on invective but short on facts and logic. On jurisdiction, the shares initially issued to Dr. Alberelli and his mother were transferred to Italba long before this dispute arose, a fact that Uruguay has known for more than 15 years. Uruguay’s claim that it is entitled to deny Italba the benefits of the Treaty also must fail because: (a) Italba is not owned or controlled by a non-U.S. national—it was co-owned by an Italian citizen and a U.S. citizen, with neither owner possessing a controlling stake; and (b) the evidence shows that Italba was anything but a shell corporation: its

10. *Id.* ¶¶ 84-123.

11. *Id.* ¶¶ 269-86, 207-10, 248-52, 256, 262, 211-32, 237-38, 175-76, 143-68.

12. *Id.* ¶¶ 296-99, 378-96.

co-owners resided in Florida and conducted numerous business transactions with companies in the United States and world-wide from their home.

9. Uruguay's defense based on the statute of limitations defies logic: the termination of Trigosul's license in 2011 was followed by three years of litigation in the Uruguayan courts. The outcome of that litigation was a determination by the TCA on October 23, 2014 that URSEC's termination ruling should be annulled—as if it had never occurred.¹³ It was Uruguay's failure to implement its own court's final judgment—and, indeed, Uruguay's active frustration of that judgment, discovered in 2015—that permanently destroyed Italba's legally valid investment and thereby engaged Uruguay's state responsibility under the Treaty within the statute of limitations.¹⁴

10. The remainder of Italba's claims are similarly unaffected by Uruguay's statute of limitations argument because, at the time of the underlying breaches, Uruguay actively concealed its unlawful and discriminatory animus. As a result, it was impossible for Italba, at that time, to know with sufficient certainty that Uruguay's conduct was the result of Treaty breaches, as opposed to mere bureaucratic ineptitude. It bears emphasizing that although the value of Italba's investment was concentrated in Trigosul's license, Italba did not respond to URSEC's initial termination of the license with a Treaty claim. To the contrary, Italba afforded the Uruguayan courts with an opportunity to correct the mistakes that URSEC refused to acknowledge. Sadly, Italba's faith in Uruguayan justice was not rewarded. However, Uruguay's self-serving argument that Italba should have run to ICSID at the first sign of a dispute or risk being tossed out on statute of limitations grounds would be both wrong and a terrible precedent in the field of investment treaty arbitration, which more properly serves as a last resort for investors, like Italba,

13. Memorial ¶¶ 6, 76, 100, 181.

14. *Id.* ¶¶ 74-76, 99-103; *see infra* Section III.C.1.

who cannot obtain justice from a host State.

11. On the merits, Uruguay's arguments are mutually contradictory and, therefore, must fail as well. The sole basis of Uruguay's argument that it complied with the TCA Judgment is that, after Italba filed its Request for Arbitration and more than 18 months had passed since the TCA Judgment, Uruguay offered Trigosul dubious rights in alternative frequencies of limited value. The timing and nature of Uruguay's purported attempt to comply with the TCA Judgment are, in fact, the best evidence of the underlying breach: In March 2015, Trigosul and Italba discovered that the reason for URSEC's failure to implement the TCA Judgment was that URSEC had given Trigosul's allocated frequencies away to a competitor.¹⁵ URSEC had done so, moreover, while Trigosul's challenge to URSEC's revocation of its license was still pending before the TCA, and without notice to Trigosul or the TCA.¹⁶ By prejudging the TCA's decision in this way, URSEC deliberately placed itself in a situation from which compliance with an adverse TCA Judgment would be effectively impossible under Uruguayan law.¹⁷ After the TCA Judgment, URSEC took no responsibility for its secret re-allocation of Trigosul's frequencies: Italba and Trigosul discovered URSEC's double-booking of Trigosul's frequencies only through their own independent investigation.¹⁸

12. Uruguay's argument that Trigosul's license was worthless because of its precarious nature is equally illogical. Besides the fact that it is unsupportable under Uruguayan law, the argument also makes no sense: if the license was so easily dismissed without compensation, why wasn't that defense raised during the TCA proceedings? Uruguay's attempt

15. *Id.* ¶¶ 79, 101, 103, 108, 112, 115.

16. *Id.* ¶¶ 7, 101, 115.

17. *Id.* ¶ 130; *see infra* Sections IV.A.2(a), IV.A.3, IV.B.2, IV.C.4(a), (c).

18. Memorial ¶ 79; Witness Statement of Gustavo Alberelli (Sept. 16, 2016) (*First Alberelli Witness Stmt.*) ¶ 88; Witness Statement of Luis Herbon (Sept. 16, 2016) (*First Herbon Witness Stmt.*) ¶ 49.

to relitigate the TCA proceeding proves too much as well. Uruguay already had the opportunity to defend the notion that Trigosul deserved to have its license revoked before its own courts. It failed to do so.

13. Uruguay's defenses on damages equally must fail: (a) Uruguay's claims that Trigosul's license to operate (over frequencies well-suited for cutting edge mobile broadband data transmission) was worthless does not withstand scrutiny; while (b) Uruguay's claim that Italba's lost business opportunity damages are built on lies and forgeries is belied by the record before the Tribunal—the emails, contracts, and letters before the Tribunal show that Italba worked tirelessly to commercialize its investment and found numerous opportunities that, but for Uruguay's unlawful conduct, would have yielded substantial benefits to Italba and Uruguayan consumers.

14. These matters will be discussed in greater detail below. However, the following points, relating in particular to the allegation that either Dr. Alberelli or Mr. Herbon forged the contract with Dr. Fernando Garcia, merit brief discussion here:

- a. No one has come forward with any evidence that either Dr. Alberelli or Mr. Herbon forged the signature on the contract—it is true that Dr. Garcia now says that the signature on the contract is not his own—but he offers no other relevant testimony. Moreover, as a handwriting expert has noted, the signature on the contract is an undistinguished mark that anyone could have made.
- b. Dr. Alberelli and Mr. Herbon categorically deny the allegation that they forged anything.
- c. At the same time, the contemporaneous emails produced by Italba show Dr. Alberelli repeatedly asking his friend and colleague, Dr. Daniel Tellez—someone Dr. Garcia initially testified he did not know and then later admitted to knowing, though he presently denies knowing Dr. Alberelli—whether Dr. Garcia had signed the contract. Why would he ask such questions if he was actually forging the contract at that very moment?
- d. These same emails contain communications between Dr. Alberelli, Dr. Tellez, and/or persons in Dr. Garcia's employ who provide information needed for the preparation of the contract. At no point does anyone say to Dr. Alberelli, "Who are you?"

- e. Finally, the timing of Uruguay’s allegations is highly suspect: (i) they have only been made now, in the context of the ICSID arbitration, even though the allegedly forged documents have been in Uruguay’s possession since at least 2012; and (ii) the criminal investigation began at the instigation and supervision of the Secretary to the President of Uruguay, Dr. Miguel Angel Toma, who has been intimately involved in Uruguay’s defense in these proceedings. In short, Uruguay’s criminal “investigation” has all of the earmarks of a politically motivated “witch hunt” intended to distract from, confuse, and impede the proceedings at hand in the hopes of allowing the State to escape accountability for the breach of its Treaty obligations to Italba and its shameful treatment of Trigosl.

15. Uruguay’s motives for its unlawful treatment of Italba’s investment are not fully transparent and may never be. There is nevertheless good reason to conclude that Uruguay’s animus towards Trigosl—and resulting breaches of its Treaty obligations to Italba—arose from a mix of official venality and institutional protection for Uruguay’s powerful state-owned telecommunications company, Antel.¹⁹

16. Trigosl’s problems may have started in July 2006, when Dr. Alberelli refused a request from an URSEC Director, Alicia Fernandez, to provide a bribe of USD \$25,000 to “expedite” the issuance to Trigosl of a conforming license.²⁰ At subsequent meetings with URSEC regulators, Italba representatives were given to understand that, following Ms. Fernandez’s failed bribe attempt, Trigosl’s application for a conforming license had been “put in the freezer.”²¹

17. The resulting difficulties were likely compounded by the government’s determination to protect Antel’s domination of the Uruguayan telecommunications sector from foreign competition.

18. Observers have noted Antel’s unique status as the “crown jewel” of Uruguayan

19. Memorial ¶¶ 10, 38-40.

20. See Memorial ¶ 35; First Alberelli Witness Stmt. ¶ 39; First Herbon Witness Stmt. ¶ 22.

21. Second Statement of Gustavo Alberelli (May 12, 2017) (*Second Alberelli Witness Stmt.*) ¶ 34.

state capitalism, as well as its considerable political influence and value as a source of political patronage.²² In that context, it bears observing that in late 2006 and early 2007, Antel made repeated efforts to obtain control over Trigosul’s frequencies.²³ In meetings with Italba and Trigosul, Antel representatives coupled an unrealistically low offer for Trigosul’s rights with a threat, pointedly noting that Antel had asked URSEC to reallocate Trigosul’s frequencies to its control.²⁴ Indeed, in late December 2006, URSEC announced plans to put the frequencies Antel sought—including those licensed to Trigosul for its use—up for auction.²⁵ Shortly thereafter, Antel formally demanded that Trigosul be required simply to return its frequencies to URSEC.²⁶ Although URSEC did not follow through with this specific plan, Antel’s demands closely foreshadow URSEC’s later action to revoke Trigosul’s license.

19. It would be a mistake to underestimate Antel’s political clout. URSEC’s 2009 cancellation of another foreign investor’s Direct-to-Home (*DTH*) satellite broadcast license, for example, has been widely ascribed to Antel’s influence.²⁷ In another example, a Uruguayan senator admitted that, in order to create a “de facto” monopoly for Antel, URSEC deliberately

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22. Walter T. Molano, *The Logic of Privatization: The Case of Telecommunications in the Southern Cone of Latin America* (Greenwood Press 1997) (C-154), at 75; see also *id.* at 76 (explaining how attempts to privatize ANTEL failed because “the Uruguayan political system . . . allowed both political parties to appoint members and staff to the state-owned companies . . . ensur[ing] the sharing of power and distribution of economic rents between the two most powerful groups in the country.”).
 23. Memorial ¶¶ 38-40.
 24. *Id.*; First Alberelli Witness Stmt. ¶¶ 40-43; First Herbon Witness Stmt. ¶23.
 25. See Decree No. 249/006 (Dec. 27, 2006) (C-024), at 2-3, 5-7, 9-10; see also Memorial ¶ 40; First Alberelli Witness Stmt. ¶ 42.
 26. See *Respuesta de la Administracion Nacional de Telecomunicaciones a Consulta Publica Sobre “Procedimiento Competitivo para Asignar Espectro Radioelectrico en la Banda de 3.300 a 3.700 MHz”* (Mar. 8, 2007) (C-025), at 5-6.
 27. Juan Pedro Tomas, *Govt limits triple play to national firms, cancels Telmex satellite TV license* (Feb. 20, 2009) (C-045); see *Telmex Acusa A Uruguay De Violar TLC Con Mexico* (Mar. 15, 2009) (C-046); Jonathan Marie, *Uruguay Might Give Telmex Its DTH License Back* (Dec. 17, 2009) (C-047). Telmex challenged the revocation of its license before Uruguay’s highest administrative court, which ultimately nullified the revocation and ordered URSEC to return Telmex’s license. Jonathan Marie, *Uruguay Returns DTH License To Telmex* (Feb. 6, 2013) (C-048).

ignored, for more than a decade, cable operators' requests for fiber optic licenses.²⁸ And the former President of Uruguay, José Mujica, publicly stated that the actions Uruguay has taken to defend Antel's monopoly have created legal issues for the country with respect to its obligations under international treaties.²⁹

20. The character of the Uruguayan government's relationship to Antel is also demonstrated by public reports concerning the government's reaction to a different telecommunications dispute. In 2015, Uruguay enacted a new media law that prohibited any company other than Antel from providing "triple play" services, despite the warnings of commentators that such a law unconstitutionally favored a monopoly.³⁰ After several telecommunications companies brought a challenge, Uruguay's Supreme Court struck down the provision barring competition with Antel in the "triple play" market.³¹ But Uruguay's Minister of Industry, herself *a former President of Antel*, publicly dismissed the Supreme Court's ruling, declared that "Uruguay already has Internet," and suggested that the Court's decision was unworthy of the Government's attention.³²

21. Given the power within Uruguay of the economic and political interests involved, it may be unsurprising that the discriminatory animus and bad faith treatment that Italba faced as

28. El País, *Pit-Cnt en "alerta" por "nuestra" Antel* (Aug. 31, 2016) (C-155).

29. El Observador, *Gobierno protege a Antel y le da Monopolio de Fibra óptica* (May 14, 2012) (C-156) ("Si yo me atengo a la lealtad de competencia internacional, el espacio de las telecomunicaciones uruguayas termina en dos o tres empresas transnacionales. Pero si me pongo a obstruirles el paso le creo un problema jurídico al país.") ("If I stick to the principle of international competition, Uruguayan telecommunications would end up with two or three transnational companies. But if I try to obstruct the development [of those companies], I create a legal problem for my country.")

30. See Uruguay Law No. 19,307 (Jan. 14, 2015) (C-085), Art. 56; see also El Observador, *Corte abre camino para que los cables puedan ofrecer Internet* (Aug. 12, 2016) (C-086); El País, *Canales podrán enviar datos por web* (Aug. 13, 2016) (C-087); see generally Molano, *supra* at n.22.

31. See *Judgment of Supreme Court of Uruguay No. 240* (Aug. 8, 2016) (C-088), at 2; see also El Observador, *Corte abre camino para que los cables puedan ofrecer Internet* (Aug. 12, 2016) (C-086); El País, *Canales podrán enviar datos por web* (Aug. 13, 2016) (C-087).

32. See *Tendencia de operadores de cable y empresas de telecomunicaciones a brindar servicios cruzados se está "imponiendo" en Uruguay* (Aug. 24, 2016) (C-089).

an investor has continued into this arbitration.

22. This is, as noted, most clearly demonstrated by the highly irregular conduct of Dr. Toma, the Secretary to the President of Uruguay, a high-ranking official whose office directly oversees regulation of the telecommunications sector in Uruguay.³³ That Dr. Toma should be engaged with an international telecommunications dispute involving Uruguay is, of course, unsurprising. But that so high-ranking an official as Dr. Toma should directly solicit—and chill—testimony from potential witnesses in this dispute should give the Tribunal serious misgivings.³⁴ Here, however, the Tribunal should also consider that it was none other than Dr. Toma who filed the October 19, 2016 complaint that launched a groundless criminal investigation of Italba’s key witnesses, Dr. Alberelli and Mr. Luis Herbon, in Italba’s claim against Uruguay.³⁵ The Tribunal’s view of these criminal proceedings should be further informed by the fact that Mr. Herbon has also been denied the opportunity to examine the witnesses against him.³⁶

23. It is unfortunate that the Uruguayan government’s treatment of Italba in an international arbitration proceeding to which it consented should so starkly undercut Uruguay’s reputation as a transparent destination for foreign investment.³⁷ Ultimately, however,

33. See, e.g., *Sitios Oficiales del Gobierno, Oficinas de la Presidencia de la República (C-157)*.

34. See, e.g., Alberelli Witness Statement accompanying Italba’s Reply in Further Support of Provisional Measures (Nov. 24, 2016), ¶¶ 4-5 (“One witness that I contacted informed me that he had received a phone call from Dr. Miguel Angel Toma, the Secretary of the Presidency of Uruguay. In that phone call Dr. Toma had asked the witness whether he was considering testifying on behalf of Italba in this arbitration and indicated that it would be in the witness’s best interest if he did not assist Italba in any way.”); see also *infra* at ¶ 53(e), (g), (m).

35. See Counter-Memorial ¶ 383; see *infra* at ¶ 53(e), (g).

36. Second Statement of Luis Herbon (May 12, 2017) (*Second Herbon Witness Stmt.*) ¶ 28 n.45.

37. Respected NGO Transparency International assesses perceptions of corruption in Uruguay as generally quite low. That said, Transparency International’s most recent report on Uruguay warns that “[t]here are a few areas, given the potential rents they offer, that could be considered as offering opportunities for corruption or abuses and that could benefit from the implementation of further transparency and accountability measures. These include, for example, the management of the country’s state-owned enterprises and the allocation of

international law holds states accountable for their conduct in particular cases.

24. In this case, Uruguay's conduct was in breach of numerous provisions of the Treaty. In **Part II** of this Reply, Italba reviews the facts that are undisputed and at issue between the parties. In **Part III**, Italba refutes Uruguay's attacks on the Tribunal's jurisdiction, confirming both the Tribunal's authority to hear Italba's claims and that those claims are timely. In **Part IV**, Italba refutes Uruguay's defenses on the merits, while demonstrating that Uruguay's treatment of Italba's investment in Trigosul was in breach of its Treaty obligations (a) not to expropriate Italba's investment except in accordance with Article 6; (b) to accord Italba's investment fair and equitable treatment; (c) to treat Italba no less favorably than it treats other domestic and foreign investors; and (d) to provide Italba with full protection and security. Finally, in **Part V**, Italba refutes Uruguay's arguments as to the standard of compensation and valuation methodology to be applied in redressing Uruguay's Treaty breaches and demonstrates how the "full reparation" standard of customary international law yields compensation in the amount of USD \$61.1 million, calculated as of April 30, 2017, plus further pre-award and post-award interest at a semi-annual compounded rate of 8.77%, as detailed in Mr. Dellepiane's second Report.

II. FACTS

A. Uncontested Facts

25. In Italba's Memorial, the following facts were proven and, following the submission of Uruguay's Counter-Memorial, remain either uncontroverted or incontrovertible:

a. Italba is a United States company that was incorporated under the laws of

public jobs." Maita Martini & Marie Chene, *Uruguay: Overview of Corruption and Anti-Corruption*, Transparency International (Mar. 28, 2016) (C-158), at 3. The Transparency International Report specifically identifies "state monopolies in a number of areas, including water and sanitation [and] telecommunications" as "areas offering opportunities for corruption." *See id.* at 4; Molano, *supra* at n.22.

the State of Florida in May 1982.³⁸

- b. Gustavo Alberelli, Italba's President, owns 50 percent of the shares in Italba. His wife, Beatriz Alberelli, the company's Secretary, owns the remaining 50 percent. Dr. Alberelli is an Italian national and permanent resident of the United States since August 1, 1977. Ms. Alberelli is a U.S citizen.³⁹
- c. On January 17, 1997 and August 4, 1997, the Uruguay Ministry of Defense (*UMDN*) issued Dr. Alberelli a license to provide point-to-point and multi-point wireless data transmission services in Uruguay at frequencies of 1865-1870, 1895-1900, 1945-1950, and 1975-1980 MHz (the *PCS Spectrum*).⁴⁰
- d. In July 1999, Italba finalized a joint venture agreement with the U.S.-based telecommunications company Worldstar Communications Corporation (*Worldstar*) to provide voice, data, and video services, including Voice over Internet Protocol (*VoIP*), in Uruguay.⁴¹
- e. On the basis of that agreement, Italba purchased for Trigosul \$700,000 worth of equipment that was compatible with the PCS Spectrum.⁴²
- f. On February 8, 2000, UMDN approved the transfer of Dr. Alberelli's

38. Memorial ¶ 12.

39. *Id.*; Counter-Memorial ¶¶ 81-82.

40. Memorial ¶ 16; Counter-Memorial ¶ 138.

41. Memorial ¶ 19; Joint Venture Agreement for Telecommunications Project in Uruguay (July 1999) (**C-007**); Shareholders' Agreement between Italba, Worldstar, and Villaclara S.A. (Oct. 1998) (**C-008**).

42. Memorial ¶ 19; Wavelynx Shipment Invoice No. 5925 (Feb. 18, 2000) (**C-009**); Quotation No. 2501 from Wavelynx International, Inc. (Jan. 11, 2000) (**C-159**), at 2; Seller's Agreement between Italba Corporation and Wavelynx International, Inc. (Feb. 27, 2000) (**C-160**), at 3.

license to Trigosul, a Uruguayan company.⁴³

- g. On October 3, 2000, the President of Uruguay issued a decree reserving the 1700-2200 MHz frequency band (other than 1910-1930 MHz) for the development of a type of wireless technology known as Personal Communication Services.⁴⁴ Pursuant to that decree, the Uruguay National Communications Authority (*UNCA*) revoked Trigosul's rights to the PCS Spectrum and granted it a license to operate in the 3425-3450 and 3525-3550 MHz frequency band (the *Spectrum*).⁴⁵
- h. The new Spectrum was not compatible with the services that Italba had agreed to provide to Worldstar or the equipment that Italba had purchased for the PCS Spectrum.⁴⁶ Italba therefore lost both the Worldstar opportunity and the value of the equipment it purchased.⁴⁷
- i. On February 21, 2001, the Uruguayan executive branch enacted Ley 17.296, which created URSEC as a public agency charged with regulating telecommunications in Uruguay.⁴⁸
- j. In June 2001, Italba submitted to the U.S. Embassy in Uruguay an advocacy questionnaire form that identified Italba as the owner of

43. Memorial ¶ 16; Counter-Memorial ¶ 138; UMDN Resolution No. 142/000 (Feb. 8, 2000) (C-005).

44. Memorial ¶ 20; Counter-Memorial ¶ 139; Decree No. 282/000 (Oct. 3, 2000) (C-010), at 3-4.

45. Memorial ¶ 20; Counter-Memorial ¶ 139; UNCA Resolution No. 278/000 (Oct. 4, 2000) (C-011), at 9-10; UNCA Resolution No. 444/000 (Dec. 12, 2000) (C-012), at 2.

46. Memorial ¶ 20.

47. *Id.*

48. *Id.* ¶ 21; Uruguay Law No. 17,296 (Feb. 21, 2001) (C-013), at Art. 70.

Trigosul.⁴⁹

- k. In early 2002, Italba began negotiating the terms of a potential joint venture with Eastern Pacific Trust (*EPIC*), a U.S.-based investment trust. In February 2002, the parties signed a letter of intent.⁵⁰ That letter set forth that Italba would contribute Trigosul’s license to the joint venture, and EPIC would provide up to USD \$1 million in tiered venture capital.⁵¹
- l. In June 2002, Italba and EPIC entered into a joint venture agreement, in which the parties agreed to form a new company in Florida to invest in Trigosul and Italba agreed to contribute Trigosul’s license in Uruguay.⁵²
- m. During standard due diligence following the execution of the joint venture agreement, EPIC’s counsel advised EPIC that Uruguay was contemplating new telecommunications licensing regulations that would amend the categories of telecommunications licenses and require URSEC to conform all existing licenses—like the one held by Trigosul—to the new licensing regime.⁵³
- n. EPIC advised Italba that it could not move forward with the joint venture project unless and until URSEC issued to Trigosul a license that conformed to the new regulations.⁵⁴ For example, on January 8, 2003 letter, EPIC wrote: “[O]ur investment group cannot move forward with

49. Advocacy Questionnaire Submitted By Trigosul to the U.S. Embassy in Uruguay (June 11, 2001) (C-102) (listing Trigosul as 100% owned by Italba).

50. Memorial ¶ 22.

51. Letter from S. Rossi to A. Jansenson & G. Alberelli (Feb. 3, 2002) (C-014), at 1.

52. Co-Investment Agreement Among Eastern Pacific Trust and Italba Corporation (June 14, 2002) (C-015), at § 1.03.

53. Memorial ¶ 23.

54. *Id.* ¶ 24.

concluding our agreements with Trigosul until we receive the certified copy of the actual License to be issued by URSEC.”⁵⁵

- o. On March 25, 2003, Uruguay enacted new telecommunications licensing regulations that amended the categories of telecommunications licenses (the *2003 License Regulations*).⁵⁶ Article 38 of those regulations stated: “La Unidad Reguladora de Servicios de Comunicaciones dictará las normas para la regularización de las autorizaciones y permisos otorgados con anterioridad a la vigencia del nuevo régimen que por este Reglamento se aprueben.”⁵⁷
- p. After the 2003 License Regulations were enacted, Trigosul’s Director, Luis Herbon, began visiting URSEC’s offices in person every few days to inquire about the status of Trigosul’s conforming license.⁵⁸ As time passed and URSEC did not issue the conforming license, Dr. Alberelli began calling URSEC nearly every day to communicate Trigosul’s urgent need for a conforming license and inquire as to when it would be issued.⁵⁹ Dr. Alberelli and Mr. Herbon also arranged meetings with URSEC’s Secretary General, Dr. Elena Grauert, regarding the conforming license.⁶⁰
- q. During these calls and meetings, no URSEC official ever communicated

55. Letter from A. Cherp to A. Jansenson, G. Alberelli and L. Herbon (Jan. 8, 2003) (C-016).

56. Memorial ¶ 25; Counter-Memorial ¶ 140; *Reglamento De Administracion Y Control Del Espectro Radioelectrico* (Mar. 25, 2003); Decree No. 114/000 (Mar. 25, 2003); Decree No. 115/003 (Mar. 25, 2003) (C-017).

57. *Id.* at 18 (Art. 38), 32 (Art. 38) (“[URSEC] will dictate regulations for the regularization of authorizations and permits granted before the new system approved through this Regulation became effective.”).

58. Memorial ¶ 27; Counter-Memorial ¶¶ 96, 160.

59. *Id.*

60. Memorial ¶ 27; Witness Statement of Elena Grauert (Dec. 30, 2016) (*Grauert Witness Stmt.*) ¶ 5.

to either Dr. Alberelli or Mr. Herbon that, in URSEC’s view, Trigosul did not need a conforming license.⁶¹

- r. On April 10, 2003, EPIC wrote in a letter to Italba: “[W]e have not received the certified copy of your new telecommunication license granted by URSEC of Uruguay. . . . [W]e are not able to go to the next step without this document and accordingly we will lose the potential funding for your Telecommunication project.”⁶²
- s. Italba and Trigosul continued to pursue a conforming license. No one from URSEC ever advised Trigosul or Italba that a conforming license was not necessary or available.⁶³
- t. On May 12, 2003, EPIC terminated the joint venture because of URSEC’s failure to issue a conforming license to Trigosul, writing in a letter to Italba: “[W]e have not received the certified copy of your new telecommunication license granted by URSEC of Uruguay. This license is the cornerstone of our proposed agreements and in that we have not received the required License documentation, it is with regret that I must inform you that we cannot proceed as outlined in the Eastern Pacific Trust proposal.”⁶⁴
- u. In early 2004, Dr. Alberelli and Mr. Herbon met with the then-President of

61. See Grauert Witness Stmt. ¶¶ 5-6; Witness Statement of Juan Piaggio (Dec. 23, 2016) (*Piaggio Witness Stmt.*) ¶ 5; Witness Statement of Dr. Fernando Pérez Tabó (*Perez Tabo Witness Stmt.*) ¶¶ 3-4; see also Counter-Memorial ¶¶ 168, 181.

62. Letter from A. Cherp to A. Jansenson, G. Alberelli & L. Herbon (Apr. 10, 2003) (C-018).

63. See Perez Tabo Witness Stmt. ¶¶ 3-4; Grauert Witness Stmt. ¶ 5; Piaggio Witness Stmt. ¶ 4.

64. Letter from A. Cherp to A. Jansenson, G. Alberelli, & L. Herbon (May 12, 2003) (C-019).

URSEC, Dr. Fernando Perez Tabo, concerning its conforming license.⁶⁵

At that meeting, Dr. Perez Tabo never communicated to Dr. Alberelli or Mr. Herbon that, in URSEC's view, Trigosul did not need a conforming license or that a conforming license would never be issued.⁶⁶

- v. During a meeting in 2005, URSEC's General Manager, Juan Piaggio, suggested that Trigosul put its request for a conforming license in writing.⁶⁷ Mr. Piaggio never communicated to Trigosul that, in URSEC's view, Trigosul did not need a conforming license or that a conforming license would never be issued.⁶⁸
- w. On July 6, 2005, at Mr. Piaggio's request, Trigosul sent a letter to URSEC to make a formal request for a license conforming to the 2003 License Regulations:⁶⁹ "Nos dirigimos a [ustedes] a efectos de solicitarle la adecuación de la licencia de transmisión de datos de TRIGOSUL S.A., a los términos de lo dispuesto por la ley Nro. 17296 de 21 de Febrero de 2001 y los Decretos 114/03 y 115/03 ambos el 25 de Marzo de 2003. Vuestra autorización así como la asignación de frecuencias son anteriores a las normas precitadas."⁷⁰

65. Memorial ¶ 30; First Alberelli Witness Stmt. ¶ 33; First Herbon Witness Stmt. ¶ 17; Perez Tabo Witness Stmt. ¶¶ 3-4; Grauert Witness Stmt. ¶ 5.

66. Perez Tabo Witness Stmt. ¶¶ 3-4.

67. Memorial ¶ 31; Piaggio Witness Stmt. ¶ 4.

68. Piaggio Witness Stmt. ¶ 4.

69. Memorial ¶ 31; Piaggio Witness Stmt. ¶ 5; Letter from L. Herbon to J. Piaggio (July 6, 2005) (C-020).

70. Letter from L. Herbon to J. Piaggio (July 6, 2005) (C-020) ("We are writing to request that you adjust Trigosul SA's data transmission license in accordance with the provisions set forth in Law No. 17296 dated February 21, 2001 and in Decrees 114/03 and 115/03 dated March 25, 2003. Your authorization and allocation of frequencies predate the aforementioned provisions.").

- x. URSEC did not respond to that letter.⁷¹
- y. On August 15, 2005, Mr. Herbon sent another letter to URSEC in which Trigosul reiterated its request for a conforming license.⁷²
- z. URSEC did not respond to that letter.⁷³
- aa. On January 26, 2006, Trigosul sent another letter to URSEC, again reiterating its entitlement to a conforming license and informing URSEC that, as a result of URSEC's delay in issuing that license, Trigosul was in danger of losing a \$6.5 million investment: "Ahora la adecuación de la licencia nos tiene demorada otra inversión esta vez por US \$6,500,000, y los inversionistas han estudiado el tema legal y nos lo exigen como condición para continuar con el proyecto. Lo que sucede ahora es que la demora está preocupando a los inversionistas que nos han puesto una fecha tope, y si no se consigue la adecuación los fondos serán invertidos en otro emprendimiento."⁷⁴
- bb. URSEC did not respond to that letter.⁷⁵

71. Memorial ¶ 31.

72. *Id.* ¶ 32; Piaggio Witness Stmt. ¶ 6; Letter from L. Herbon to J. Piaggio (Aug. 15, 2005) (C-021) ("Simultáneamente, nos gustaría nos informara acerca de una gestión iniciada tiempo atrás, por carta de 6 de Julio de 2005 para la adecuación de la adjudicación de frecuencia de TRIGOSUL, S.A. de acuerdo a lo dispuesto por la ley No. 17.296 del 21 de Febrero de 2001 y los Decretos 114/03 115/03 ambos del 25 de Marzo de 2003.") ("At the same time, we would appreciate it if you could inform us about the procedure initiated some time ago, by letter dated July 6, 2005, for the adjustment of the allocation of frequencies to TRIGOSUL, S.A., in accordance with the provisions of Act No. 17.296 of February 21, 2001 and the Decrees 114/03 115/03 both dated March 25, 2003.").

73. Memorial ¶ 32.

74. *Id.* ¶ 33; Letter from L. Herbon to R. Martinez (Jan. 26, 2006) (C-022) ("Now the adjustment of the license has delayed another investment, this time worth USD \$6,500,000, and the investors, having examined the legal issue, demand [the adjustment of the license] as a requirement to continue with the project. What happens now is that the delay is a concern for the investors who have imposed a deadline, and if the adjustment does not occur, the funds will be invested in another venture.").

75. Memorial ¶ 33.

- cc. On March 23, 2006, Mr. Herbon sent another letter reminding URSEC that Trigosul would lose the investment if URSEC did not act as required by the 2003 License Regulations before March 31, 2006.⁷⁶
- dd. URSEC did not respond to that letter.⁷⁷
- ee. On December 27, 2006, URSEC announced plans to hold an auction in March 2007 for the frequencies in the 3300-3700 MHz bandwidth, which included Trigosul's Spectrum.⁷⁸ Antel subsequently submitted a statement to URSEC indicating its desire that all current owners of frequencies in the 3300-3700 MHz bandwidth return their frequencies to URSEC.⁷⁹
- ff. On February 14, 2007, Italba and Phinder Technologies, Inc. (**Phinder**), a Canadian telecommunications company, executed a joint venture term sheet concerning the provision of Internet, VoIP, and other services in Latin America. In that term sheet, Phinder agreed to contribute its VoIP network and infrastructure to the joint venture, together with USD \$300,000 in initial cash funding for the purchase of equipment and USD \$100,000 to obtain licenses in Panama, and Italba agreed to contribute the non-exclusive use of its telecommunications licenses in target countries, including Trigosul's license in Uruguay.⁸⁰

76. *Id.* ¶ 34; First Alberelli Witness Stmt. ¶ 38; First Herbon Witness Stmt. ¶ 21; Letter from L. Herbon to L. Lev (Mar. 23, 2006) (C-023); Counter-Memorial ¶ 374 n.709.

77. Memorial ¶ 34.

78. *Id.* ¶ 40; Decree No. 249/006 (Dec. 27, 2006) (C-024), at 2-3, 5-7, 9-10.

79. Memorial ¶ 40; Respuesta de la Administracion Nacional de Telecomunicaciones a Consulta Publica Sobre "Procedimiento Competitivo para Asignar Espectro Radioelectrico en la Banda de 3.300 a 3.700 MHz" (Mar. 8, 2007) (C-025), at 5-6.

80. Memorial ¶ 44; Joint Venture Terms Sheet Between Phinder Technologies Inc. and Italba Corporation (Feb. 2007) (C-030).

- gg. Pursuant to that agreement, on March 8, 2007, the parties formed Zupintra Panama, S.A. (*Zupintra*), a joint venture company in Panama that was owned 51% by Phinder and 49% by Italba.⁸¹ On March 19, 2007, the parties issued press releases announcing that Zupintra would be developing next generation telecommunications opportunities in Latin America and the Caribbean.⁸²
- hh. By June 2007, Zupintra had completed initial construction on its Latin American telecommunications network, linked the Argentinian and Uruguayan Internet backbone, and conducted connection tests on that backbone.⁸³
- ii. By the time Italba's joint venture with Phinder was poised to move forward into the commercial phase, URSEC still had not issued a conforming license to Trigosl, responded to any of Trigosl's written requests for a conforming license, or advised Trigosl that a conforming license was not necessary and would not be issued.⁸⁴
- jj. Around the same time that Italba was working on the Phinder joint venture, Trigosl was also negotiating a potential joint venture with Telmex Uruguay, the Uruguayan branch of Mexican telecommunications

81. Memorial ¶¶ 43, 46; Zupintra Certificate of Incorporation (Mar. 8, 2007) (C-032).

82. Zupintra Communications Inc. forms Joint Venture with Italba Corporation (Mar. 19, 2007) (C-033); Juan Pedro Tomás, *Zupintra, Italba create telecoms JV* (Mar. 19, 2007) (C-034); *Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of the Company* (Mar. 21, 2007) (C-035).

83. First Alberelli Witness Stmt. ¶ 51; Juan Pedro Tomás, *Zupintra Panama completes first phase of LatAm network* (May 8, 2007) (C-036); Emails from R. Miranda to A. Goldstein et al. (May 04, 2007) (C-037); Email from G. Alberelli to M. Kisiel et al. (May 08, 2007) (C-038); Email from C. Hall to G. Alberelli (June 12, 2007) (C-039); Email from M. Kisiel to C. Hall et al. (May 10, 2007) (C-040).

84. Memorial ¶ 47.

giant Telmex.⁸⁵

- kk. On June 21, 2007, the parties executed a Confidentiality Agreement to facilitate the sharing of information during their negotiations. The Confidentiality Agreement identified Trigosul's license as the subject of the parties' negotiations.⁸⁶
- ll. On February 17, 2009, the President of Uruguay signed Executive Order IE 810, which amended the descriptions of the four categories of licenses in the 2003 License Regulations.⁸⁷ URSEC still did not take any action on Trigosul's request for a conforming license.⁸⁸
- mm. In 2010, Trigosul relocated from Montevideo to Punta del Este.⁸⁹
- nn. On July 30, 2010, Trigosul formally notified URSEC that it had relocated to Punta del Este and indicated that it was ready for URSEC to inspect its equipment and approve it to begin operations in the region.⁹⁰
- oo. In late 2010, Trigosul began negotiating a potential business relationship with Canal 7, a television channel in the Maldonado region of Uruguay.⁹¹
- pp. Following these negotiations, Canal 7 authorized Trigosul to install test node and radio equipment in Canal 7's tower.⁹²

85. *Id.* ¶ 48.

86. *Id.*; Confidentiality Agreement between Telmex and Trigosul S.A. (June 21, 2007) (C-042).

87. Memorial ¶ 50.

88. *Id.*

89. *Id.* ¶ 53.

90. *Id.*; First Alberelli Witness Stmt. ¶ 62; First Herbon Witness Stmt. ¶ 32; Letter from L. Herbon to G. Lombide (Jan. 12, 2011) (*Jan. 12, 2011 Letter*) (attaching Letter from L. Herbon to URSEC (July 30, 2010)) (C-026), at 6.

91. Memorial ¶ 57.

92. *Id.*; Letter from D. Bobre to M. Toma (Nov. 9, 2016) (R-72).

- qq. In November and December 2010, Trigosl's contractor, Service e Instalaciones S.A. (*SEI*), installed test nodes and radio equipment in Canal 7's tower and ran tests of that equipment.⁹³
- rr. On December 28, 2010, URSEC's General Counsel issued a memorandum recommending the revocation of Trigosl's license to provide wireless data services in Uruguay.⁹⁴ The memorandum set forth two bases for this recommendation: *First*, the memorandum alleged that Trigosl was no longer operating and had therefore failed to comply with its obligation to provide data services in Uruguay.⁹⁵ The basis for that allegation was a failed inspection that URSEC conducted at Trigosl's former address in Montevideo, rather than its new address in Punta del Este.⁹⁶ *Second*, the memorandum alleged that Trigosl had not paid the required fees for its use of the Spectrum.⁹⁷
- ss. On January 12, 2011, Mr. Herbon sent a letter to the President of URSEC, Gabriel Lombide, asserting that Trigosl had notified URSEC of its move to Punta del Este in July 2010, was providing services in that region, and was up-to-date on its payments to URSEC.⁹⁸
- tt. On January 19, 2011, URSEC issued a report (the *URSEC Report*) that

93. See Memorial ¶ 58; Letter from D. Bobre to M. Toma (Nov. 9, 2016) (**R-72**); see also Trigosl-SEI Written Agreement (Aug. 18, 2010) (**C-058**); Letter from L. Herbon to SEI (Sept. 17, 2010) (**C-059**); Letter from L. Herbon to Canal 7 (Oct. 6, 2010) (**C-060**).

94. Memorial ¶ 63; URSEC Memorandum (Dec. 28, 2010) (*URSEC Memorandum*) (**C-066**); Counter-Memorial ¶ 213.

95. Memorial ¶ 64; URSEC Memorandum (**C-066**), at 2; Counter-Memorial ¶ 213.

96. Memorial ¶ 64; URSEC Memorandum (**C-066**), at 2; Counter-Memorial ¶¶ 240-241.

97. Memorial ¶ 64; Counter-Memorial ¶ 228.

98. Memorial ¶ 65; Jan. 12, 2011 Letter (**C-026**).

did not address the substance of Mr. Herbon's letter and instead asserted, without further explanation, that Trigosul had failed to provide a reason that URSEC should not revoke its license.⁹⁹

- uu. The URSEC Report added a third alleged basis for the recommendation to revoke Trigosul's license, namely that Trigosul had allowed SEI to operate in the Spectrum without URSEC's authorization.¹⁰⁰
- vv. The URSEC Report recommended that: (a) URSEC release the frequencies that had been allocated to Trigosul; and (b) the executive branch revoke Trigosul's license to provide wireless data services in Uruguay.¹⁰¹
- ww. On January 20, 2011, URSEC entered Resolution No. 001/011, revoking Trigosul's right to operate in the Spectrum.¹⁰²
- xx. On March 1, 2011, Trigosul formally appealed that resolution.¹⁰³
- yy. URSEC did not respond to Trigosul's request for an appeal hearing.¹⁰⁴
- zz. After Trigosul lodged its appeal of URSEC's revocation of its license, Dr. Alberelli contacted the U.S. Embassy in Uruguay for assistance in

99. Memorial ¶ 66; URSEC Report (Jan. 19, 2011) (C-067), at 2.

100. Memorial ¶ 66; URSEC Report (Jan. 19, 2011) (C-067), at 1-2; Jan. 12, 2011 Letter (attaching Letter from A. Amaro to URSEC (Oct. 6, 2010)) (C-026), at 8. After Trigosul moved to Punta del Este, Trigosul engaged SEI to install two test nodes (*i.e.*, data connection points) in the Spectrum, and on October 6, 2010, SEI notified URSEC of the installation and noted that Trigosul's equipment was ready for inspection. *See* Memorial ¶ 54.

101. Memorial ¶ 66; URSEC Report (Jan. 19, 2011) (C-067), at 2.

102. Memorial ¶ 67; URSEC Resolution No. 001/011 (Jan. 20, 2011) (C-068), at 3; Counter-Memorial ¶¶ 25, 104.

103. Memorial ¶ 68; First Alberelli Witness Stmt. ¶ 76-77; First Herbon Witness Stmt. ¶ 39; Letter from A. Duran Martinez to G. Lombide (Mar. 1, 2011) (C-069); Counter-Memorial ¶ 105 n.133.

104. Memorial ¶ 69.

mediating Italba's dispute with URSEC.¹⁰⁵

- aaa. On April 14, 2011, a meeting between Italba representatives and URSEC officials, organized by the U.S. Embassy, took place in Montevideo in an effort to resolve the parties' dispute.¹⁰⁶
- bbb. On July 8, 2011, Uruguay's Ministry of Industry, Energy, and Mining (*MIEM*) revoked Trigosul's license to provide wireless data services in Uruguay. The MIEM resolution repeated the same arguments raised by URSEC as the basis for the termination without referencing or addressing the defenses Trigosul had raised.¹⁰⁷
- ccc. On August 23, 2011, another meeting between representatives of Italba and URSEC, organized by the U.S. Embassy, took place in Montevideo.¹⁰⁸
- ddd. On October 24, 2011 and March 22, 2012, Trigosul filed claims against URSEC and MIEM, respectively, in Uruguay's highest administrative court, the Tribunal de lo Contencioso Administrativo (*TCA*) seeking nullification of URSEC's January 20, 2011 resolution and MIEM's July 8, 2011 resolution revoking Trigosul's license.¹⁰⁹
- eee. On October 25, 2012, the TCA consolidated the two proceedings.¹¹⁰
- fff. On September 5, 2013, while the proceedings in the TCA had already

105. Memorial ¶ 71; First Alberelli Witness Stmt. ¶ 78. Dr. Alberelli also contacted Florida Senator Bill Nelson, who interceded on Italba's behalf. Second Alberelli Witness Stmt. ¶ 22.

106. Memorial ¶ 71; First Alberelli Witness Stmt. ¶ 79; Email from R. Gorter to G. Alberelli et al. (Apr. 14, 2011) (C-071); Counter-Memorial ¶ 107 n.138.

107. Memorial ¶ 72; MIEM Resolution No. 335/011 (July 8, 2011) (C-072), at 2-3; Counter-Memorial ¶¶ 25, 237 n.431.

108. Memorial ¶ 73; First Alberelli Witness Stmt. ¶ 81; First Herbon Witness Stmt. ¶ 43.

109. Memorial ¶ 74; Petition for Annulment (Oct. 28, 2011) (C-074); Petition for Annulment (Mar. 22, 2012) (C-075); TCA Judgment (Oct. 23, 2014) (C-076), at 7; Counter-Memorial ¶¶ 26, 105, 239 n.434.

110. Memorial ¶ 74; Prueba Trigosul SA con Poder Ejecutivo URSEC (Oct. 25, 2012) (C-077), at 44-46.

been pending for nearly a year, URSEC re-allocated Trigosul's rights to operate in the Spectrum to its competitor, Dedicado, in exchange for Dedicado's rights in spectrum in the 3600-3625MHz and 3675-3700MHz ranges. This exchange was effected without giving any notice to Trigosul.¹¹¹ Dedicado said it wanted Trigosul's Spectrum because Trigosul's frequencies allowed for more efficient operation given the other frequencies in which Dedicado held rights.¹¹²

ggg. On October 23, 2014, the TCA rendered a final decision, finding that URSEC's and MIEM's revocation of Trigosul's license was unlawful, that the challenged resolutions were based on inaccurate factual findings by URSEC, and that those resolutions were therefore null and void (*TCA Judgment*).¹¹³

hhh. On February 5, 2015, Trigosul's counsel, Augusto Duran, wrote to the President of URSEC to remind him that the TCA Judgment had automatically reinstated Trigosul's rights to operate in the Spectrum. In the same letter, Trigosul requested that, in accordance with the TCA Judgment, URSEC add Trigosul back to the *Registro de Prestadores de Servicios de Trasmisiones de Datos* and take all further steps necessary to

111. Memorial ¶ 79; First Herbon Witness Stmt. ¶ 49; First Alberelli Witness Stmt. ¶ 88; URSEC Resolution No. 220/013 (Sept. 5, 2013) (C-084), at 2; Counter-Memorial ¶¶ 28, 270.

112. See URSEC 2013 Resolution 220/2013 (CLEX-023) (“[E]s imprescindible adoptar las medidas tecnológicas que permitan que nuestra red inalámbrica de datos disponga de canales contiguos, optimizando el recurso del espectro de las radiocomunicaciones, llegando a velocidades máximas y a su vez minimizando las bandas de guarda;” b) “la necesidad de lograr una adecuada separación entre las frecuencias de ida y de vuelta y a la vez, evitar la partición espectral que impide el adecuado despliegue de nuevas tecnologías y obtener los mayores anchos de banda posible y aumentar la eficiencia en el uso de la banda.”).

113. Memorial ¶ 75; TCA Judgment (Oct. 23, 2014) (C-076), at 17, 19, 21; Counter-Memorial ¶¶ 26, 241 (n.440), 260, 269.

effectuate the reinstatement of Trigosl's rights to operate in the Spectrum.¹¹⁴

- iii. URSEC did not respond to Mr. Duran's letter.¹¹⁵
- jjj. On August 5, 2015, Italba sent to Uruguay a notice of dispute under the Treaty.¹¹⁶ Uruguay did not respond.¹¹⁷
- kkk. On March 24, 2016, ICSID registered this arbitration.¹¹⁸
- lll. Nearly a year and a half after the entry of the TCA Judgment, on April 5, 2016, Uruguay entered Executive Order IE 156, confirming that the TCA Judgment had reinstated Trigosl's rights and directing URSEC to assign frequencies to Trigosl so that Trigosl could return to providing wireless data services in Uruguay.¹¹⁹
- mmm. After the Executive Order was issued, URSEC proposed assigning to Trigosl a different set of frequencies in the 3600-3625 MHz and 3675-3700 MHz ranges.¹²⁰ These were the same frequencies that Dedicado had held prior to September 2013, when it had asked URSEC to exchange them for Trigosl's Spectrum because of the technical limitations of the

114. Memorial ¶ 78; Letter from L. Herbon to G. Lombide (Feb. 5, 2015) (C-082); Counter-Memorial ¶ 270 n.503.

115. Memorial ¶ 78.

116. *Id.* ¶ 80; Letter from Italba to Uruguay International Economic Affairs Secretariat & President of Uruguay (Aug. 5, 2015) (C-090), at 3; Counter-Memorial ¶ 271 n.510.

117. Memorial ¶ 98.

118. *Id.* ¶ 81; Letter from C. Mata Prates to M. Kinnear (Mar. 10, 2016) (C-091); Letter from C. Mata Prates to M. Kinnear (Mar. 16, 2016) (C-092); Letter from C. Gianelli to M. Kinnear (Mar. 23, 2016) (C-093).

119. Memorial ¶ 81; Executive Order IE 156 (Apr. 5, 2016) (C-094); Counter-Memorial ¶ 275 n.520.

120. Memorial ¶ 82; URSEC Proposal (May 9, 2016) (C-095); Counter-Memorial ¶ 26.

3600-3625 MHz and 3675-3700 MHz ranges.¹²¹

- nnn. On May 6, 2016, Italba rejected URSEC's proposal. Italba stated that the frequencies that URSEC was attempting to assign to Trigosul in lieu of the Spectrum were significantly less valuable than the Spectrum.¹²²
- ooo. On May 19, 2016, Uruguay provided to Italba a draft URSEC resolution dated May 9, 2016, proposing to retrieve from Dedicado the Spectrum that was originally assigned to Trigosul and return it to Trigosul.¹²³
- ppp. On May 31, 2016, Italba rejected URSEC's proposal on the grounds that Italba had already brought this arbitration several months earlier—after Uruguay failed to respond to the notice of dispute under the Treaty—and Italba had elected damages, not restitution, as its remedy. Moreover, given Uruguay's years of discriminatory conduct against Italba, a return to doing business there was not an acceptable solution.¹²⁴

26. Further, in its Counter-Memorial, Uruguay pleads the following additional facts, irrelevant to the resolution of the dispute, which Italba does not dispute:

- a. Italba operates out of the home of Dr. and Ms. Alberelli.¹²⁵
- b. Italba's employees are Dr. Alberelli and Ms. Alberelli.¹²⁶

121. URSEC Resolution No. 220/013 (Sept. 5, 2013) (C-084) at 3.

122. Memorial ¶ 82; First Alberelli Witness Stmt. ¶ 90; Letter from A. Yanos to P. Reichler et al. (May 6, 2016) (C-096). Counsel for Uruguay responded the same day with a letter stating that Uruguay disagreed, for the record, with the assertions in Italba's letter. Letter from P. Reichler to A. Yanos (May 6, 2016) (C-097); Counter-Memorial ¶¶ 26, 276 n.523-24.

123. Memorial ¶ 83; Draft URSEC Resolution (May 9, 2016) (C-098), at 3; Counter-Memorial ¶¶ 26 n.34, 30, 260, 267 n.495, 278 nn.531-32.

124. Memorial ¶ 84; First Alberelli Witness Stmt. ¶ 91; Letter from A. Yanos to P. Reichler (May 31, 2016) (C-099).

125. Counter-Memorial ¶¶ 76-77.

126. *Id.* ¶ 78.

- c. UNCA originally set a deadline of March 2000 for Dr. Alberelli to begin commercial operation in the PCS Spectrum pursuant to the license granted to him.¹²⁷ In August 1999, Dr. Alberelli requested that UNCA transfer his license to Trigosul. UNCA granted that requested and extended the deadline for commercial operation until August 2000.¹²⁸
- d. UNCA subsequently revoked Trigosul’s license to operate in the PCS Spectrum and instead granted Trigosul a license to operate in the Spectrum. UNCA set a deadline of December 2001 for Trigosul to begin commercial operation in the Spectrum.¹²⁹
- e. Trigosul later requested and received extensions of that deadline.¹³⁰
- f. Trigosul began commercial operation in June 2003.¹³¹

B. Facts In Dispute

27. In its Counter-Memorial, Uruguay disputes the following facts upon which Italba relies:¹³²

127. *Id.* ¶ 218 & n.385.

128. *Id.* ¶ 219.

129. *Id.* ¶ 220.

130. *Id.* ¶ 221.

131. *Id.* ¶ 223.

132. In addition, Uruguay disputes the fact that Italba was actively negotiating a potential joint venture with DirecTV that failed because Uruguay revoked Trigosul’s license. Counter-Memorial ¶ 379. Italba has not made a claim for damages on the basis of its negotiations with DirecTV because both the DirecTV and Telmex deals concerned DTH satellite television and therefore could not have been done simultaneously. Memorial ¶ 197(f). Italba is therefore claiming damages only in respect of the Telmex deal. *Id.* ¶¶ 197(b), 212; *see infra* Section V.E. As a result, the factual dispute concerning DirecTV is irrelevant. In any event, Italba notes that Uruguay disputes the existence of the negotiations with DirecTV solely on the basis of a letter from a DirecTV representative stating that she could not attest to the fact of the negotiations-in other words, that she could neither confirm nor deny the existence of those negotiations. Counter-Memorial ¶ 379; Letter from M. Ros to M. Toma (Nov. 3, 2016) (**R-71**). Contrary to Uruguay’s assertions, the letter does not state that the negotiations did not occur.

- a. Italba owns and controls Trigosul.¹³³
- b. URSEC officials gave verbal assurances to Trigosul that it would receive a license conforming to the 2003 License Regulations.¹³⁴
- c. Alicia Fernandez requested that Dr. Alberelli pay her a bribe in order to expedite the processing of Trigosul's request for a conforming license. Dr. Alberelli refused to pay that bribe.
- d. Italba lost joint venture opportunities with EPIC, Starborn, Phinder/Zupintra, and Telmex because of URSEC's failure to grant Trigosul a conforming license.¹³⁵
- e. Trigosul lost its business with Canal 7 because URSEC unlawfully revoked its license.¹³⁶
- f. Trigosul had a valid contract with Dr. Fernando Garcia to provide services to his radiology clinics and associated clinics in Uruguay.¹³⁷
- g. Trigosul was pursuing a business opportunity with Grupo Afinidad Mary, the U.S. expatriate retirement community in Punta del Este, Uruguay, which it lost because URSEC revoked its license.¹³⁸

C. Reply Facts

28. As evidenced in the lists set out above, the facts in dispute at this point in the arbitration are few. The remainder of this section of the Reply establishes that the remaining

133. Counter-Memorial ¶ 46.

134. *Id.* ¶ 161.

135. *Id.* ¶¶ 372-77.

136. *Id.* ¶ 234.

137. *Id.* ¶ 235.

138. *Id.* ¶ 236.

disputed facts are as Italba contends them to be.

1) Italba owns and controls Trigosl.

29. As President and Chief Executive Officer of Italba, it was always Dr. Alberelli's plan and intention that Italba would be the parent company and sole owner of Trigosl.¹³⁹

Consistent with that intention, as described more fully below, Italba acted as the parent company and sole owner of Trigosl: it made all of Trigosl's business decisions, funded Trigosl's operations, and represented to third parties that it was the owner of Trigosl.

30. In mid-2002, it came to Dr. Alberelli's attention in the due diligence process for the EPIC joint venture that, although Italba had been acting as the owner of Trigosl for years, the shares in Trigosl had not yet been formally transferred to Italba.¹⁴⁰ To rectify that situation, on May 24, 2002, Dr. Alberelli's mother transferred her shares to Dr. Alberelli by endorsing the back of the share certificates belonging to her with a notation of the transfer to Dr. Alberelli, leaving him with a 100% interest in Trigosl.¹⁴¹ On August 15, 2002, while in Miami, Florida, Dr. Alberelli transferred all of his shares in Trigosl to Italba by endorsing the back of a bundle of all of the shares with the following notation and his signature: "En el dia de la fecha 15 Agosto de 2002 se transfiere a Italba Corp. (Miami FL 33183, 8540 SW 132 Court)."¹⁴² Dr. Alberelli then delivered the shares to Italba by placing them in a safety deposit box at First Union Bank in Miami in the name of the co-owners of Italba, Gustavo Alberelli and Beatriz

139. Second Alberelli Witness Stmt. ¶¶ 9, 11.

140. *Id.* ¶ 17. At the request of the company that incorporated Trigosl, which insisted that the company have two shareholders and that both be present in Uruguay, Dr. Alberelli initially issued Trigosl shares to his mother and himself. *Id.* ¶ 10.

141. Trigosl's Share Certificates (C-161), at 1-6; Second Alberelli Witness Stmt. ¶¶ 17.

142. Trigosl's Share Certificates (C-161), at 7-8 ("On the date of August 15, 2002, this is transferred to Italba Corp. (Miami FL 33183, 8540 SW 132 Court)"); Second Alberelli Witness Stmt. ¶¶ 17-18.

Alberelli.¹⁴³ By these actions, Dr. Alberelli transferred all of his interest in Trigosul to Italba, and he understood and believed that his actions effected such a transfer.¹⁴⁴ Trigosul's stock certificates have remained in that safety deposit box in Miami ever since.¹⁴⁵

31. At the same time, Trigosul's formal record-keeping was consistently inconsistent. For example, Trigosul's stock ledger has only one undated entry suggesting a single issuance of 20 shares.¹⁴⁶ In fact, six shares were issued in 1996, and another fourteen shares were purportedly issued in 1999.¹⁴⁷ However, Trigosul's shareholder meeting minutes do not contain any resolution in 1999 to increase the capital of the company by issuing new shares, and shareholder meetings held after the issuance of the new shares do not reflect any increase in the company's capital.¹⁴⁸

32. While Trigosul's share certificates reflect endorsements in May and August 2002 transferring interest in the company from Ms. Caravetta to Dr. Alberelli and from Dr. Alberelli to Italba, neither of those transfers are recorded on Trigosul's stock ledger.¹⁴⁹ Moreover, even after those transfers, Trigosul's shareholder meeting minutes incorrectly identify Ms. Caravetta and Dr. Alberelli as the shareholders of the company and state that they held equal shares in the company.¹⁵⁰

33. Despite these record-keeping errors, Italba's actions both prior to and following the share transfers in May and August 2002 demonstrate that Italba considered itself to be the

143. Addendum to Safe Deposit Lease Agreement for Self Services Boxes (Aug. 25, 1999) (C-162).

144. Second Alberelli Witness Stmt. ¶ 18.

145. *Id.* ¶ 17.

146. Trigosul's Stock Ledger Book (C-163), at 2.

147. Trigosul's Share Certificates (C-161).

148. Trigosul's Book of Shareholders and Directors Meetings (C-164), at 4-6.

149. Trigosul's Stock Ledger Book (C-163), at 2; Trigosul's Share Certificates (C-161) at 1-12.

150. Trigosul's Book of Shareholders and Directors Meetings (C-164), at 7, 9; Trigosul's Share Certificates (C-161), at 1-12; Trigosul's Stock Ledger Book (C-163), at 2.

owner of Trigosl, acted as the owner of Trigosl, and controlled Trigosl's business.

34. *First*, Italba made all of Trigosl's business decisions. As Trigosl's General Manager and Legal Representative, Luis Herbon always acted pursuant to instructions from Italba, which he also understood to be the legal owner of Trigosl.¹⁵¹ Italba was responsible for developing Trigosl's original business plan in January 1999 and for commissioning an independent analysis of the feasibility of that plan.¹⁵² Italba also commissioned a study in 2001 from the U.S.-based company Prime Wave 2000 to analyze potential locations for the installation of Trigosl's radio equipment.¹⁵³ Italba sought out potential joint ventures that would allow it to realize the full value of its investment in Trigosl. In each of these joint ventures, Italba acted as the negotiating and contracting party, and its contribution to the joint venture partnerships included the use of Trigosl's license—which Italba was able to contribute because it owned Trigosl.¹⁵⁴ For example, Italba entered into a joint venture agreement with Worldstar that involved the provision of data and other services through Trigosl's license.¹⁵⁵ Italba also entered into a joint venture agreement with EPIC, which would have involved providing VoIP services through Trigosl.¹⁵⁶ Italba's joint venture agreement with Phinder also involved the exclusive use of Italba's telecommunications licenses in target countries, including Trigosl's license in Uruguay.¹⁵⁷ Before URSEC unlawfully revoked Trigosl's license, Italba was also

151. Second Herbon Witness Stmt. ¶¶ 1, 10, 15.

152. First Alberelli Witness Stmt. ¶ 18; Second Alberelli Witness Stmt. ¶ 11; A Proposal for a Banking Communication Network (Jan. 6, 1999) (C-006).

153. Second Alberelli Witness Stmt. ¶ 11; Prime Wave Communication, *Site Survey Report: Uruguay* (Oct. 15, 2001) (C-165).

154. *See generally* Memorial Sections II.B-C; Second Alberelli Witness Stmt. ¶¶ 11-20.

155. Second Alberelli Witness Stmt. ¶ 11; Joint Venture Agreement for Telecommunications Project in Uruguay (July 1999) (C-007).

156. *See* Co-Investment Agreement Among Eastern Pacific Trust and Italba Corporation (June 14, 2002) (C-015).

157. Joint Venture Terms Sheet Between Phinder Technologies Inc. and Italba Corporation (Feb. 2007) (C-030), at 2.

negotiating a joint venture with DirecTV that would have involved the provision of Internet services to DirecTV customers through the use of Trigosul's frequencies.¹⁵⁸

35. *Second*, Italba contributed the vast majority of Trigosul's share capital. In February 2001, Italba wired \$35,000 to Trigosul¹⁵⁹ as reimbursement, together with other contributions from Italba, for 632,674 Uruguayan pesos that Trigosul paid to UNCA as an advance on the first two years of fees for Trigosul's operation in the Spectrum.¹⁶⁰ In October 2001, an extraordinary shareholders meeting recognized the 632,674 Uruguayan pesos that Italba provided to Trigosul as a contribution to Trigosul's share capital.¹⁶¹

36. *Third*, Italba funded Trigosul's operations. Specifically:

- a. Italba purchased the equipment necessary for Trigosul to operate in the PCS Spectrum and, later, in the Spectrum.¹⁶² Uruguay was aware of that fact: An October 2000 letter that Luis Herbon submitted to UNCA contained attachments showing that Italba had purchased equipment through L-3 Communications on Trigosul's behalf,¹⁶³ and a September 2002 resolution by the President of Uruguay approving the payment of USD \$33,000 to Trigosul, Villaclara, and Jorter to settle a dispute

158. First Alberelli Witness Stmt. ¶¶ 67-68; Second Alberelli Witness Stmt. ¶ 20.

159. Italba's Commercial Checking Bank Account Statement (Feb. 1 - Feb. 28, 2001) (C-166), at 2. The wire transfer was made to Luis Herbon's account at Indumex, a Uruguayan financial services company that facilitates international money transfers. *Id.*

160. Trigosul's Diary (C-167), at 9, 10; Second Alberelli Witness Stmt. ¶ 16; Second Herbon Witness Stmt. ¶ 14.

161. Trigosul's Book of Shareholders and Directors Meetings (C-164), at 5-6.

162. Second Alberelli Witness Stmt. ¶ 14; Second Herbon Witness Stmt. ¶¶ 11, 13; Fax from D. Los Santos to A. Jansenson (May 8, 2001) (C-168); Quotation No. 2501 from Wavelynx International, Inc. (Jan. 11, 2000) (C-159); Seller's Agreement between Italba Corporation and Wavelynx International, Inc. (Feb. 27, 2000) (C-160); StarMesh Technologies Invoice No. 107 to Italba (June 12, 2007) (C-169). Although the invoice with StarMesh Technologies indicates that the purchased equipment will be shipped to Italba in Miami, shortly after its arrival in Miami, Italba shipped that equipment to Trigosul. URSEC Certificate of Homologation (June 29, 2007) (C-170), at 1.

163. Letter from D. Los Santos to G. Alberelli (Sept. 26, 2000) (C-135), at 6; *see also id.* at 3.

concerning that equipment stated that Italba was the purchaser.¹⁶⁴

- b. Italba regularly wrote checks to pay for Trigosul's expenses, including fees to URSEC, rent for office space, and other business needs.

Dr. Alberelli or Mr. Herbon would cash the checks and apply the proceeds to Trigosul's expenses.¹⁶⁵ For example, in June 2005, Italba wrote a check to "Cash" in the amount of \$1,250 with the memo line "pagar URSEC" ("to pay URSEC"); and in May 2006 wrote a check for \$2,500 that referenced, in the memo line, "URSEC Uruguay."¹⁶⁶ This cash from Italba would be recorded in Trigosul's financial records as a "contribution by directors" ("aporte directores") used to cover operational expenses.¹⁶⁷

- c. In April 2004, Italba provided approximately \$25,000 to Mr. Herbon for the purchase of Uruguayan bonds that Italba directed Mr. Herbon to hold for two years and then sell in order to raise funds for Trigosul's operations.¹⁶⁸ Mr. Herbon carried out those instructions, selling the bonds in August and November 2006 and using the proceeds from that sale to pay Trigosul's expenses over a period of months, again entering each such

164. UMDN-URSEC Resolution (Sept. 10, 2002) (C-171), ¶ III(1) ("[E]l monto de la reclamación se integra por los siguientes conceptos: 1) compra de radios factura de ITALBA: U\$S 25.964") ("[T]he amount of the claim is integrated by the following concepts: 1) ITALBA invoice for the purchase of radios: US \$25,964"); *see also* Internal Memorandum from the Legal Department of the Dirección Nacional de Comunicaciones (Feb. 6, 2001) (C-172), at 2-5 (recognizing the damage caused to Trigosul by the change of frequencies).

165. Second Alberelli Witness Stmt. ¶ 15; Second Herbon Witness Stmt. ¶ 13.

166. Check from Italba Corp. to Cash (June 7, 2005) (C-173); Check from Italba Corp. to G. Alberelli (May 13, 2006) (C-174).

167. Second Alberelli Witness Stmt. ¶ 15 n.23; Second Herbon Witness Stmt. ¶ 15; Trigosul's Detalle de Operaciones (Dec. 1, 2001 - Nov. 30, 2006) (C-175), at 8-9, 11-12, 14-15; Trigosul's Diario de Imputaciones Contables (Dec. 1, 2007 - Nov. 30, 2015) (C-176), at 1, 4-6, 8, 12-14, 20, 25, 27-29.

168. Second Alberelli Witness Stmt. ¶ 19; Second Herbon Witness Stmt. ¶ 15; Check from Italba to Indumex SA (Apr. 27, 2004) (C-177); Check from Indumex SA to G. Rivero (Apr. 27, 2004) (C-178); Receipt for Purchase of Bonds by L. Herbon (Apr. 29, 2004) (C-179).

payment in Trigosul's financial records as a "contribution by directors."¹⁶⁹

37. *Fourth*, Italba represented to third parties that it was the owner of Trigosul, including in communications with the U.S. and Uruguayan governments.¹⁷⁰ For example, in June 2001, Italba submitted to the U.S. Embassy in Uruguay an advocacy questionnaire form and anti-bribery agreement that identified Italba as the owner of Trigosul.¹⁷¹ Similarly, in a July 9, 2001 letter to the Secretary of the Presidency of Uruguay, Italba stated that Trigosul was its subsidiary and discussed its investment in equipment for Trigosul that was compatible with the PCS Spectrum.¹⁷² After Uruguay revoked Trigosul's license to the PCS Spectrum, rendering useless the equipment that Italba had purchased for Trigosul, Italba "and its subsidiary Trigosul" contracted with L-3 Communications for the purchase of new equipment compatible with Trigosul's new frequencies.¹⁷³ Subsequent communications between Italba and L-3 reflected the parties' understanding that Italba owned Trigosul and, in that capacity, had rights to the Spectrum.¹⁷⁴ Likewise, in communications with its potential joint venture partners, Italba represented that it was the parent company of Trigosul.¹⁷⁵ No treaty existed between the United States and Uruguay at the time of these communications.

169. Receipts for Sale of Bonds by L. Herbon (Aug. 18, 2006 - Nov. 30, 2006) (C-180); Trigosul's Detalle de Operaciones (Dec. 1, 2001 - Nov 30, 2006) (C-175), at 12.

170. Second Alberelli Witness Stmt. ¶ 12; Second Herbon Witness Stmt. ¶ 11.

171. Advocacy Questionnaire Submitted By Trigosul to the U.S. Embassy in Uruguay (June 11, 2001) (C-102) (listing Trigosul as 100% owned by Italba); Agreement Concerning Bribery and Corporate Policy Prohibiting Bribery (June 11, 2001) (C-181) (noting that Italba Corp. is requesting advocacy assistance for its telecommunications project in Uruguay, Trigosul).

172. Letter from A. Jansenson to R. Lago (July 9, 2001) (C-182).

173. Fax from D. Los Santos to A. Jansenson (May 8, 2001) (C-168), at 2; Memorandum of Understanding between L-3 Communications and Italba (May 18, 2001) (C-183).

174. Letter from D. Los Santos to G. Alberelli (Sept. 26, 2000) (C-135), at 3.

175. Letter from S. Rossi to A. Jansenson & G. Alberelli (Feb. 3, 2002) (C-014); Co-Investment Agreement Among Eastern Pacific Trust and Italba Corporation (June 14, 2002) (C-015); Letter from A. Cherp to A. Jansenson, G. Alberelli & L. Herbon (Jan. 8, 2003) (C-016); Joint Venture Terms Sheet Between Phinder Technologies Inc. and Italba Corporation (Feb. 2007) (C-030).

2) URSEC officials gave verbal assurances to Trigosul and EPIC that a conforming license was forthcoming.

38. As detailed in the Memorial and the accompanying witness statements of Gustavo Alberelli and Luis Herbon, representatives of Trigosul met with various URSEC officials on several occasions from 2003 through 2006 to follow up on Trigosul's requests for a conforming license.¹⁷⁶ At each of these meetings, URSEC officials assured Trigosul that URSEC was processing the conforming license and would issue it soon.¹⁷⁷ Uruguay does not dispute that these meetings occurred, but asserts that URSEC officials never gave Trigosul any assurances about whether and when a conforming license would be issued.¹⁷⁸ However, even if, *quod non*, no URSEC officials gave specific assurances to Trigosul, Uruguay concedes that no URSEC official *ever* told Trigosul that it was not necessary for Trigosul to obtain a conforming license.¹⁷⁹ To the contrary, each of the URSEC officials with whom Trigosul met encouraged Trigosul to apply for such a license.¹⁸⁰

39. In fact, URSEC itself believed that conforming licenses were necessary under the 2003 License Regulations and, at least as late as March 2006, was evaluating Trigosul's request for such a license. In a March 2006 *internal* report bearing the signatures of Juan Piaggio and Hector Bude, which was produced only recently by Uruguay, URSEC stated: "In this sense, we must keep in mind that **everything related to the conforming licenses of telecommunications service operators is in the process of being evaluated. . . . [O]nce the conforming licenses are granted**, if Trigosul wishes to provide a telecommunication service different from the one it

176. Memorial ¶¶ 27-34; First Alberelli Witness Stmt. ¶¶ 28, 31-35, 37-38; First Herbon Witness Stmt. ¶¶ 15, 17-21.

177. Memorial ¶¶ 27-34; First Alberelli Witness Stmt. ¶¶ 28, 31-35, 37-38; First Herbon Witness Stmt. ¶¶ 15, 17-21.

178. Grauert Witness Stmt. ¶¶ 5-6; Piaggio Witness Stmt. ¶ 5; Perez Tabo Witness Stmt. ¶¶ 3-4.

179. *See* Grauert Witness Stmt. ¶¶ 5-6; Piaggio Witness Stmt. ¶ 5; Perez Tabo Witness Stmt. ¶¶ 3-4.

180. *See* Grauert Witness Stmt. ¶¶ 5-6; Piaggio Witness Stmt. ¶ 5; Perez Tabo Witness Stmt. ¶¶ 3-4.

does, it should obtain authorization from the Regulatory Unit.”¹⁸¹

40. In addition to assuring Dr. Alberelli and Mr. Herbon that Trigosul’s conforming license was forthcoming—as reflected in URSEC’s own documents—URSEC officials also assured Alan Cherp, a third party in this arbitration who was acting on behalf of EPIC, that Trigosul would receive a conforming license. In his witness statement, Mr. Cherp states that he arranged a meeting with URSEC in or around August 2002, after EPIC received advice that Uruguay was expected to issue new telecommunications licensing regulations that would likely require Trigosul to obtain an updated license conforming to the changes in the regulations.¹⁸² At that meeting, an URSEC official assured Mr. Cherp that Trigosul would receive a conforming

181. URSEC Report (Mar. 30, 2006) (C-184), at 3 (emphasis added) (“En este sentido debemos tener presente que se encuentra en proceso de evaluación todo lo referido a la adecuación de licencias de operadores de servicios de telecomunicaciones. . . . Que efectuada la adecuación de licencia de telecomunicaciones, en la medida que TRIGOSUL S.A. desee prestar un servicio de telecomunicaciones diferente al que ya efectiviza, deberá obtener la autorización de esta Unidad Reguladora.”). This document was included in Uruguay’s production to Italba on March 15, 2017 and was one of only a handful of internal URSEC documents that Uruguay produced. Notwithstanding Uruguay’s attempts to inflate the scale of its production by producing individual pages or sections of a document as unique documents, its production was actually staggeringly small. Letter from A. Yanos to Tribunal (Mar. 22, 2017) (C-185). Moreover, Uruguay refused to produce documents in response to several of Italba’s requests, including its request for Trigosul’s tax filings with the Dirección General Impositiva (*DGI*), which Uruguay claimed it could not access without a letter from Trigosul authorizing DGI to disclose those filings. Letter from P. Reichler to Tribunal (Mar. 29, 2017) (C-186) at 2. Italba provided such a letter to Uruguay on April 18, 2017, but has yet to receive any documents in response to its request. Letter of Authorization from Trigosul to DGI (Apr. 18, 2017) (C-187). Uruguay also failed to produce a single document in response to Italba’s request for applications to URSEC under the 2003 License Regulations by Dedicado S.A., Telstar S.A., Rinytel S.A., or Telefonica Moviles del Uruguay S.A., despite the fact that each of those companies were indisputably issued licenses post-2003. URSEC Resolution No. 157/010 (Mar. 25, 2010) (C-053) (Dedicado S.A.); URSEC Resolution No. 544/010 (Oct. 29, 2010) (C-054) (Telstar S.A.); URSEC Resolution No. 053/011 (Mar. 16, 2011) (C-055) (Rinytel S.A.); URSEC Resolution No. 611/007 (Dec. 27, 2007) (C-041). And even after the Tribunal ordered Uruguay to produce documents concerning “the potential purchase, sale, lease, and/or auction by ANTEL of Trigosul’s right to the Spectrum” or “any request from ANTEL that URSEC re-allocate Trigosul’s rights to the Spectrum,” Uruguay refused to produce any documents, claiming that it had no responsive documents. But that position is contradicted by communications that Trigosul received from Antel indicating that it had made a request to URSEC for Trigosul’s frequencies. Email from O. Novoa to L. Herbon (May 16, 2006) (C-188). It was Uruguay’s position with respect to the schedule in this arbitration that document production occur simultaneously with the drafting of Italba’s Reply Memorial. The result of that aggressive schedule—which Italba argued against—is that Italba must now file its Reply Memorial without the benefit of a full and fair production from Uruguay. It goes without saying that Uruguay’s failure to produce documents in good faith or complete its production before the deadline for Italba’s Reply Memorial has prejudiced Italba’s ability to gather and present evidence in support of its claims.

182. Witness Statement of Alan Cherp (May 9, 2017) (*Cherp Witness Stmt.*) ¶ 12.

license within a few weeks after the passage of the new regulations.¹⁸³ Despite these assurances, URSEC never issued a conforming license to Trigosul.¹⁸⁴

3) Dr. Alberelli refused Ms. Fernandez’s request for a bribe.

41. Although URSEC was actively considering the issuance of a conforming license to Trigosul in March 2006, no conforming license had been received by the summer of 2006. As a result, after years of receiving verbal assurances from URSEC that Trigosul’s conforming license was forthcoming, Dr. Alberelli arranged a meeting with Alicia Fernandez, a then-Director of URSEC, to inquire as to the status of the license.¹⁸⁵ During that meeting, Ms. Fernandez requested a bribe in order to “expedite” the processing of Trigosul’s license, which Dr. Alberelli refused to pay.¹⁸⁶ Uruguay disputes that this meeting took place and argues that it could not have occurred because Dr. Alberelli identified the date of the meeting as sometime in July 2006, and immigration records show that he was out of the country until July 31, 2006.¹⁸⁷ It is, however, possible that the meeting took place on July 31. In any event, even assuming the accuracy of the immigration records that Uruguay cites, the fact that Dr. Alberelli’s recollection of the precise date of a meeting that took place more than 10 years ago may have been off does not in any way show that the meeting did not occur.

42. There is, moreover, additional evidence that Dr. Alberelli’s rejection of Ms. Fernandez’s request for a bribe resulted in Ms. Fernandez using her office as a Director of URSEC to discriminate against Trigosul. In August 2011, at a mediation session that took place between Italba and members of URSEC in Montevideo, Hector Bude, the Chief of URSEC’s

183. *Id.* ¶ 11-12.

184. *Id.* ¶¶ 12-14.

185. First Alberelli Witness Stmt. ¶ 39.

186. *Id.*

187. Counter-Memorial ¶ 166; *see also* Witness Statement of Alicia Fernandez (Dec. 28, 2016) ¶ 4.

Frequencies Department, stated that he was instructed by Ms. Fernandez to “put Trigosul in the freezer.”¹⁸⁸ At the time, Dr. Alberelli did not appreciate the meaning of that comment.¹⁸⁹ With the benefit of hindsight, however, it is clear that URSEC’s actions following Dr. Alberelli’s refusal to bribe Ms. Fernandez, including its refusal to issue Trigosul a conforming license, its later revocation of Trigosul’s license, its giving away of Trigosul’s frequencies to a competitor while Trigosul’s case against the revocation of its license was pending in the TCA, and its failure to comply with the TCA Judgment, were not in good faith.

4) Italba lost business opportunities with EPIC, Phinder/Zupintra, Starborn, and Telmex because URSEC failed to grant Trigosul a conforming license.

43. As established in the Memorial and accompanying exhibits and testimony, Italba’s joint ventures with EPIC, Starborn, Phinder/Zupintra, and Telmex each failed because of URSEC’s failure to issue Trigosul a license conforming to the 2003 License Regulations, as it was required to do under Uruguay law. Uruguay contends that Italba did not lose these joint venture opportunities because of the lack of a conforming license, but rather because Trigosul’s license did not permit it to provide the services contemplated in the joint venture proposals.¹⁹⁰ That is incorrect.

44. *First*, while Uruguay asserts that Trigosul was not authorized to provide VoIP services, as contemplated as part of the EPIC joint venture,¹⁹¹ there was in fact no restriction on Trigosul’s ability to provide VoIP services at the time of that joint venture. The only restriction in Trigosul’s license was that it could not provide data transmission over the public telephone

188. Second Alberelli Witness Stmt. ¶ 34; Second Herbon Witness Stmt. ¶ 4.

189. Second Alberelli Witness Stmt. ¶ 34.

190. Counter-Memorial ¶¶ 372-76; Witness Statement of Dr. Nicolás Cendoya (Jan. 15, 2017) (*Cendoya Witness Stmt.*) ¶¶ 59, 69-74.

191. Counter-Memorial at ¶ 373.

network; there was no limitation on Trigosul's ability to transmit voice data over the Internet.¹⁹² In fact, it was only in August 2010 that Uruguay first decreed that VoIP services were subject to the monopoly of Antel, Uruguay's state-owned telecommunications company.¹⁹³ Thus, until August 2010, no regulation or decree restricted Trigosul's ability to provide VoIP services under its license.¹⁹⁴

45. *Second*, with respect to the Phinder/Zupintra transaction, which involved the provision of VoIP, WIMAX, Internet, and GSM telephony services,¹⁹⁵ as noted above, there was no restriction at the time on Trigosul's ability to provide VoIP services, nor does Uruguay even suggest that Trigosul could not provide WIMAX or Internet services. While Trigosul's license did not specifically authorize it to provide GSM telephony, it was free to partner with service providers who were authorized for mobile telephony or to purchase such services from an authorized provider and re-sell them.¹⁹⁶ Indeed, both the former President and Chief Executive

192. See UMDN Resolution No. 75/997 (Jan. 17, 1997) (C-003); UMDN Resolution No. 142/000 (Feb. 8, 2000) (C-005). Moreover, Trigosul was free to partner with Jorter S.A., another one of Italba's Uruguayan subsidiaries, which had a license to provide telephony services over public networks. See Second Alberelli Witness Stmt. ¶ 27; see also Memorial ¶ 17; First Alberelli Witness Stmt. ¶ 16; First Herbon Witness Stmt. ¶ 8.

193. Decree 260/010 (Aug. 27, 2010) (C-189), Art. 1.

194. The same is true of the joint venture transaction that Italba was negotiating with Worldstar in 1999, which would have involved the provision of voice, data, and video services in Uruguay, including VoIP. See Memorial ¶ 19. Uruguay is correct that the Worldstar joint venture documents do not refer to Trigosul and its license, but rather to the license of a company named Sumitel S.A. Counter-Memorial ¶ 373 n.705. The Worldstar transaction contemplated the formation of a new joint venture holding company, Netstar Holdings, that would act as 100% owner of a new subsidiary, Sumitel S.A. Once these companies were created, Trigosul would apply to transfer its license to Sumitel S.A. Second Alberelli Witness Stmt. ¶ 11 n.11; Joint Venture Agreement for Telecommunications Project in Uruguay (July 1999) (C-007). Of course, that did not happen because of URSEC's revocation of Trigosul's license to the PCS Spectrum.

195. Citing to Dr. Alberelli's first witness statement, Uruguay asserts in its Counter-Memorial that, while the Phinder/Zupintra transaction originally contemplated the provision of GSM telephony, unification of the Argentina-Uruguay Internet backbone, and WIMAX and VoIP services, the parties ultimately decided to offer only GSM telephony services. Counter-Memorial ¶ 375. That is a misreading of Dr. Alberelli's witness statement, which does not state that the parties abandoned the plan to provide unification of the Argentina-Uruguay backbone or WIMAX and VoIP services, but only that the parties eliminated the three-phase structure of the original proposal. First Alberelli Witness Stmt. ¶ 49. Dr. Alberelli specifically notes that the agreement still included VoIP and other services. *Id.*

196. Second Alberelli Witness Stmt. ¶ 28; Second Herbon Witness Stmt. ¶ 18.

Officer and the former Chief Operating Officer of Phinder/Zupintra, who worked with Italba on the transaction, have confirmed in witness statements that the reason that the joint venture fell apart was not because of Trigosl's inability to provide the services contemplated in the deal: it was URSEC's failure to issue a conforming license to Trigosl, without which Zupintra considered the deal to be subject to too much legal uncertainty.¹⁹⁷

46. *Third*, Trigosl did not need a Class C license for the Starborn joint venture. While that joint venture contemplated later phases involving fiber optic transmission—and therefore would have required *either* that Trigosl lease fiber optic services from another carrier *or* apply for a Class C license to provide those services itself—the initial phase of the project concerned wireless data transmission only.¹⁹⁸ Trigosl was undoubtedly permitted to provide wireless data transmission services under the terms of its existing license.

47. Similarly, the Telmex joint venture involved Trigosl partnering with Telmex to provide wireless data transmission services to customers in Uruguay.¹⁹⁹ It was not providing “carrier” services that would have required a Class C license.²⁰⁰

5) Trigosl lost its business with Canal 7 because URSEC unlawfully revoked its license.

48. As described in Italba's Memorial, in late 2010, Trigosl began negotiating a potential business relationship with Canal 7, a television station broadcasting out of the Maldonado region of Uruguay, that would involve Canal 7 using Trigosl's network for wireless data transmission services to communicate between the channel's headquarters and its reporters

197. Witness Statement of Johnathan Alexander van Arem (May 10, 2017) (*van Arem Witness Stmt.*), ¶ 4; Witness Statement of Christopher G. Hall (May 12, 2017) (*Hall Witness Stmt.*), ¶ 4.

198. Second Alberelli Witness Stmt. ¶ 29; Second Herbon Witness Stmt. ¶ 19.

199. Second Alberelli Witness Stmt. ¶ 29; Second Herbon Witness Stmt. ¶ 19.

200. Second Alberelli Witness Stmt. ¶ 29; Second Herbon Witness Stmt. ¶ 19.

on location.²⁰¹ In or around August 2010, Trigosul engaged a company called Service E Instalaciones (*SEI*) to install test nodes and radio equipment in Canal 7's tower, which it did in November and December 2010.²⁰² Trigosul began providing services on a trial basis (*i.e.*, test services free of charge) to Canal 7 in December 2010, but lost its business opportunity with Canal 7 because of URSEC's illegal revocation of its license in January 2011.²⁰³

49. Uruguay argues that Trigosul never provided services to Canal 7, citing a letter from a representative of Canal 7, again in response to an inquiry from Dr. Toma. That letter admits that: (a) Trigosul installed test nodes and radio equipment in Canal 7's tower in November and December 2010; and (b) Canal 7 prepared a March 14, 2011 report on the technical trials that it performed on the installed equipment in late 2010.²⁰⁴ There is nothing in Canal 7's letter that contradicts the facts pleaded in the Memorial—indeed, the letter supports the existence of a business relationship between Trigosul and Canal 7. Trigosul could not, of course, do more than provide test services to Canal 7 on a trial basis because, as indicated in Dr. Alberelli's first witness statement, Trigosul was awaiting URSEC's inspection of its equipment and approval to begin operations in Punta del Este.²⁰⁵ Although Trigosul requested that inspection in July 2010, URSEC did not carry it out until December 2010—and even then, URSEC sent its inspectors to the wrong address in Montevideo, despite being notified on at least

201. Memorial ¶ 57.

202. *Id.* ¶ 58; First Alberelli Witness Stmt. ¶ 65.

203. Memorial ¶¶ 58, 70; First Alberelli Witness Stmt. ¶ 66.

204. Counter-Memorial ¶¶ 387-88; Letter from M. Toma to D. Bobre (Nov. 7, 2016) (**R-78**); Letter from D. Bobre to M. Toma (Nov. 9, 2016) (**R-72**). The letter also notes that Canal 7's authorization for Trigosul to install test equipment was oral and not in writing. *Id.*

205. First Alberelli Witness Stmt. ¶ 66. Contrary to the Witness Statement of Nicolas Cendoya, there was nothing illegal or improper about the services that Trigosul would provide Canal 7. Cendoya Witness Stmt. ¶¶ 111-12. The proposed transaction would not involve a "lease" of Trigosul's frequencies to Canal 7 in a technical sense; rather, Trigosul would provide wireless data transmission services to Canal 7, exactly as it was already authorized to do under the terms of its license. Second Alberelli Witness Stmt. ¶ 51.

two separate occasions that Trigosul had moved its offices to Punta del Este.²⁰⁶

50. In addition, Alejandro Amaro, the current Technical Director of Canal 7 and former President of SEI, confirms in a witness statement submitted with this Reply Memorial, that Canal 7 expressly authorized the installation of Trigosul's equipment in Canal 7's towers in Maldonado.²⁰⁷ Canal 7's representatives were also clearly aware that the equipment installed was for the purpose of ultimately providing data transmission services to Canal 7.²⁰⁸ Indeed, the parties specifically agreed that Canal 7 would enter into a long-term agreement with Trigosul for the provision of such services following an initial trial period.²⁰⁹ In the middle of that trial period, however, Uruguay destroyed Trigosul's business opportunity with Canal 7 by illegally revoking Trigosul's license.²¹⁰

6) Trigosul had a valid contract with Dr. Garcia to provide services to his radiology clinic and associated clinics.

51. As set forth in Italba's Memorial, in late 2010, Trigosul began negotiating a contract with Dr. Fernando Garcia to provide data transmission services for his radiology clinics

206. Memorial ¶¶ 53-54; Jan. 12, 2011 Letter (attaching Letter from L. Herbon to URSEC (July 30, 2010)) (C-026), at 6; *id.* (attaching Letter from A. Amaro to URSEC (Oct. 6, 2010)) (C-026), at 8; Second Witness Statement of Alejandro Amaro on Behalf of Claimant (May 11, 2017) (*Second Amaro Witness Stmt.*), at 4-5.

207. Witness Statement of Alejandro Amaro (Dec. 26, 2016) (*First Amaro Witness Stmt.*), Answers to Questions 18-25.

208. *Id.* at Answer to Question 11 (“Estos nodos estaban conectados a la torre del canal para que se pudieran brindar servicios a Canal 7”) (“These nodes were connected to the channel’s tower in order to provide services to Canal 7”); *see also id.* at Answer to Question 19 (“El jefe técnico de ese entonces, el señor Fernando Bareño y todos estaban al tanto de la finalidad de la instalación de esos equipos”) (“The technical director therefore, Mr. Fernando Bareño and everyone else were aware of the purpose of the installation of the equipment”); *id.* at Answer to Question 23 (“El responsable del canal en aquella época era el Gerente General de canal, el Sr. Rafael Inchausti y el Jefe Técnico, el Sr. Fernando Bariño. Ambos me conocen, estaban al tanto del instalación de los equipos y de la razón por la cual los mismos fueron instalados.”) (“The person responsible of the channel at that time was General Manager, Mr. Rafael Inchausti and the Technical Director, Mr. Fernando Bariño. Both of them know me and were aware of the installation of the equipment and the reason why they were installed.”).

209. *Id.* at Answer to Question 17.

210. *See Id.* at Answer to Question 22; Memorial ¶ 67.

across Uruguay.²¹¹ The parties subsequently executed a Data Transmission and Equipment Loan Agreement, pursuant to which Trigosl would lease telecommunications equipment to Dr. Garcia, as well as provide training and maintenance services.²¹² In December 2010, as it did with Canal 7, Trigosl began providing test services to Dr. Garcia on a trial basis, free of charge, while it waited for URSEC's inspection and approval of its operations in Maldonado.²¹³

52. Uruguay argues that these events never occurred, citing a statement from Dr. Garcia before the Clerk of the State Notary and Dr. Garcia's testimony before the Uruguayan Criminal Court alleging that he never had any communications with Trigosl or received any services from Trigosl.²¹⁴ That testimony is belied, not only by inconsistencies between what Dr. Garcia told the Clerk of the State Notary and what he told the Uruguayan Criminal Court, but also by contemporaneous documents proving that Dr. Garcia did enter into a business relationship with Trigosl²¹⁵ and by sworn testimony from another key witness, Dr. Daniel Tellez, who acted as an intermediary between Trigosl and Dr. Garcia with respect to the business deal.

53. The uncontested or incontrovertible facts concerning Trigosl's contract with Dr. Garcia and the criminal investigation that Uruguay has initiated regarding that contract are as follows:

211. Memorial ¶ 55.

212. *Id.* ¶ 56; Data Transmission and Equipment Loan Agreement (Dec. 2010) (C-057).

213. *Id.*

214. Counter-Memorial ¶ 235.

215. Given the baseless accusations of forgery and fraud that Uruguay has leveled against Dr. Alberelli and Mr. Herbon, Italba engaged the services of a computer forensic examiner at FTI Consulting, Inc. (*FTI*) to examine emails between Dr. Daniel Tellez, Dr. Marcela Tellez, Dr. Garcia's office, and Dr. Alberelli and confirm their authenticity. FTI conducted such an examination and confirmed that those emails are authentic. See Affidavit of Axel Bolanos (May 11, 2017) (*FTI Report*) ¶ 3-6.

- a. Dr. Garcia is a radiologist in Uruguay.²¹⁶
- b. In the TCA proceedings against URSEC and MIEM in respect of the unlawful revocation of Trigosul’s license, Trigosul submitted copies of:
(i) an October 4, 2010 letter from Dr. Garcia to Dr. Alberelli (the **October 4, 2010 Letter**); and (ii) the executed Data Transmission and Equipment Loan Agreement between Trigosul and Dr. Garcia.²¹⁷
- c. Uruguay did not challenge the authenticity of those documents at any time during the TCA proceedings.
- d. The first time that Uruguay raised any challenge to the authenticity of those documents was in October 2016, after Italba filed its Memorial.
- e. In early October 2016, Dr. Miguel Angel Toma, the Secretary of the Presidency of Uruguay, contacted Dr. Garcia to “inquire” about the October 4 Letter and the Data Transmission and Equipment Loan Agreement, both of which Italba had attached as exhibits to its Memorial.²¹⁸
- f. On October 17, 2016, Dr. Garcia submitted a written declaration disclaiming the authenticity of both documents and stating that he did not

216. Testimony of Dr. Fernando Garcia Before the Uruguayan Criminal Court (Nov. 1, 2016) (**C-141**), at 3.

217. Letter from F. Garcia to G. Alberelli (Oct. 4, 2010) (**C-056**); Data Transmission and Equipment Loan Agreement (Dec. 2010) (**C-057**).

218. Letter from Uruguay to the Tribunal (Nov. 8, 2016) (**C-137**), at 2; Testimony of Dr. Fernando Garcia Before the Uruguayan Criminal Court (Nov. 1, 2016) (**C-141**), at 3 (“El Secretario de Presidencia me llamo hace 20 dias para consultarme”) (“The Secretary of the Presidency called me 20 days ago to consult with me”).

recognize the documents or the signatures on those documents and did not know Dr. Alberelli, Mr. Herbon, Dr. Tellez, or Trigosl.²¹⁹

- g. On the basis of Dr. Garcia's declaration, the Secretary of the Presidency filed a criminal complaint with the State's Attorney General's office on October 19, 2016, requesting the immediate commencement of a criminal investigation for forgery and fraud against Dr. Alberelli and Mr. Herbon.²²⁰
- h. On October 24, 2016, Mr. Herbon received a summons to appear before a Uruguayan criminal court at the end of that week.²²¹ Because Mr. Herbon was scheduled to be out of the country on his scheduled hearing date, that hearing was postponed to December 1, 2016.²²² Mr. Herbon's hearing date was subsequently further postponed to February 15, 2017.²²³
- i. On November 1, 2016, Dr. Garcia appeared at a hearing before the Uruguayan Criminal Court and gave testimony that contradicted his written declaration.²²⁴ Specifically, Dr. Garcia testified that—contrary to

219. Criminal File assigned to El Juzgado Letrado de Primera Instancia (Oct. 19, 2016) (*Criminal File*) (C-138), at 31 (“A) Con relacion a la nota de fecha 4 de octubre de 2010, declara que: . . . b) . . . que no conoce a las personas que se nombran en la misma, ‘Dr. Alberelli’ y ‘Dr. Daniel Tellez’”) (“A) With respect to the letter dated October 4, 2010, he declares that: . . . b) . . . he does not know the individuals referenced in the latter, ‘Dr. Alberelli’ and ‘Dr. Daniel Tellez’”); *see also id.* at 30-32, 36; Witness Statement of Fernando García Piriz (Dec. 29, 2016) ¶¶ 1-2; *see also* Counter-Memorial ¶¶ 235, 381-84, 395.

220. Counter-Memorial ¶ 383; Criminal File (C-138), at 36, 40; Criminal Complaint submitted with the Fiscalía General De La Nación (Oct. 19, 2016) (*Criminal Complaint*) (C-139), at 1-2; Counter-Memorial ¶ 383.

221. *Citación del Ministerio Del Interior Dirección General De Información E Inteligencia Policial División Operativa* (Oct. 21, 2016) (C-140).

222. Second Herbon Witness Stmt. ¶ 24. Mr. Herbon's hearing date was subsequently further postponed to February 15, 2017. *Id.*

223. *Id.* ¶ 24 n.40.

224. Counter-Memorial ¶ 383; *compare* Criminal File (C-138), at 30-32, 36 (Written Declaration of Dr. Fernando Garcia) *with* Testimony of Dr. Fernando Garcia Before the Uruguayan Criminal Court (Nov. 1, 2016) (C-141).

what he wrote in his declaration—he *did* know Dr. Tellez, the individual who acted as an intermediary between Dr. Alberelli and himself with respect to the negotiation of the business transaction with Trigosul.²²⁵

- j. On November 14, 2016, Dr. Tellez gave testimony before the Uruguayan Criminal Court that further contradicted Dr. Garcia’s testimony. Specifically, Dr. Tellez testified that he introduced Dr. Alberelli and Dr. Garcia after he learned about Dr. Alberelli’s telemedicine project in Uruguay and thought it would interest Dr. Garcia.²²⁶ He also testified that Dr. Garcia told him that he had spoken with Dr. Alberelli and wanted to pursue the relationship by setting up a further meeting.²²⁷
- k. On February 15, 2017, counsel for Mr. Herbon in the criminal proceedings requested the opportunity to question key witnesses, including Dr. Garcia and Dr. Tellez.²²⁸
- l. On March 6, 2017 the prosecutor denied Mr. Herbon’s request.²²⁹ Counsel for Mr. Herbon renewed his request on May 9, 2017.²³⁰

225. Testimony of Dr. Fernando Garcia Before The Uruguayan Criminal Court (Nov. 1, 2016) (C-141), at 4 (“Question: Do you know Dr. Daniel Tellez? A: Yes. He is a dermatologist in IMPASA. This is the only name I know.”).

226. Testimony of Dr. Daniel Angel Tellez Before the Uruguayan Criminal Court (Nov. 14, 2016) (C-153), at 2.

227. *Id.* at 2 (“QUESTION: Do you know if Alberelli contacted the ultrasound technicians you recommended? ANSWER. Yes, Garcia told me that he had contacted him. Garcia was the one who told me that he wanted to have a meeting with Alberelli . . .”).

228. Second Herbon Witness Stmt. ¶ 28 n.45; Criminal File assigned to El Juzgado Letrado de Primera Instancia (Nov. 1, 2016) (C-190), at 66-71 (Legal Brief Submitting Documentation and Request to Produce Evidence of Feb. 15, 2017).

229. Second Herbon Witness Stmt. ¶ 28 n.45; Criminal File assigned to El Juzgado Letrado de Primera Instancia (Nov. 1, 2016) (C-190) at 73-74 (Opinion of the Prosecutor issued outside the hearings of Mar. 6, 2017).

230. Request to Produce Evidence submitted by Jorge Barrera (May 9, 2017) (C-191).

- m. In addition to contacting and interviewing witnesses about the documents that Italba submitted with its Memorial, the Office of the President of Uruguay has been vigorously involved in the ongoing criminal investigation, making at least four submissions to the prosecutor since November 2016.²³¹ In one of those submissions, the Office of the President argued to the prosecutor that certain statements in Italba's submissions to the Tribunal prove that Mr. Herbon is guilty of the charges against him.²³²
- n. Because of concerns about whether he would be treated fairly in the criminal investigation, given its politicized nature, Mr. Herbon has not appeared at his hearing and has not been able to return to Uruguay.

54. In fact, Trigosl's relationship with Dr. Garcia began in late 2010, when Dr. Tellez, a dermatologist based in Montevideo, learned about Dr. Alberelli's telemedicine projects in Uruguay and decided to introduce Dr. Garcia and Dr. Alberelli in the hopes of facilitating a business relationship.²³³ Following an introductory call on which the parties discussed using Trigosl's wireless data services to transmit medical files to and from Dr. Garcia's radiology clinics across Uruguay, Dr. Garcia, Dr. Alberelli, and Dr. Tellez met in person in December 2010 to finalize the terms of a deal.²³⁴ That meeting resulted in an agreement that Trigosl would lease telecommunications equipment to Dr. Garcia's radiology clinics and associated

231. Second Herbon Witness Stmt. at ¶¶ 27-28.

232. Criminal File assigned to El Juzgado Letrado de Primera Instancia (Nov. 1, 2016) (C-190) (Letter from M. Errazquin to General Prosecutor's Office with attachments of Feb. 16, 2017), at 51-55.

233. Testimony of Dr. Daniel Angel Tellez Before the Uruguayan Criminal Court (Nov. 14, 2016) (C-153), at 1-2.

234. Second Alberelli Witness Stmt. ¶ 39.

clinics and provide training and maintenance services.²³⁵ As referenced above, Trigosul began providing test services to Dr. Garcia on a trial basis, free of charge, while it awaited URSEC's inspection and approval to operate in Maldonado.²³⁶

55. In early February 2011, after URSEC revoked Trigosul's license to operate in the Spectrum, Trigosul realized that it was important to put the parties' agreement in writing in case it became relevant in an appeal of the resolution revoking the license. Therefore, on February 7, 2011, Dr. Alberelli asked Dr. Tellez to put both parties in touch.²³⁷ The next day, Paula Gutierrez, Dr. Garcia's assistant, contacted Dr. Alberelli by email to request information for the preparation of a letter concerning the parties' discussions in October 2010.²³⁸

56. On February 10, 2011, Gonzalo Cicatiello, Dr. Garcia's assistant, forwarded Dr. Garcia's information to Dr. Marcela Tellez, Dr. Tellez's daughter whom Dr. Alberelli and Mr. Herbon understood to be a lawyer.²³⁹ In his email, Mr. Cicatiello stated that he would complete the requested letter and send a signed copy back to Dr. Alberelli.²⁴⁰

57. On February 10 and 12, 2011, Dr. Marcela Tellez and Dr. Alberelli exchanged drafts of a Data Transmission and Equipment Loan Agreement between Trigosul and Dr. Garcia, which set forth that Trigosul was providing test services to Dr. Garcia free of charge during a

235. *Id.*

236. *Id.*; First Alberelli Witness Stmt. ¶ 64; First Herbon Witness Stmt. ¶ 33.

237. Second Alberelli Witness Stmt. ¶ 41; Email from G. Alberelli to D. Tellez (Feb. 7, 2011) (C-192).

238. Email from P. Gutierrez to G. Alberelli (Feb. 8, 2011) (C-193). In his response to Paula Gutierrez, Dr. Alberelli asked to speak to Dr. Garcia about the installation of Trigosul's equipment. *Id.* Dr. Garcia sent an identical email to Dr. Alberelli on February 9, 2011, again asking for additional information for the preparation of a letter about the parties' discussions in October 2010, to which Dr. Alberelli again responded saying that he needed to talk to Dr. Garcia. Email from P. Gutierrez to G. Alberelli, copying Dr. Tellez (Feb. 9, 2011) (C-194).

239. Emails from M. Tellez to G. Alberelli (Feb. 10, 2011) (C-195).

240. *Id.*

trial period, but that Dr. Garcia remained responsible for Trigosul's equipment.²⁴¹ That afternoon, Dr. Marcela Tellez also sent Dr. Alberelli an unsigned draft of the October 4, 2010 Letter bearing Dr. Garcia's logo and signature block.²⁴² The letter stated that Dr. Garcia had heard about Trigosul's telemedecine business from Dr. Tellez, and that Dr. Garcia was interested in using Trigosul's Spectrum to transmit medical files to and from radiology clinics in Montevideo, Maldonado, and Colonia and to expand his business to other regions of Uruguay.²⁴³

58. On February 16, 2011, in response to prodding from Dr. Alberelli, Dr. Tellez emailed Dr. Alberelli that Dr. Garcia had signed "everything."²⁴⁴

59. Later that month, Dr. Garcia invited Dr. Alberelli and Dr. Tellez to a barbecue at his home. At that barbecue, Dr. Garcia handed Dr. Alberelli a signed copy of the October 4, 2010 Letter and two signed copies of the Data Transmission and Equipment Loan Agreement so that each party would have one original signed version.²⁴⁵ Dr. Alberelli later provided both copies of the contract to Mr. Herbon, who signed on Trigosul's behalf, made copies of both originals, and sent one of the original signed versions to Dr. Garcia.²⁴⁶

60. Dr. Alberelli had no reason to question the authenticity of the signatures on those documents, both of which he received directly from Dr. Garcia. As demonstrated in the emails described above—all of which were contemporaneous and determined by forensic experts to be

241. *Id.*; see also Emails between G. Alberelli and M. Tellez (Feb. 10, 2011) (C-196); Email from M. Tellez to G. Alberelli (Feb. 12, 2011) (C-197); Email from M. Tellez to G. Alberelli (Feb. 12, 2011) (C-198); Email from M. Tellez to G. Alberelli (Feb. 12, 2011) (C-199).

242. Email from M. Tellez to G. Alberelli (Feb. 12, 2011) (C-200).

243. *Id.*

244. Email from D. Tellez to G. Alberelli (Feb. 16, 2011) (C-201); see also Email from G. Alberelli to M. Tellez (Feb. 20, 2011) (C-202); Second Alberelli Witness Stmt. ¶ 45.

245. Second Alberelli Witness Stmt. ¶ 46; see Data Transmission and Equipment Loan Agreement (Dec. 2010) (C-057); Additional Signed Copy of Data Transmission and Equipment Loan Agreement (Dec. 2010) (203).

246. Second Alberelli Witness Stmt. ¶ 46.

authentic²⁴⁷—Dr. Tellez represented to Dr. Alberelli that Dr. Garcia had signed the documents, and Dr. Alberelli relied on that representation. Dr. Alberelli’s reliance on statements from Dr. Tellez was bolstered by communications he had with Paula Gutierrez and Ms. Tellez had with and Gonzalo Cicatiello, both of whom worked for Dr. Garcia and confirmed Dr. Garcia’s business relationship with Trigosl. Neither Dr. Tellez nor Dr. Garcia had any incentive to provide forged documents to Dr. Alberelli. In light of Uruguay’s allegations that Dr. Garcia’s signature on the Data Transmission and Equipment Loan Agreement was forged, Italba engaged John Hargett, an expert in handwriting analysis, to examine the allegedly forged signature against other examples of the signatures of Dr. Garcia, Dr. Alberelli, and Mr. Herbon. While Mr. Hargett opined that the signature on the Data Transmission and Equipment Loan Agreement most closely resembled Dr. Garcia’s signature, given the lack of identifying characteristics of the signature on the agreement, Mr. Hargett concluded that it could not be determined whether Dr. Garcia, Dr. Alberelli, Mr. Herbon, or anyone else made the signature on the agreement.²⁴⁸

61. The fact that Uruguay did not initiate any criminal investigation until *after* Italba filed its Memorial—despite having known about the Garcia documents years earlier in the context of the TCA proceedings—together with the intimate involvement of the Office of the President of Uruguay in initiating the criminal investigation and communicating with the prosecutor, speaks volumes about the highly politicized nature of the claims against Dr. Alberelli and Mr. Herbon. The prosecutor’s denial of Mr. Herbon’s request for the opportunity to examine key witnesses²⁴⁹ and refusal to acknowledge the conflicting testimony of Dr. Garcia and

247. FTI Report ¶¶ 5-6.

248. Expert Report of John Hargett (Feb. 13, 2017).

249. Second Herbon Witness Stmt. ¶ 28 n.45; Criminal File assigned to El Juzgado Letrado de Primera Instancia (Nov. 1, 2016) (C-190) at 73-74 (Opinion of the Prosecutor issued outside the hearings of Mar. 6, 2017).

Dr. Tellez²⁵⁰ confirm that the true purpose of the criminal investigation is not to get to the truth regarding any allegations of forgery or fraud, but rather to put pressure on Italba in this arbitration and hamper its ability to prove its case.

62. That is precisely what has occurred. Since the criminal investigation began nearly seven months ago, neither Dr. Alberelli nor Mr. Herbon has been able to return to Uruguay because of their concerns that they will not be treated fairly in a criminal proceeding as politically charged as this one, in which the Office of the President has such an unusual role.²⁵¹ As a result, Dr. Alberelli and Mr. Herbon cannot access documents relevant to this proceeding that remain in Uruguay or meet with witnesses who are in Uruguay. Their inability to do so has negatively impacted Italba's ability to gather evidence to present its case in this arbitration.

63. Even more troubling, Dr. Alberelli and counsel for Italba spoke to at least one potential witness who detailed efforts by Uruguayan government officials to coerce them to testify against Italba but would not go on the record for fear of retribution.²⁵²

250. *See supra* ¶ 53(i), (j). As noted above, there are serious inconsistencies between the testimony given by Dr. Garcia and Dr. Tellez, as well as inconsistencies between Dr. Garcia's initial witness statement and his testimony at a hearing before the Uruguayan criminal court. It is not clear why Dr. Garcia made those false and conflicting statements, but it is possible that there were incentives to him doing so that have nothing to do with this arbitration. For example, Dr. Garcia is an approved government contractor who has done work for the Uruguayan government in the past and may be reliant on that business in the future. ACCE Procurement Agency of the State (Nov.28, 2012) (C-204) (awarding contracts to Dr. Garcia); Administracion de los Servicios de Salud del Estado, Hospital de Flores Resolution (May 17, 2012) (C-205) (same).

251. Second Alberelli Witness Stmt. ¶ 49; Second Herbon Witness Stmt. ¶ 28.

252. Letter from A. Yanos to Tribunal (Feb. 9, 2017) (C-206) at 2; Alberelli Witness Statement accompanying Italba's Reply in Further Support of Provisional Measures (Nov. 24, 2016), ¶¶ 4-5 ("One witness that I contacted informed me that he had received a phone call from Dr. Miguel Angel Toma, the Secretary of the Presidency of Uruguay. In that phone call Dr. Toma had asked the witness whether he was considering testifying on behalf of Italba in this arbitration and indicated that it would be in the witness's best interest if he did not assist Italba in any way.").

7) Italba was pursuing a business opportunity for U.S. expatriate retirees in Punta del Este.

64. As set forth in Italba’s Memorial, in January 2011, Trigosul developed a plan to offer Internet, telephone, DTH satellite television, and telemedicine services to a community of retired Americans living in the Maldonado region, which Trigosul referred to as “Grupo Afinidad Mary.”²⁵³ Uruguay argues that Grupo Afinidad Mary “does not exist” because it was unable to locate an organization in Uruguay with that name.²⁵⁴ However, the name “Grupo Afinidad Mary” does not refer to a legal entity in Uruguay—it was internal shorthand at Trigosul to refer to the community of U.S. expatriate retirees spending extensive periods of time in the Maldonado region, which included expats who had become permanent residents of Uruguay, as well as those who maintained a residence in the United States, but lived in Uruguay during the winter months in the U.S. (typically November through March).²⁵⁵

65. Based on information that Dr. Alberelli received from U.S. retirees spending extensive periods of time in Uruguay, the community of U.S. expatriates required access to Internet, mobile telephony, international long-distance calling, satellite television, and telemedicine services.²⁵⁶ Italba already had a successful business offering similar services in Panama through its Panamanian subsidiary Pan Americana de Telemedicina and recognized the need for those services, particularly telemedicine, in Uruguay.²⁵⁷ As the Uruguayan government has itself recognized, telemedicine is a vital service in Punta del Este and other areas of Uruguay

253. Memorial ¶ 61.

254. Counter-Memorial ¶¶ 236, 380.

255. Second Alberelli Witness Stmt. ¶ 53; Second Herbon Witness Stmt. ¶ 23.

256. Second Alberelli Witness Stmt. ¶ 53; *see also* Grupo Afinidad Mary—Proyección de Ingresos, Inversiones y Costos (C-064), at 2.

257. First Alberelli Witness Stmt. ¶¶ 12, 69-70.

outside of Montevideo, where there are fewer healthcare professionals, particularly specialists, available.²⁵⁸

66. Trigosl's business plan was to purchase mobile telephony, long-distance calling, and satellite television services from Telmex's local subsidiary, Claro, and to re-sell those services as part of an integrated product and services package at a competitive rate.²⁵⁹ At the time, Claro had a license to provide national and international telephone and data services through Telmex.²⁶⁰ Telmex was also in the process of appealing the January 2009 decision of the Uruguayan government to revoke Telmex's DTH license, and expectations in that regard were that Telmex's license would soon be restored, and Trigosl would be able to use Claro's towers and DTH license to transmit data directly to nursing homes or individual households in the U.S. expatriate community.²⁶¹ Thus, Trigosl's contribution to the project would be offering Internet access through its license, and Claro's contribution would be cellular and long-distance telephony and DTH satellite television.²⁶² While Uruguay argues that Trigosl was not authorized to provide telemedicine services, telemedicine was at the time and remains an unregulated industry in Uruguay; there are no regulations in place that would have required Trigosl to obtain authorization to provide such services. Accordingly, Trigosl had the necessary license for the services it intended to provide as part of the Grupo Afinidad Mary project.

258. *Telemedicina permite atención de pacientes de zonas rurales en su lugar de residencia* (Oct. 10, 2014) (C-207); see also A. Margolis et al., *e-Health in Uruguay: development and challenges in e-Health in Latin American and the Caribbean: Progress and Challenges* 115-130 (A. Fernandez & E. Oviedo, eds. 2011) (C-208), at 124.

259. Grupo Afinidad Mary—Proyección de Ingresos, Inversiones y Costos (C-064), at 2-3.

260. Memorial ¶¶ 48, 51.

261. See Grupo Afinidad Mary—Proyección de Ingresos, Inversiones y Costos (C-064), at 2-3; see also Memorial ¶¶ 48-51.

262. Grupo Afinidad Mary—Proyección de Ingresos, Inversiones y Costos (C-064), at 2-3.

III. JURISDICTION

67. As established in the Memorial, Italba is a Florida corporation and thus both a “national of another Contracting State” within the meaning of Article 25(2)(b) of the ICSID Convention and a protected investor under Article 1 of the Treaty.²⁶³ This arbitration, in which Italba alleges multiple breaches of the Treaty, thus concerns a legal dispute between a contracting party to the Treaty and a national of the other contracting party.²⁶⁴ Italba’s business activities in Uruguay—specifically its 100% ownership and control of its subsidiary, Trigosl, and Trigosl’s license to operate in the Spectrum—form a “covered investment” within the meaning of Article 1 of the Treaty.²⁶⁵ Uruguay made a standing offer to arbitrate disputes with U.S. investors alleging breaches of the Treaty pursuant to Articles 24 and 25 of the Treaty.²⁶⁶ Italba, as established in Italba’s Memorial, discovered the Treaty breaches that form the basis of its claim in March of 2015, and timely accepted Uruguay’s standing offer of arbitration through its notice of dispute dated August 5, 2015.²⁶⁷

68. Uruguay challenges the Tribunal’s jurisdiction. In particular, Uruguay contends: (a) Italba is not a protected investor under the Treaty because: (i) Italba does not own Trigosl; and (ii) even if it did, the license is not a covered investment because it is revocable at will without compensation; (b) even if Italba is a covered investor, Uruguay is entitled to deny Italba benefits under the Treaty because the company is controlled by Dr. Alberelli and has no business in the United States; and (c) even if Italba is entitled to protection under the Treaty, the claims in this arbitration must be dismissed because the license was terminated in January 2011 and Italba

263. Memorial ¶¶ 87-90.

264. *Id.* ¶ 95.

265. *See id.* ¶¶ 91-94; Treaty (C-001), Art 1(g)-(h).

266. Memorial ¶¶ 96-98.

267. *Id.* ¶¶ 99-103.

did not notify Uruguay of the claim until August 2015.

69. In the following section, Italba sets out the facts and legal reasons that all of Uruguay's jurisdictional challenges must be dismissed. Specifically, in this section, Italba demonstrates the following:

- a. Italba is a covered investor under the Treaty because it is the owner and controller of Trigosul. *First*, Dr. Alberelli transferred all of the outstanding Trigosul shares to Italba in 2002 by inscribing his intent to make such a transfer on the shares and then delivering the shares to Italba—a transfer valid under Florida law, the law governing the transfer and the relevant law under Uruguay's conflict of laws principles as well. *Second*, Italba exercised all financial and legal control over Trigosul from its inception, providing Trigosul with all funds used in its business operations—an economic reality relevant to the question of ownership and control under both international and Uruguayan law. *Third*, even under Uruguay's corporate laws, Dr. Lapique, an expert in Uruguayan corporate law, shows that Italba owned at least 93.36% of the Trigosul's shares because of capital contributions the company made throughout the history of Trigosul. *Finally*, even if Italba did not “own” Trigosul, the facts establish that Italba controlled Trigosul and, therefore, was a covered investor under the Treaty.
- b. Italba is also a covered investor because Italba's investment in Trigosul's license and rights to operate in the Spectrum are covered investments under the Treaty. The fact that Trigosul's rights are described as “precarious” does not mean such rights are revocable at will without compensation—a fact that is clear under Uruguayan law and patently obvious given the fact that the TCA Judgment reinstated those rights.
- c. Uruguay has no right under Article 17(2) of the Treaty to deny Italba the benefits of the Treaty. *First*, Uruguay's claim that Italba has no substantial business activity in the United States is demonstrably false. For over 35 years, Italba was involved in businesses relating to telecoms, textiles and telemedicine in the United States, Canada, Ecuador, Panama and Uruguay. It is the opposite of a passive holding company. *Second*, contrary to Uruguay's assertions, Italba is neither owned nor controlled by a non-U.S. national—in fact, the company is 50% owned by Dr. Alberelli, an Italian national, and 50% owned by Beatriz Alberelli, a U.S. national. Neither has the power to control the company, within the meaning of the Treaty.
- d. Italba's claims for Uruguay's numerous breaches of the Treaty are timely brought within Article 25(1)'s limitations period. *First*, Italba's expropriation claim is based on Uruguay's failure to implement and active frustration of the TCA Judgment annulling the earlier termination of

Trigosul’s license. Uruguay’s attempts to relate Italba’s claims back to URSEC’s 2011 revocation of Trigosul’s rights in the Spectrum, arguing that the conduct in 2015 was merely a continuation of its unlawful conduct in 2011 but that argument must fail—not only because Italba’s claims are not based on that revocation but, more generally, because Article 25(1)’s limitations period applies to specific *claims*, not to a generalized dispute between the parties. *Second*, Italba’s claims based on Uruguay’s earlier unfair and inequitable treatment are also timely because Italba learned the true character of Uruguay’s other breaches only in March 2015 when, despite URSEC’s concealment and misdirection, Italba discovered that URSEC had secretly re-allocated the Spectrum even while Trigosul’s rights in the Spectrum had been *sub judice* before the TCA. It was only then that Italba had clear evidence that Uruguay’s prior mistreatment was the product of discrimination rather than bureaucratic ineptitude.

A. Italba Is A Covered Investor Under The Treaty.

1) Italba owns and controls Trigosul.

70. Pursuant to Article 1 of the Treaty, an “‘investment’ means every asset that an investor *owns* or *controls, directly* or *indirectly*, that has the characteristics of an investment, *including such characteristics as the commitment of capital* or other resources, the expectation of gain or profit, or the assumption of risk.”²⁶⁸ By Article 1’s definition, and as set out in the Memorial, Italba is unquestionably an “investor of a Party” in Uruguay within the meaning of Article 1 and is entitled to bring this arbitration because, at all relevant times, it “owned” and, in any event, “controlled” Trigosul—the victim of Uruguay’s unlawful conduct.²⁶⁹

71. Uruguay insists, however, that Italba “has failed to prove it is or has been the owner of Trigosul” and that Italba accordingly cannot seek the Treaty’s protections in response to Uruguay’s unlawful treatment of Trigosul.²⁷⁰ Uruguay is wrong. Whether the question is

268. Treaty (C-001), Art. 1 (emphasis added).

269. See Memorial ¶¶ 93-94; First Alberelli Witness Stmt. ¶ 16.

270. Counter-Memorial ¶¶ 51-61; Cendoya Witness Stmt. ¶ 31.

examined under Florida law or Uruguayan law, the evidence confirms that Italba indeed owns Trigosul.

72. As set forth in the witness statements of Gustavo and Beatriz Alberelli, the Alberellis' plan as co-owners of Italba was to integrate their investments in Uruguay within the ambit of Italba's operations.²⁷¹ From a tax, liability, and financial planning perspective, having Italba own and manage investments in Uruguay made the most sense and was consistent with the approach that the Alberellis took with other investments in Latin America, all of which went through Italba.²⁷² Thus, in 2002, when the Alberellis realized that they had not formally transferred Trigosul's shares to Italba, they took action. *First*, in May 2002, they asked Dr. Alberelli's mother to transfer her shares in Trigosul to Dr. Alberelli, which she did.²⁷³ *Second*, in August 2002, the shares were transferred to Italba and moved to Miami, Florida and placed in a safety deposit box that Dr. Alberelli and his wife own for the purpose of maintaining important documentation belonging to Italba.²⁷⁴ To indicate that the shares now belonged to Italba, Dr. Alberelli noted on the back of the bundle of shares that he was transferring them to Italba.²⁷⁵ It bears some emphasis that, at the time these actions took place, there was no treaty

271. Second Alberelli Witness Stmt. ¶ 9; Witness Statement of Beatriz Alberelli on Behalf of Claimant (May 12, 2017) (*Beatriz Alberelli Witness Stmt.*) ¶ 4.

272. Second Alberelli Witness Stmt. ¶ 9; Beatriz Alberelli Witness Stmt. ¶ 5; *see also* Joint Venture Agreement between Sunrise Telecomunicacoes Ltd. and Italba (July 16, 1999) (C-209) (agreement concerning provision of phone line services in Latin America); Foreign Carrier Termination Agreement between Panamsat Carrier Services, Inc. and Italba (Mar. 1, 2000) (C-210) (agreement to provide termination telecommunications services in Ecuador); Landing Rights Agreement between and among Telesat Canada, Privanet S.A., and Italba (Aug. 1, 2001) (C-211) (agreement among Italba, Italba's Ecuadorian subsidiary, and Telesat Canada concerning satellite landing rights in Ecuador); Reciprocal Telecommunications Agreement between Globecall de Brasil Ltda Rua Mattias Aires and Italba (Aug. 17, 2004) (C-212) (agreement to provide VoIP services in Latin America); Letter from O. Gnass to G. Alberelli (Jan. 24, 2007) (C-213) (stating that Italba is authorized to sell Redline Communications Inc. products in Uruguay, Panama, Argentina, and Panama).

273. Second Alberelli Witness Stmt. ¶ 17; Beatriz Alberelli Witness Stmt. ¶ 6.

274. Second Alberelli Witness Stmt. ¶ 17; Beatriz Alberelli Witness Stmt. ¶ 6.

275. Second Alberelli Witness Stmt. ¶ 17; Beatriz Alberelli Witness Stmt. ¶ 6.

between the United States and Uruguay and no material dispute between Trigosul or Italba and the government of Uruguay.

73. At the same time, it is important to recall that the transfer in Florida of Trigosul's shares simply reflected the formalization of an arrangement that had been in place since the inception of Italba's investments in Uruguay. In particular, since the acquisition of Trigosul, Italba made the investments necessary to provide the company with all of its funds. Moreover, the fact that Italba was the owner and controller of Trigosul was made clear to all. Italba registered with the U.S. Embassy as the owner of Trigosul;²⁷⁶ Trigosul advised the Uruguayan government that it was owned by Italba, a U.S. national;²⁷⁷ and Italba negotiated important transactions with corporations and suppliers in the United States and elsewhere, representing itself as the sole owner and controller of Trigosul, a fact that Trigosul's legal representative has confirmed.²⁷⁸

74. Thus, as detailed further below, whether one views the question of ownership under Florida law—the place where Trigosul's shares were formally transferred from Dr. Alberelli to Italba—or Uruguayan corporate law, the answer is the same: Italba owns Trigosul. In addition, the history of Trigosul amply demonstrates that Italba directly controlled Trigosul as well.

276. Advocacy Questionnaire Submitted By Trigosul to the U.S. Embassy in Uruguay (June 11, 2001) (C-102); Agreement Concerning Bribery and Corporate Policy Prohibiting Bribery (Nov. 6, 2011) (C-181).

277. Letter from A. Jansenson to R. Lago (July 9, 2001) (C-182), at 1.

278. *See, e.g.*, Letter from S. Rossi to A. Jansenson & G. Alberelli (Feb. 3, 2002) (C-014); Co-Investment Agreement Among Eastern Pacific Trust and Italba Corporation (Jun. 14, 2002) (C-015); Letter from A. Cherp to A. Jansenson, G. Alberelli & L. Herbon (Jan. 8, 2003) (C-016); Joint Venture Terms Sheet Between Phinder Technologies Inc. and Italba Corporation (Feb. 2007) (C-030); Fax from D. Los Santos to A. Jansenson (May 8, 2001) (C-168); Quotation No. 2501 from Wavelynx International, Inc. (Jan. 11, 2000) (C-159); Seller's Agreement between Italba Corporation and Wavelynx International, Inc. (Feb. 27, 2000) (C-160); Wavelynx Shipment Invoice No. 5925 (Feb. 18, 2000) (C-009); StarMesh Technologies Invoice No. 107 to Italba (June 12, 2007) (C-169).

(a) Italba Owns Trigosul Under Florida Law.

75. In this case, because Dr. Alberelli was in Florida when he formally transferred his ownership interest in Trigosul to Italba,²⁷⁹ Florida law governs the validity of that transfer.

76. Article 30(1) of the Treaty states that, with respect to claims submitted under Articles 24(1)(a)(i)(A) and 24(1)(b)(i)(A)—as Italba’s claims are—“the tribunal shall decide the issues in dispute in accordance with this Treaty and applicable rules of international law.” The Treaty does not set forth any further standards pertaining to choice of law issues. Ordinarily, the validity of a transaction occurring in Florida would be governed by Florida law.²⁸⁰

77. However, even if one were to view the question of Trigosul’s ownership as one concerning “[t]he law applicable to an issue relating to the existence or scope of property rights comprising the investment” the ultimate result would be the same because questions concerning the existence or scope of property rights look to “the municipal law of the host state, including its rules of private international law.”²⁸¹ In this case, Uruguay is the host state but Uruguayan law requires that the validity of the transfer of Trigosul’s shares be decided under Florida law.

78. Specifically, Uruguayan law specifies that both assets (including shares) and the legal transfer of such assets are governed by the law of the place in which the assets are found or where the legal transfer occurred.²⁸² Here, the share certificates of Trigosul were located in

279. Second Alberelli Witness Stmt. ¶ 17.

280. Florida law also requires that the law of the place where an asset is located when a transfer takes place is the governing law for purposes of determining the validity of that transfer. Fla. Stat. § 678.11101(3) (1997) (C-214) (“The local law of the jurisdiction in which a security certificate is located at the time of delivery governs”); 10 Fla. Jur. 2d Conflict of Laws (C-215), § 24 (“The law of the actual situs of transfer generally controls transfers of personalty.”).

281. Zachary Douglas, *The International Law of Investment Claims* (Cambridge Univ. Press 2009) (CL-102), at 52, 54-55; see also *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (Sept. 22, 2014) (CL-071), ¶¶ 531-35.

282. Appendix of the Civil Code of Uruguay (C-216), Art. 2398 (“Los bienes, cualquiera que sea su naturaleza, son exclusivamente regidos por la ley del lugar en que se encuentran, en cuanto a su calidad, a su posesión, a su enajenabilidad absoluta o relativa y a todas las relaciones de derecho de carácter real de que son

Florida and the act that transferred ownership of those shares from Dr. Alberelli to Italba occurred in Florida. Thus, Florida law governs Trigosul's ownership.

79. Under Florida law, a transfer of shares is complete when shares are "delivered" to the transferee, *i.e.*, the transferee acquires possession of the stock certificates.²⁸³ Here, Dr. Alberelli endorsed the back of a bundle of all of Trigosul's stock certificates with a notation indicating the transfer of his ownership interest to Italba and then delivered those certificates to Italba by depositing them in a safety deposit box in the name of Italba's co-owners, Gustavo and Beatriz Alberelli, where Dr. and Ms. Alberelli typically kept key documents belonging to Italba.²⁸⁴ Under Florida law, that delivery is sufficient to effect a transfer of ownership interest in Trigosul from Dr. Alberelli to Italba. Accordingly, Italba owns Trigosul.

(b) Italba Also Owns Trigosul Under Uruguayan Domestic Corporate Law.

80. Because Florida law governs the question of whether Italba owns Trigosul, the Tribunal need not look any further to establish Italba's ownership rights. But even if Uruguayan domestic corporate law were relevant to the question of ownership, application of that law would

susceptibles.") ("Assets, whatever their nature, are exclusively governed by the law of the place where they are, in terms of their quality, their possession, [and] their absolute or relative transfer."); Alejandro Miller, *La transferencia de derechos accionarios* (Revista de la Facultad de Derecho No. 26) (C-217), at 105, 109; Luis Lapique, *Las Acciones en una Sociedad Anónima* (FCU) (C-218), at 21, 108; Appendix of the Civil Code of Uruguay (C-216), Art. 2399 ("Los actos jurídicos se rigen, en cuanto a su existencia, naturaleza, validez y efectos, por la ley del lugar de su cumplimiento, de conformidad, por otra parte, con las reglas del interpretación contenidas en los artículos 34 a 38 inclusive del Tratado de Derecho Civil de 1889..") ("Legal instruments shall be governed, with respect to their existence, nature, validity and effects, by the law of the place of performance in accordance, among other things, with the rules of interpretation contained in articles 34 to 38 of the Civil Law Treaty of 1889."); *see also* Civil Law Treaty of 1889 (C-219), Art. 34 ("[L]os contratos sobre cosas ciertas e individualizadas se rigen por la ley del lugar donde ellas existían al tiempo de su celebración") ("[C]ontracts regarding individualized and specific asset are **governed by the law of the place where they existed at the time of their performance.**") (emphasis added).

283. Fla. Stat. § 678.3011(1)(a) (1997) (C-220) ("Delivery of a certificated security to a purchaser occurs when . . . The purchaser acquires possession of the security certificate."); *see also, e.g., Tanner v. Robinson*, 411 So. 2d 240, 242 (Fla. Dist. Ct. App. 1982) (C-221) (transfer of a gift of stock effective upon actual or constructive delivery of the shares).

284. Second Alberelli Witness Stmt. ¶ 17.

yield the same result as under Florida law. Under Uruguayan domestic corporate law, a party can demonstrate ownership in one of three ways: (a) by endorsing a stock certificate with a notation of the transfer, delivering the certificates to the transferee, and/or registering the transfer in the company's stock ledger; (b) in the absence of a formal transfer of shares, by demonstrating that, as a matter of "economic reality," the party owned and acted as the owner of the company; and (c) by making capital contributions to the company.²⁸⁵ Here, pursuant to the "economic reality" theory, Italba is the sole owner of Trigosul.

81. In particular, Uruguayan law recognizes that "law in general . . . must adjust its provisions to reality, since its aim is to regulate facts and events."²⁸⁶ That concept makes particular sense in the context of closely held corporations, where corporate formalities and recordkeeping may in practice be more relaxed.²⁸⁷ In the case of Trigosul, Dr. Luis Lapique, an expert in Uruguayan corporate law, concluded that the corporate records are so mutually inconsistent and error-filled that they cannot be relied upon to represent the reality of how Trigosul functioned.²⁸⁸ Thus, "[i]t is imperative to resort to the economic reality behind Trigosul" in determining its ownership and to consider evidence of how the company actually operated, including whether the parent company understood itself to be the owner of the subsidiary, acted in a manner consistent with ownership, and held itself out to third parties as the

285. Expert Report of Dr. Luis Lapique (May 12, 2017) (*Dr. Lapique Report*) at 9-15 (capital contributions), 15-16 (transfer by endorsement), 17-18 (economic reality); *see also* Law 16,060 (C-222), Art. 305 ("La transmisión de las acciones será libre. . . . Las acciones endosables se transmitirán por una cadena ininterrumpida de endosos y para el ejercicio de sus derechos el endosatario solicitará el registro.") ("The transfer of the shares shall be free. . . . The endorsable shares shall be transferred by an uninterrupted chain of endorsements and for the exercise of their rights the endorser will consult the registry.").

286. TCA Decision 662/2010 (Sept. 4, 2010) (C-223).

287. Dr. Lapique Report at 4, 14.

288. *See id.* at 77-79, 22; *see also supra* Section II.C.1.

owner.²⁸⁹

82. In this case, the economic reality of Trigosul is that Italba was Trigosul's parent. *First*, Italba directed all of Trigosul's business decisions. In carrying out his duties as Trigosul's General Manager, Luis Herbon acted exclusively on instructions from Italba, which he understood to be the owner of Trigosul.²⁹⁰ Italba developed Trigosul's business plan and commissioned studies in 1999 and 2001 to analyze, respectively, the feasibility of Trigosul's business plan and the most advantageous potential locations for Trigosul's radio equipment.²⁹¹ Italba also sought out, negotiated, and contracted with potential joint venture partners on Trigosul's behalf. The joint venture agreements with Worldstar, EPIC, and Phinder all named Italba as the contracting party and all involved the use of Trigosul's license, which Italba—as Trigosul's owner—was in a position to include in those deals.²⁹² In addition, at the time URSEC unlawfully revoked Trigosul's license, Italba was actively negotiating a joint venture with DirecTV that would have involved the use of Trigosul's frequencies to provide Internet services to DirecTV's customers.²⁹³ Critically, Italba's counterparties in these transactions did not require that Trigosul or Dr. Alberelli be party to the joint venture agreements—they were satisfied that Italba was the owner of Trigosul and, therefore, Trigosul's license and could bind

289. Dr. Lapique Report at 17-18; *see also* Larrañaga L., *Sentencia Suprema Corte de Justicia Dos Comentarios: I) Apariencia jurídica y responsabilidad*, Anuario de Derecho Civil Uruguayo, T. 40, FCU, Montevideo (2010) (C-224), at 1050, 1058; Decision 90/2009 of Court of Appeals Term 1, available at Base de Jurisprudencia Nacional (C-225) (applying economic reality doctrine to fins standing to sue in plaintiffs' favor because minutes of meetings established that plaintiffs had participated in shareholders' meetings, despite the fact that plaintiffs were not registered as shareholders in the bank's books and records).

290. Second Herbon Witness Stmt. ¶¶ 10, 15.

291. Second Alberelli Witness Stmt. ¶ 11. A Proposal for a Banking Communication Network (Jan. 6, 1999) (C-006); Prime Wave Communication, *Site Survey Report: Uruguay* (Oct. 15, 2001) (C-165).

292. Second Alberelli Witness Stmt. ¶ 11; Joint Venture Agreement for Telecommunications Project in Uruguay (July 1999) (C-007); Shareholders' Agreement between Italba, Worldstar, and Villaclara S.A. (Oct. 1998) (C-008); Co-Investment Agreement Among Eastern Pacific Trust and Italba Corporation (June 14, 2002) (C-015); Joint Venture Terms Sheet Between Phinder Technologies Inc. and Italba Corporation (Feb. 2007) (C-030), at 2.

293. Second Alberelli Witness Stmt. ¶ 20.

Trigosul to perform under the contracts.

83. *Second*, Italba contributed the overwhelming majority of Trigosul's share capital. In early 2001, Italba made a capital contribution to Trigosul of 632,674 Uruguayan pesos.²⁹⁴ In recognition of Italba's capital contribution, an extraordinary meeting of Trigosul's shareholders later that year accordingly increased the authorized capital of the company from 182,500 to 690,000 Uruguayan pesos. Thus, Italba contributed 92.04% of Trigosul's share capital.²⁹⁵

84. *Third*, Italba funded Trigosul's operations. In order for Trigosul to operate in the PCS Spectrum and, later, the Spectrum, Italba purchased equipment for Trigosul through contracts with Wavelynx, L3 Communications, and StarMesh Technologies.²⁹⁶ Uruguay was well aware of that fact: Mr. Herbon submitted a letter to UNCA in October 2000 showing that Italba had purchased equipment for Trigosul,²⁹⁷ and a September 2002 resolution by the President of Uruguay explicitly recognized that Italba paid for Trigosul's equipment.²⁹⁸ Italba

294. Trigosul's Book of Shareholders and Directors Meetings (C-164), at 5-6; Trigosul's Diary (C-167), at 9, 10; *see also* Dr. Lapique Report at 7. While this contribution from Italba at the time exceeded Trigosul's maximum authorized share capital, it was nevertheless used by Trigosul to fund its operations. Dr. Lapique Report at 11 ("To date, Italba Corp. has not been issued its shares, but its contributions have been received by [Trigosul]. . ."); *see also* Trigosul's Bylaws (C-226), at 3.

295. Dr. Lapique Report at 11 ("Having made the contributions in October 2001, Italba Corp. would be the majority shareholder of the [Trigosul] since it would immediately be entitled to be issued shares for \$127,750, and, once the process of increase of the authorized capital has been completed (registered and published), it would be entitled to the shares corresponding to the remaining amount contributed, which is an additional \$504,924, being the majority shareholder with 92.04% of the capital stock of [Trigosul]."); *see also id.* at 12 ("the fact that the shares were not issued and registered, does not deprive Italba Corp. of its shareholder status"); *id.* at 14-15; *see also* Trigosul's Book of Shareholders and Directors Meetings (C-164), at 5-6.

296. Second Alberelli Witness Stmt. ¶ 14; Second Herbon Witness Stmt. ¶ 13 n.15; Fax from D. Los Santos to A. Jansenson (May 8, 2001) (C-168); Quotation No. 2501 from Wavelynx International, Inc. (Jan. 11, 2000) (C-159); Seller's Agreement between Italba Corporation and Wavelynx International, Inc. (Feb. 27, 2000) (C-160); Wavelynx Shipment Invoice No. 5925 (Feb. 18, 2000) (C-009); StarMesh Technologies Invoice No. 107 to Italba (June 12, 2007) (C-169); *see also* URSEC Certificate of Homologation (June 29, 2007) (C-170), at 1-2 (showing that equipment purchased through StarMesh Technologies was ultimately shipped to Uruguay).

297. Letter from D. Los Santos to G. Alberelli (Sept. 26, 2000) (C-135), at 6.

298. UMDN-URSEC Resolution (Sept. 10, 2002) (C-171), ¶ III(1) ("el monto de la reclamación se integra por los siguientes conceptos: 1) compra de radios factura de ITALBA: U\$S 25.964") ("the amount of the claim is integrated by the following concepts: 1) purchase of Italba invoice radios: US \$25,964").

also regularly wrote checks to cover payments for URSEC fees and other Trigosul expenses.²⁹⁹ These checks would typically be cashed by either Dr. Alberelli or Mr. Herbon and used to cover operational expenses.³⁰⁰ In addition, in April 2004, Italba provided \$25,000 to Mr. Herbon for the purchase of Uruguayan bonds, which, in accordance with Italba's instructions, Mr. Herbon held for two years, sold, and then used to pay Trigosul's expenses over a period of months.³⁰¹ Thus, Italba provided the funds that allowed Trigosul to operate.

85. *Fourth*, reflecting its understanding that it was the sole owner of Trigosul, Italba routinely represented to third parties that it owned Trigosul, including in an advocacy questionnaire and anti-bribery agreement submitted to the U.S. Embassy in Uruguay,³⁰² a July 2001 letter to the Secretary of the Presidency of Uruguay,³⁰³ in its business transaction with L3 Communications,³⁰⁴ in presentations to potential investors,³⁰⁵ and in joint venture negotiations

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299. Second Alberelli Witness Stmt. ¶ 15; Second Herbon Witness Stmt. ¶ 13; Trigosul's Detalle de Operaciones (Dec. 1, 2001 - Nov 30, 2006) (C-175), at 8-9, 11-12, 14-15; Trigosul's Diario de Imputaciones Contables (Dec. 1, 2007 - Nov. 30, 2015) (C-176), at 1-2, 4-5, 8, 12-14, 20, 25, 27-29. For example, in June 2005, Italba wrote a check to "Cash" in the amount of \$1,250 with the memo line: "pagar URSEC" ["to pay URSEC"]. Check from Italba Corp. to Cash (June 7, 2005) (C-173). Another check from Italba in May 2006 for \$2,500 referenced, in the memo line: "URSEC Uruguay." Check from Italba Corp. to G. Alberelli (May 13, 2006) (C-174).
300. Second Alberelli Witness Stmt. ¶ 15; Second Herbon Witness Stmt. ¶ 13; Trigosul's Detalle de Operaciones (Dec. 1, 2001 - Nov 30, 2006) (C-175), at 8-9, 11-12, 14-15; Trigosul's Diario de Imputaciones Contables (Dec. 1, 2007 - Nov. 30, 2015) (C-176), at 1-2, 4-5, 8, 12-14, 20, 25, 27-29.
301. Second Alberelli Witness Stmt. ¶ 19; Second Herbon Witness Stmt. ¶ 15; Check from Italba to Indumex SA (Apr. 27, 2004) (C-177); Check from Indumex S.A. to G. Rivero (Apr. 27, 2004) (C-178); Receipt for Purchase of Bonds by L. Herbon (Apr. 29, 2004) (C-179); Receipts for Sale of Bonds by L. Herbon (Aug. 18 - Nov. 30, 2006) (C-180); Trigosul's Detalle de Operaciones (Dec. 1, 2001 - Nov. 30, 2006) (C-175), at 12.
302. Advocacy Questionnaire Submitted By Trigosul to the U.S. Embassy in Uruguay (June 11, 2001) (C-102) (listing Trigosul as 100% owned by Italba); Agreement Concerning Bribery and Corporate Policy Prohibiting Bribery (C-181) (noting that Italba Corp. is requesting advocacy assistance for its telecommunications project in Uruguay, Trigosul).
303. Letter from A. Jansenson to R. Lago (July 9, 2001) (C-182) (stating that Italba is the majority shareholder in Trigosul and Villaclara S.A.).
304. Letter from D. Los Santos to G. Alberelli (Sept. 26, 2000) (C-135), at 6 (indicating L3's understanding that Italba, through Trigosul, had acquired rights to the Spectrum); Fax from A. Jansenson to D. Los Santos (May 2, 2001) (C-227) (identifying Trigosul as a subsidiary of Italba and proposing a deal that would involve putting Trigosul's license and stock in escrow); Fax from D. Los Santos to A. Jansenson (May 8, 2001) (C-168) (attaching draft agreement between L-3 Communications and "Italba Communication Group and its subsidiary Trigosul S.A. of Uruguay").

and agreements with EPIC and Phinder.³⁰⁶ Nearly all of these communications predated by several years the Treaty's signature and entry into force, such that there would have been no incentive for Italba to represent falsely that it was the owner of Trigosul. The representation that Italba owned Trigosul merely reflected "economic reality:" as demonstrated above, Italba in every aspect acted as the owner of Trigosul.

86. Uruguay's arguments to the contrary are unavailing. While Uruguay contends that it had no notice of Italba's ownership of Trigosul, Uruguay in fact received notice in July 2001—in a letter from Luis Herbon to the Secretary of the Presidency—that Italba owned Trigosul.³⁰⁷ Thus, Uruguay was aware of that fact no later than July 2001 and never took any action or suggested that there was anything improper about Italba's ownership of Trigosul until it sought to avoid jurisdiction in this arbitration.³⁰⁸

87. Uruguay next points to a November 1999 letter from Luis Herbon to the National Telecommunications Directorate, in which Mr. Herbon stated that Trigosul's stock certificates were in the name of Gustavo Alberelli (95%) and Carmela Caravetta (5%).³⁰⁹ Regardless of what Mr. Herbon's understanding may have been at the time,³¹⁰ it was not correct by the time of

305. Italba Communications Presentation, *Wireless Local Loop in Uruguay* (May 14, 2001) (C-228), at 3 (Italba is a "[l]icense holder in the 3.5MHz frequency in Uruguay (through Trigosul SA Telecom)").

306. Letter from S. Rossi to A. Jansenson & G. Alberelli (Feb. 3, 2002) (C-014); Co-Investment Agreement Among Eastern Pacific Trust and Italba Corporation (June 14, 2002) (C-015); Letter from A. Cherp to A. Jansenson, G. Alberelli & L. Herbon (Jan. 8, 2003) (C-016); Joint Venture Terms Sheet Between Phinder Technologies Inc. and Italba Corporation (Feb. 2007) (C-030).

307. Letter from A. Jansenson to R Lago (July 9, 2001) (C-182).

308. Contrary to Uruguay's argument in its Counter-Memorial, Trigosul had no legal obligation to register as a foreign-owned subsidiary with the Director of Public Registries or to provide such information in its tax filings or commercial meeting minutes. Dr. Lapique Report at 21-22.

309. Counter-Memorial ¶ 56; Letter from L. Herbon (Trigosul) to UNCA (Nov. 4, 1999) (R-19).

310. While a notary public certified in November 1999 that Dr. Alberelli and his mother respectively owned 95% and 5% of Trigosul's shares, that certification was incorrect. Dr. Lapique reviewed Trigosul's corporate records and determined that Trigosul's share certificates Nos. 7-20 were not validly issued because there was no board or shareholder resolution increasing Trigosul's authorized capital and no capital or other

Uruguay's breaches of the Treaty. As discussed above, Ms. Caravetta formally transferred her shares to her son in May 2002, and Dr. Alberelli formally transferred all of his interest in Trigosl to Italba in August 2002.³¹¹ Moreover, as demonstrated above, Italba's ownership of Trigosl as a matter of economic reality under Uruguayan law predates even these transfers.

88. Finally, Uruguay argues that, under Article 15 of Decree No. 115/003, Trigosl should have but failed to obtain URSEC's authorization "with regard to any shareholding change in a corporate license holder."³¹² That argument fails because Decree No. 115/003 was not enacted until March 25, 2003, several months *after* Dr. Alberelli formally transferred his shares to Italba in August 2002.³¹³

89. In addition, even if the Tribunal were to reject both Uruguayan choice of law principles and Uruguayan law's "economic reality" doctrine, in favor of a formalistic approach to ownership, Italba would still own 93.36% of Trigosl's shares because: (a) it contributed 92.04% of Trigosl's share capital, and (b) at the very least, one of Trigosl's shares (amounting to an additional 1.33% of the company) was transferred to Italba via an endorsement on the back of the share certificate.³¹⁴

90. As set forth in the expert report of Dr. Lapique, under Uruguayan law, a party's contribution to a corporation's capital structure is sufficient to confer shareholder status on that

contributions were made to justify the issuance of those shares. Dr. Lapique Report at 5-6. Accordingly, only six shares in Trigosl were validly issued, three of which were in Dr. Alberelli's name, and three of which were in Ms. Caravetta's name. *Id.*

311. *See supra* Section II.C.1.

312. Counter-Memorial ¶ 57; Decree No. 115/003 (Mar. 25, 2003) (C-017), Art. 15.

313. Dr. Lapique Report at 19-20 (administrative authorizations prior to any formal transfer of shares were not required by the laws and regulations predating the Decree No. 115/003); *see also* Civil Code of Uruguay (C-216), Art. 7 (laws in Uruguay do not have retroactive effect). In any event, even if Trigosl had an obligation under Decree No. 115/003, the effect of its failure to obtain URSEC's authorization prior to any formal transfer of ownership would be sanctions (such as warnings or fines)—not invalidating the transfer of ownership. Dr. Lapique Report at 20.

314. *Id.* at 22.

party, regardless of formal legal title to shares.³¹⁵ On October 31, 2001, Trigosl held an extraordinary shareholders meeting that increased the company's authorized capital from 182,500 to 690,000 Uruguayan pesos and recognized a contribution of 632,674 Uruguayan pesos from Italba to Trigosl's share capital.³¹⁶ The amount of that contribution was equal to 92.04% of Trigosl's share capital, which obligated Trigosl to issue additional shares to Italba equal to 92.04% ownership of the company.³¹⁷ The fact that Trigosl did not formally complete the increase in the authorized capital by recording it with the National Registry of Commerce and failed to issue new shares reflecting Italba's capital contribution does not deprive Italba of its 92.04% ownership of Trigosl.³¹⁸ In fact, as a matter of law, Italba has the right to demand that Trigosl issue the shares corresponding to its capital contribution.³¹⁹

91. Italba would also have obtained an additional 1.33% holding in Trigosl when, in August 2002, Dr. Alberelli endorsed the back of a bundle of Trigosl's share certificates with a notation of their transfer to Italba.³²⁰ While Italba takes the position that, under Florida law, this

315. *Id.* at 12 (citing Nuri Rodríguez Olivera, *Las acciones al portador y nominativas como títulos valores no causado*, LJU T. 124). Argentinian case law and scholars also support the principle that a person may be a shareholder of a corporation without possession or legal title to shares. *Id.* at 12-13 (citing Nissen, *Ley de Sociedades Comerciales*, T. III, at 214-16; Garcia Cuerva, *El contrato de suscripción de acciones*, at 184; Gagliardo, *Responsabilidad de los directores de sociedades anónimas*, Tomo 1 at 306-07 (Quinta Ed. Ampliada y actualizada)).

316. *Id.* at 9; Trigosl's Book of Shareholders and Directors Meetings (**C-164**), at 5-6; Second Alberelli Witness Stmt. ¶ 16; Second Herbon Witness Stmt. ¶ 13.

317. Dr. Lapique Report at 11-15.

318. *Id.* at 13-15, 22 (concluding that, regardless of corporate formalities, Italba owns 92.04% of shares in Trigosl because of its capital contribution to Trigosl).

319. *Id.* at 11 ("To date, Italba Corp. has not been issued its shares, but its contributions have been received by [Trigosl] and have been correctly recorded in [Trigosl's] equity. Italba has the right to demand the issuance of the shares, and Trigosl has the obligation to issue the same.") ("A la fecha no se le han emitido a Italba Corp. sus acciones, pero sus aportes han sido recibos por la Sociedad, y han sido correctamente registrados en el patrimonio social. Italba tiene derecho a exigir la emisión de las acciones y Trigosl tiene la obligación de emitir las mismas.").

320. Dr. Lapique Report at 15-17; Trigosl's Share Certificates (**C-161**), at 8. *Id.* at 4 (**C-161**) ("On the date of August 15, 2002, this is transferred to Italba Corp. (Miami FL 33183, 8540 SW 132 Court.)"); Second Alberelli Witness Stmt. ¶¶ 17-18.

endorsement and subsequent delivery to Italba transferred all of Trigosul's shares,³²¹ under Uruguayan domestic corporate law, at the very least the share certificate bearing the endorsement was validly transferred to Italba.³²²

92. Accordingly, even under a strict formalistic approach, Italba owns 93.36% of Trigosul.³²³

(c) In Any Case, Italba Controls Trigosul.

93. As demonstrated above, Italba owns Trigosul under both Florida law and Uruguayan law, which satisfies Article 24 of the Treaty. But even if the Tribunal were to find that Italba did not own Trigosul, jurisdiction over Italba's claims would still be proper because Italba also "controls" Trigosul within the meaning of Article 24.³²⁴

94. The concept of "control" of an enterprise for jurisdictional purposes is a "flexible and broad" inquiry that depends upon the facts of a particular case.³²⁵ The prevailing view among ICSID tribunals is that the "control" test is intended to expand rather than restrict

321. See *supra* Section II.C.1; III.A.1(a).

322. Dr. Lapique Report at 15-16; see also Trigosul's Share Certificates (**C-161**); Trigosul's Stock Ledger Book (**C-163**). Although the transfer of Trigosul's shares to Italba pursuant to the August 15, 2002 endorsement was not recorded in Trigosul's books and records, that does not affect the validity of the transfer as between Dr. Alberelli and Italba. Dr. Lapique Report at 15-16 (citing decision of the *Juzgado Letrado de Primera Instancia en los Civil de 9no turno* (the registration requirement of the share transfer into the company's books and records serves to put third parties on notice of the transfer and does not affect the validity of the transfer itself)).

323. Dr. Lapique Report at 10, 22.

324. Treaty (**C-001**), Art. 24 (a claimant may submit claims to arbitration "on behalf of an enterprise of the respondent . . . that the claimant *owns or controls directly or indirectly*") (emphasis added).

325. *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Decision on Jurisdiction (Sept. 27, 2001) (**CL-103**), ¶ 113 ("The concept of foreign control being flexible and broad, different criteria may be taken into consideration, such as shareholding, voting rights, etc."); see also, e.g., *Aguas del Tunari, S.A., v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction (Oct. 21, 2005) (**CL-104**), ¶ 280 (noting that "foreign control" is a "flexible" concept); *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (Apr. 29, 2004) (**CL-105**), ¶ 68 (citing view of ICSID scholars that tribunals may be "'extremely flexible' in using various methods to determine the nationality of juridical entities" and that "every effort should be made to give the Centre jurisdiction by the application of the flexible approach").

jurisdiction.³²⁶ In considering this question, tribunals have looked at a variety of factors, including share ownership, decision-making procedures, the exercise of management, and other “economic criteria.”³²⁷

95. Investment tribunals have consistently held that the power to direct critical decisions on important corporate matters is sufficient to establish control.³²⁸ That is true even where the party who controlled the claimant does not formally own it. For example, in *Perenco v. Ecuador*, the tribunal found that the claimants’ control of the relevant entity was sufficient for jurisdiction, even though the claimants did not hold formal legal title in that entity.³²⁹ In that case, the tribunal rejected Ecuador’s argument that the claimants did not control the company because they were not formally registered as shareholders, noting that a formalistic approach was inappropriate under the circumstances.³³⁰ Even though the transfer of shares in the company to

326. See, e.g., *Tokios Tokelés v. Ukraine*, Decision on Jurisdiction (CL-105), ¶ 68 (“[E]very effort should be made to give the Centre jurisdiction by the application of the flexible approach”) (citing C.F. Amerasinghe, *The Jurisdiction of the International Centre for the Settlement of Investment Disputes*, 19 Indian J. Int’l Law (Apr.-June 1979) 166, 214); *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Proceeding on Jurisdiction (May 25, 1999) (CL-106), at 888 (“Article 25(2)(b) of the ICSID Convention . . . [is] meant to expand ICSID jurisdiction.”).

327. *Autopista v. Venezuela*, Decision on Jurisdiction (CL-103), ¶¶ 113, 119; see also Christoph H. Schreuer, *The ICSID Convention: A Commentary* (2d ed. 2009) (CL-107), at 327, ¶¶ 864-65 (“the existence of foreign control is a complex question requiring the examination of several factors such as equity participation, voting rights and management. . . . There is no simple mathematical formula based on shareholding or votes alone.”). For example, in *Liberian E. Timber Corp. (LETCO) v. Republic of Liberia*, the tribunal found that French nationals had effective control over a subsidiary enterprise because, *inter alia*, they dominated the decision-making structure of the subsidiary. ICSID Case No. ARB/83/2, Decision on Jurisdiction (Oct. 24, 1984) (CL-108), at 351. Similarly, in *Aguas del Tunari v. Bolivia*, the tribunal noted that the ordinary meaning of “control” can “encompass both actual exercise of powers or direction and the rights arising from the ownership of shares.” Decision on Respondent’s Objections to Jurisdiction (CL-104), ¶ 227.

328. See, e.g., *Int’l Thunderbird Gaming Corp. v. The United Mexican States*, Award (Jan. 26, 2006) (CL-109), ¶¶ 107-09 (company’s involvement in business activities and decision-making for subsidiary, together with injection of know-how and capital, sufficient to demonstrate control); *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (Aug. 27, 2008) (CL-110), ¶¶ 91, 94 (intimate knowledge of the structure and functioning of claimant and ability to direct affairs of claimant sufficient to demonstrate control).

329. *Perenco Ecuador Ltd. v. The Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability (Sept. 12, 2014) (CL-111).

330. *Id.* ¶¶ 522, 526.

the claimants was not formally registered, the tribunal found jurisdiction on the basis that, at all relevant times, the claimants exercised direction and control over the claimant.³³¹

96. Here, there is no question that Italba controlled Trigosul. As demonstrated above, Italba directed all of the business decisions of Trigosul, entered into contracts on Trigosul's behalf, negotiated and entered into joint venture agreements that involved the use of Trigosul's license, and funded Trigosul's operations.³³² Under the language of the Treaty and international law, that is sufficient to establish jurisdiction over this arbitration.³³³

97. Finally, the Tribunal should not "pierce any corporate veil" to consider whether control over Trigosul was exercised by Dr. Alberelli in his individual capacity or in his capacity as the President of Italba. The case law does not support looking behind the corporate form of the claimant to its individual shareholders to determine which shareholders control the claimant—indeed, the relevant question for jurisdictional purposes is not who controls the claimant, but whether the claimant controls the subsidiary. For example, in *Amco Asia Corporation et al. v. Republic of Indonesia*, the tribunal declined to consider the nationality of the alleged ultimate controller of the claimant because doing so would require tribunals to engage in the burdensome and improper exercise of examining control at "the second . . . third, fourth, or xth degree."³³⁴ Other tribunals have taken the same position and considered only the question of whether the claimant controlled the relevant company, rather than examining the nationality of companies or

331. *Id.* ¶¶ 514, 526-30.

332. *See supra* Section II.C.1.

333. Treaty (C-001), Art. 24; *see, e.g., Aguas del Tunari v. Bolivia*, Decision on Respondent's Objections to Jurisdiction (CL-104), ¶¶ 321-23; *Int'l Thunderbird Gaming v. Mexico*, Award (CL-109), ¶¶ 107-09; *Plama v. Bulgaria*, Award (CL-110), ¶¶ 91, 94; *Perenco v. Ecuador*, Decision on Remaining Issues of Jurisdiction and on Liability (CL-111), ¶¶ 522, 526.

334. *Amco Asia Corp. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction (Sept. 25, 1983) (CL-112), at 396 (¶ 14).

individuals who allegedly controlled the claimant.³³⁵

98. In this case, Italba is the claimant, and it controls Trigosl. Accordingly, Italba is entitled to bring claims on behalf of Trigosl under Article 24 of the Treaty.

2) Italba’s investment in license and rights to operate in the Spectrum is a covered investment under the Treaty.

99. Italba’s investment in Trigosl’s authorization to provide telecommunications services and its allocation of frequencies is a protected investment under the Treaty.³³⁶

100. In its Counter-Memorial, Uruguay argues that Italba’s claims should be dismissed on the theory that the allocation of frequencies held by Trigosl was “provisional and revocable” and thus did “not confer to the recipients any right recognized or protected by the laws of Uruguay.”³³⁷ Uruguay’s jurisdictional objection is frivolous because it finds no basis in the Treaty, misapplies Uruguayan law, and cannot be reconciled with the action of Uruguay’s highest administrative court recognizing and protecting Trigosl’s rights.³³⁸

(a) The Treaty makes no exception for provisional or revocable rights.

101. Uruguay’s argument that Trigosl’s rights do not qualify for protection under the Treaty because they are “provisional and revocable” finds no support in the Treaty.³³⁹ The

335. See, e.g., *Autopista v. Venezuela*, Decision on Jurisdiction (CL-103), ¶¶ 110, 117 (declining to look beyond the nationality of the claimant company to determine who controlled the relevant subsidiary); *Aguas del Tunari v. Bolivia*, Decision on Respondent’s Objections to Jurisdiction (CL-104), ¶¶ 218, 220, 237, 323 (same); *Compagnie d’Exploration du Chemin de Fer Transgabonnais v. Republic of Gabon*, ICSID Case No. ARB/04/5, Decision on Jurisdiction (Dec. 19, 2005) (CL-113), ¶ 36 (holding that, once foreign control by nationals of other Contracting States was established, the examination of who ultimately controlled the foreign entity must stop, except where the ultimate controller would be a national of the host State).

336. Memorial ¶¶ 91-94.

337. Counter-Memorial ¶¶ 134-36.

338. Uruguay also ignores Italba’s investments in equipment, leases, and other tangible property in Uruguay. Memorial ¶¶ 91-94.

339. Counter-Memorial ¶ 135; Cendoya Witness Stmt. ¶ 36.

Treaty defines investment to include “licenses, authorizations, permits, and similar rights conferred pursuant to domestic law.”³⁴⁰ Trigosl’s rights to operate in the Spectrum clearly meet this definition.

102. The Treaty makes no distinction, moreover, between provisional and perpetual licenses, or between revocable and non-revocable licenses. Nor does Uruguay identify a single investment arbitration award that supports this distinction. To the contrary, international investment jurisprudence is replete with decisions protecting investments in permits, licenses, authorizations, or concessions—in almost all cases revocable on one ground or another.³⁴¹ Indeed, under customary international law, all licenses—like all property rights—are revocable by the State provided that such revocation serves a public purpose, is not arbitrary or discriminatory, is accomplished in accordance with principles of due process, and is accompanied by prompt, adequate, and effective compensation.³⁴²

(b) Uruguayan law protected Italba’s rights.

103. Uruguay nevertheless purports to hinge its argument on a footnote to Article 1 of

340. Treaty (C-001), Art. 1.

341. See, e.g., *Amco Asia Corporation et al. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award in Resubmitted Case (May 31, 1990), published in 1 ICSID Reports 569 (Cambridge, 1993) (CL-114), ¶ 139 (holding that “although certain substantive grounds might have existed for the revocation of [an investment] license, the circumstances surrounding [the revocation] decision make it unlawful”); *Rumeli Telekom A.S. et al. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award (July 29, 2008) (CL-027) (finding breach of fair and equitable treatment and expropriation in the case of an investment contract that was improperly revoked in violation of the claimants’ rights of due process, even though revocation could have been justified on substantive grounds); *Khan Resources Inc. et al. v. The Government of Mongolia*, PCA Case No. 2011-09, Award on the Merits (Mar. 2, 2015) (CL-008), ¶ 319 (finding that the respondents breached their obligations under the ECT by invalidating and refusing to re-register mining and exploration licenses for alleged breaches of Mongolian law, where the respondents had failed to point to any such breaches); *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003) (CL-009), ¶¶ 128-32, 149 (rejecting Mexico’s argument that it had refused to renew a landfill’s operating license allegedly in the interest of protecting the environment and public health—reasons which may have justified Mexico’s action—and holding that Mexico’s decision was instead politically motivated and therefore breached Mexico’s treaty obligations).

342. Rudolph Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford 2d ed., 2012) (CL-115), at 137.

the Treaty that excludes from the Treaty’s definition of “investment” any licenses or authorizations “that do not create any rights protected under domestic law.”³⁴³ According to Uruguay, “neither the authorization nor the allocation of frequencies underlying” Trigosul’s license “create any rights protected under [Uruguayan] law.”³⁴⁴ This is an extraordinary assertion that, if credited, would call into question the purpose of Uruguay’s having a telecommunications licensing regime in the first place.

104. In reality, URSEC’s allocation of frequencies and associated authorization to operate in the Spectrum conferred valuable rights defined and protected under Uruguayan law.³⁴⁵ In the case of an allocation of frequencies, moreover, the rights conferred are necessarily *exclusive*, preventing others from operating in the Spectrum within the same license area.³⁴⁶

105. The opinions of Professor Pereira and the witness statement of Dr. Nicolás Cendoya—both submitted by Uruguay—confirm that an authorization to provide services and an allocation of frequencies create rights recognized under Uruguayan law.³⁴⁷ As Professor Durán

343. Counter-Memorial ¶ 125.

344. *Id.* ¶ 127.

345. See Expert Opinion of Professor Santiago Pereira Campos (Jan. 20, 2017) (*Pereira Op.*) ¶ 87 (“[R]adio or Hertzian waves constitute a limited natural resource . . . **nobody has a pre-existing right to use these waves.** Their use is only possible through a concession. Whether it is called thus or an authorization, the decision approving the use of waves is nothing other than a concession for the use of a public asset.” (citing Professor Durán Martínez; “*Radiocomunicaciones. Authorization to exercise the activity,*” in *Cases of Administrative Law*, Vol. III, Montevideo, 2003, p. 16. (SPC014)) (emphasis and ellipses in Pereira Op.)); Cendoya Witness Stmt. ¶ 17 (“In order to use the spectrum in Uruguay, a private party must receive an authorization or license to provide a particular service and an allocation of one or several blocks of frequencies which can be used to implement that authorization.”); see also Internal Memorandum from the Legal Department of the Dirección Nacional de Comunicaciones (Feb. 6, 2001) (C-172), at 4 (“notwithstanding the fact that all allocations of frequencies are in all cases precarious and revocable at any time, they logically remain revocable for cause”) (“No obstante corresponde precisar que todas las asignaciones de frecuencias, revisten en todos los casos el carácter de precarias y revocables en cualquier momento, lógicamente por motivos fundados”).

346. See National Communications Directorate, Resolution No. 227/97 (Aug. 4, 1997) (R-12), at 2 (“The National Communications Director Hereby Decides . . . To allocate to Gustavo ALBERELLI, the terrestrial fixed service radio channels listed below on an exclusive, national and secondary basis.”).

347. Pereira Op. ¶ 26(e) (“The authorization to provide services, granted to Trigosul . . . is what is called a ‘conditional or imperfect right.’”), ¶ 84 (“[T]he position of Trigosul upon receiving the authorization, was that of a conditional or imperfect right.”); Cendoya Witness Stmt. ¶ 17 (“In order to use the spectrum in

has observed, private parties “acquire the right to provide the service subject of the permit insofar as the latter is not revoked for reasons of public interest.”³⁴⁸

106. That “public interest” standard for revocation undermines Uruguay’s assertion that its telecommunications licensing regime does not actually create legally protected rights. Even assuming that authorizations to provide services or allocations of frequencies are revocable “at any time,” it does not follow that they are revocable “for any reason.”³⁴⁹ To the contrary, Uruguayan law governs the circumstances under which URSEC, Uruguay’s telecommunications regulator, may revoke these licenses. Revocations may not be arbitrary.³⁵⁰ Instead, as Uruguay’s witnesses Dr. Cendoya and Professor Pereira both concede, such revocations may be ordered only “for reasons of public interest.”³⁵¹

107. Additional legal norms constrain URSEC’s action “for reasons of public interest.”

Uruguay, a private party must receive an authorization or license to provide a particular service and an allocation of one or several blocks of frequencies which can be used to implement that authorization.”), ¶ 19 (“It is important to emphasize that there is no natural right to use certain frequencies.”).

348. Augusto Durán, *Situaciones jurídicas subjetivas* (Ed. La Ley Online Uruguay, Online citation: UY/DOC/486/2009) (C-229), at 5 (“Los permisarios pues adquieren el derecho a prestart el servicio objeto del permiso mientras este por razones de interés publico no sea revocado”) (emphasis added). Cristina Vásquez notes: “[f]rom our perspective, the provision imposing the requirement for authorization is the one that creates a legal situation of disadvantage or passiveness, restricting the legal sphere of the administered party. The administrative act of authorization, in turn, deploys a positive effect, making exercise of the right possible.” Cristina Vásquez, *La técnica autorizatoria en el sector minero* 53, *Revista de Derecho y Tribunales*, Number 21 (Montevideo, 2013) (C-230), at 53 (“Desde nuestra perspectiva, la norma que impone el requisito de la autorización es la que crea una situación jurídica de desventaja o pasiva, restringiendo la esfera jurídica del administrado. El acto administrativo de autorización, por su parte, despliega un efecto positivo habiendo posible el ejercicio del derecho.”).
349. *See, e.g.*, Carlos Delpiazzo, *Derecho de las Telecomunicaciones* (Ed. Universidad de Montevideo, Facultad de Derecho, Montevideo, 2005) (C-231), at 52; Internal Memorandum from the Legal Department of the Direccion Nacional de Comunicaciones (Feb. 6, 2001) (C-172), at 4 (“notwithstanding the fact that all allocations of frequencies are in all cases precarious and revocable at any time, they logically remain revocable for cause”) (“No obstante corresponde precisar que todas las asignaciones de frecuencias, revisten en todos los casos el caracter de precarias y revocables en cualquier momento, logicamente por motivos fundados”).
350. *See* Augusto Durán, *Un caso de revocación de oficio de una autorización para construir* in Carlos Delpiazzo and Graciela Ruocco, *Tratado Jurisprudencial y Doctrinario. Actos y Contratos de la Administración, Tome II* (Ed. La Ley Uruguay, Montevideo, 2013) (C-232), at 441-42.
351. Pereira Op. ¶ 26(e); *see also* Cendoya Witness Stmt. ¶ 71.

Uruguayan jurisprudence holds that, for administrative actions such as a license revocation to be legitimate, they must be effected “for certain, proven, legitimate, duly explained reasons, in line with the requirements of reasonability and due process, and must not involve a deviation of power.”³⁵² Moreover, under Uruguayan law, illegitimate administrative action such as the wrongful revocation of a license may be remedied by orders of annulment and/or compensation from a competent judicial body.³⁵³ Finally, any license revocation that is not “for cause” requires the state to compensate the license holder for any damages incurred.³⁵⁴

108. Uruguayan law, in other words, subjects URSEC’s potential revocation of licenses such as the authorizations and allocations held by Trigosul to the requirements of: (a) reasoned decision-making; (b) due process; and (c) compensation. Even Uruguay’s witness, Dr. Cendoya, acknowledges that URSEC may only revoke an allocation of frequencies “with a lawful purpose in mind, in accordance with existing and valid grounds and following an administrative procedure . . . with grounds stated in what is known as the motivation for the

352. Augusto Durán, *Límites a la concesión de actividades públicas* 79, *Estudios de Derecho Administrativo*, number 9 (Ed. La Ley Uruguay, Montevideo, 2014) (C-233), at 79 (“[P]or motivos ciertos, probados, legítimos, debidamente explicitados, ajustarse a las exigencias de razonabilidad y fin debido y sin incurrir en desviación de poder.”) The author has similarly also observed that revocation “must respect what in each case is established by positive law; revocation is admissible based on certain, legitimate and duly explained reasons, it must be in line with the requirements of reasonability, and the revocatory act must be appropriate for achieving the due purpose and must be in line with the specific purpose of the body ordering same, as well as the ultimate purpose of the State.” Augusto Durán, *La autorización en la pesca* 51, in *Casos de Derecho Administrativo*, Vol. VI (Montevideo, 2010), (C-234), 51 (“[S]e debe respetar lo que en cada caso establece el derecho positivo; la revocación procede por motivos ciertos, legítimos y debidamente explicitados y esta debe ajustarse a las exigencias de razonabilidad, el acto revocatorio debe ser apto para la consecución del fin debido y debe ajustarse al fin específico del órgano que lo dicta así como al fin último del Estado.”).

353. See Constitution of the Oriental Republic of Uruguay of 1967 (as amended in 2004) (C-108), Art. 312 (“El actor podrá optar entre pedir la anulación del acto o la reparación del daño por éste causado. En el primer caso y si obtuviere una sentencia anulatoria, podrá luego demandar la reparación ante la sede correspondiente. No podrá, en cambio, pedir la anulación si hubiere optado primero por la acción reparatoria, cualquiera fuere el contenido de la sentencia respectiva. Si la sentencia del Tribunal fuere confirmatoria, pero se declarara suficientemente justificada la causal de nulidad invocada, también podrá demandarse la reparación.”).

354. *Id.*

administrative act and proper notice given to the person concerned.”³⁵⁵

109. Uruguayan law therefore protects the rights vested by an URSEC authorization or allocation of frequencies in *three* respects: (a) by restricting the basis on which such rights may be revoked; (b) by requiring such revocation to be effected with due process and on the basis of reasoned decision-making; and (c) by requiring the state to compensate license holders affected by revocations not instituted “for cause.”

(c) Uruguay’s highest administrative court protected Trigosul’s rights.

110. But the Tribunal need not rely on abstract legal theory to reject Uruguay’s position that Uruguayan law did not protect Trigosul’s “revocable and provisional” rights. The October 23, 2014 judgment of the TCA, Uruguay’s highest administrative court, proves that this was the case in practice as well as in principle.

111. In its Judgment, the TCA protected Trigosul’s rights in the Spectrum by enforcing the requirements that any revocations be the result of reasoned decision-making and carried out with respect for due process. The TCA found the “*reasons* cited by the defendant Agency for issuing the Resolution in question are erroneous” and affirmed Trigosul’s rights to due process:

[T]he testing of the facts that are relevant for the act to be issued is an essential stage in the administrative procedure. Every administrative act should be issued on grounds of facts that are real, existing and true. If this was not the case, **if the facts on which the Government Agency founded its act were inexistent or different from what the Agency believed or asserted when it issued the act, the act will be unlawful, and if that is proven in**

355. Cendoya Witness Stmt. ¶ 11.

relevant court procedures, it will be annulled, and the State agency will have to make restitution.³⁵⁶

112. Applying these standards, the TCA found that Uruguay had improperly revoked Trigosul's license, and accordingly declared the URSEC and MIEM resolutions revoking Trigosul's license and authorization to be "irreparably null and void."³⁵⁷

113. The TCA Judgment therefore demonstrates that Trigosul's authorization to provide services and allocation of frequencies created rights protected under domestic Uruguayan law.

114. In view of the foregoing, Italba has demonstrated that Trigosul's authorization to provide services and allocation of frequencies constitute investments protected under the Treaty. The Tribunal should reject Uruguay's jurisdictional challenge on this ground as well.

B. Uruguay Cannot Deny Italba The Protections Of The Treaty.

115. Uruguay has no right to escape accountability for its breaches by denying Italba the protections of the Treaty. To the contrary, Uruguay's attempt to deny Italba the benefits of the Treaty pursuant to Article 17(2) on account of Italba's supposed lack of "substantial business activities" in the United States fails upon consideration of the facts and given the function of denial of benefits clauses in international investment treaty practice.

116. Uruguay begins by citing Professor Dolzer and Professor Schreuer, who correctly explain that such clauses are intended to "counteract nationality planning" by allowing a host state to deny benefits to a company that does not "have an economic connection to the state on

356. TCA Judgment (Oct. 23, 2014) (C-076), at 12, 16-17 (emphasis in original) (quoting Juan Pablo Cajarvill-Peluffo, *Sobre Derecho Administrativo* 236, Tome II (FCU 2d ed., 2008)).

357. TCA Judgment (Oct. 23, 2014) (C-076), at 12.

whose nationality it relies.”³⁵⁸

117. Uruguay also quotes the recent Decision on Jurisdiction in *Ampal-American Israel Corp. v. Egypt*:

Denial-of-benefits clauses in investment treaties are generally designed to exclude from Treaty protections nationals of third States which claim rights through so-called “mailbox” or “shell” companies that have no economic connection to the state whose nationality is invoked.³⁵⁹

118. U.S. treaty practice confirms that this is the purpose of Article 17(2) of the Treaty. As one commentator has explained “Article 17(2) . . . grants a Party the right to deny, under certain circumstances, the benefits of a US BIT to an enterprise of the other Party where that enterprise serves merely as a ‘shell’ corporation.”³⁶⁰

119. This much is undisputed. Italba agrees that Article 17(2) likewise serves, in relevant part, to guard against treaty-shopping by investors from third States who might seek to invest in Uruguay or the United States through “mailbox” or “shell” companies organized in one of the two Treaty parties.³⁶¹

120. The flaw in Uruguay’s analysis, therefore, should be clear: Italba is not a “shell”

358. R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2008) (RL-66), at 55; see Counter-Memorial ¶ 64.

359. Counter-Memorial ¶ 64 n.84 (citing *Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC, and Mr. David Fischer v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction (Feb. 1, 2016) (RL-112), ¶ 125).

360. Lee M. Caplan & Jeremy Sharpe, *United States in Commentaries on Selected Model Investment Treaties* (Chester Brown, ed. 2013) (CL-116), at 769 (discussing U.S.-Uruguay BIT).

361. See Kenneth J. Vandeveld, *U.S. International Investment Agreements* (Oxford Univ. Press 2009), (CL-117), at 157 (observing that the 2004 United States Model BIT—from which the language of Article 17(2) derives—like prior model BITs, continues to reserve to the host state the right “to prevent third-country nationals from obtaining treaty protection for their investments in the host state by inserting into the chain of ownership a shell company incorporated under the laws of the other BIT party.”); see also Lindsay Gastrell and Paul-Jean Le Cannu, *Procedural Requirements of Denial-of-Benefits Clauses in Investment Treaties: A Review of Arbitral Decisions*, 30:1 ICSID Review 78 (2015) (CL-118), at 81 (explaining that denial-of-benefits clauses “share the primary purpose of excluding from treaty protection so-called ‘mailbox’ or ‘shell’ companies [and] allow States to limit investors’ use of corporate structuring as a means of ‘treaty shopping’ . . .”).

or “mailbox” company organized to exploit treaty rights otherwise inaccessible to the true parties in interest. Italba is, in fact, the exact opposite of a “shell” or “mailbox” company.³⁶² Rather than fronting for a distant and obscured principal, its two shareholders direct the company’s varied international business enterprises from their living room.³⁶³

121. Nor can Uruguay plausibly allege that Italba was established to allow treaty-shopping. Italba was incorporated in 1982, some 17 years before it invested in Uruguay and more than twenty-three years before the Treaty was signed.³⁶⁴ Moreover, even Italba’s acquisition of Trigosul long predates the existence of the Treaty or of any dispute with Uruguay: at the very latest, Italba acquired Trigosul in August 2002, three years before the Treaty was signed.³⁶⁵

122. The Tribunal need go no further to reject Uruguay’s invocation of Article 17(2).

123. That said, Uruguay’s attempt to engage the Treaty’s Denial of Benefits Clause also fails upon a close application of Article 17(2) to the facts of Italba’s business. Article 17(2) allows each signatory to withhold the Treaty’s protections from a putative investor of the other Party only where that Party proves that the investor in question “has **no substantial business activities** in the territory of the other Party **and** persons of a non-Party, or of the denying Party, **own or control the enterprise.**”³⁶⁶ As detailed below, Uruguay has not met and cannot meet this burden.

362. First Alberelli Witness Stmt. ¶¶ 9-13.

363. *Id.* ¶¶ 8-9; Second Alberelli Witness Stmt. ¶ 7.

364. First Alberelli Witness Stmt. ¶ 8. The Treaty was signed on November 4, 2005, and entered into force on November 1, 2006.

365. *See supra* Section II.C.1.

366. Treaty (C-001), Art. 17(2) (emphasis added); *see Ulysseas, Inc. v. The Republic of Ecuador*, PCA (UNCITRAL 1976), Interim Award (Sept. 28, 2010), (CL-119), ¶ 166 (“The Tribunal agrees with Claimant that the burden of proving that the conditions for the exercise of the right to deny the BIT advantages is to be borne by Respondent as the party advancing this specific defence to the Tribunal’s jurisdiction.”); *see also* Counter-Memorial ¶ 69.

1) Italba does not lack substantial business activities in the United States.

124. Uruguay alleges that Italba lacks “substantial business activities” in the United States.³⁶⁷ This is not a question of size. Under Article 17(2), whether an investor’s business activities are “substantial” is a qualitative rather than a quantitative inquiry.³⁶⁸ A small U.S. investor is every bit as protected by the Treaty as a large and successful one. Though Uruguay concedes in passing that substantial “activities need not be ‘large,’” it spends much of its Counter-Memorial insisting upon criteria not found in Article 17(2).³⁶⁹

125. In particular, Uruguay asserts that Italba’s U.S. business “must be . . . related to the investment in question,”³⁷⁰ and “must involve the employment of permanent staff.”³⁷¹ Neither of these claimed requirements finds any support in the text of the Treaty. Nor does either of the authorities that Uruguay cites in support of these two requirements—*Limited Liability Company AMTO v. Ukraine* and *Pac Rim Cayman LLC v. El Salvador*—support Uruguay’s assertions about what the law requires.

126. With respect to its argument that an investor’s “substantial business activities” in its home state be in the same sector as its investment in the host state, Uruguay asserts that Italba’s U.S. business activities will only qualify as “substantial” if they are related to its telecommunications activities in Uruguay, and accordingly attributes great significance to “[a] report on Italba [that] only mentions that the company is a wholesaler of textile products” and

367. Counter-Memorial ¶ 72.

368. See *Limited Liability Company AMTO v. Ukraine*, SCC Case No. 080/2005, Final Award (Mar. 26, 2008), (RL-070), ¶ 69 (“‘substantial’ in this context means ‘of substance, and not merely of form’. It does not mean ‘large’, and the materiality not the magnitude of the business activity is the decisive question.”).

369. Counter-Memorial ¶ 65.

370. *Id.* (citing *AMTO v. Ukraine*, Final Award (RL-070), ¶ 69 (finding that the claimant had substantial business activities, in part “on the basis of its investment related activities conducted from premises in Latvia”).

371. *Id.* (citing *AMTO v. Ukraine*, Final Award (RL-70), ¶ 69; *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdictional Objections (June 1, 2012) (RL-91), ¶ 4.66.).

makes “no mention of investment or activity by Italba concerning telecommunications.”³⁷²

Uruguay similarly alleges that Italba “lacks professional licenses, not even [sic] from the Federal Communications Commission of the United States (FCC),”³⁷³ and asserts that Italba has “no connection at all to the United States *in the relevant sector*.”³⁷⁴

127. Uruguay’s insistence that Italba’s U.S. business activities will only qualify as “substantial” if they are related to its telecommunications activities in Uruguay finds no support in the text of the Treaty, which contains neither a definition of “substantial business activities,” nor much less a requirement tying such activities to a particular “relevant sector.”³⁷⁵ The sole authority Uruguay offers in support of its position that the Treaty requires Italba to be active in the U.S. telecommunications sector for its investment in Uruguay’s telecommunications sector to find protection under the Treaty is the *AMTO* decision.³⁷⁶

128. Uruguay mischaracterizes *AMTO*.³⁷⁷ The *AMTO* tribunal considered claims brought under the Energy Charter Treaty (*ECT*) by a Latvian investor in a Ukrainian company that was engaged in the “installation of electric wiring and reinforcement” and that supplied services in the nuclear energy industry.³⁷⁸ Ukraine, the respondent in that case, invoked the *ECT*’s denial of benefits clause, arguing that the claimant lacked substantial business activities in Latvia.³⁷⁹ The *AMTO* tribunal concluded that Ukraine had no right to deny the claimant the

372. *Id.* ¶ 72.

373. *Id.* ¶ 73.

374. *Id.* ¶ 75 (emphasis added).

375. *Id.* ¶ 72; Treaty (C-001), Art. 17(2).

376. Counter-Memorial ¶¶ 65, 72-75.

377. *See Id.* ¶ 65.

378. *AMTO v. Ukraine*, Final Award (RL-070), ¶¶ 15-18.

379. *Id.* ¶ 26(h).

protections of the ECT.³⁸⁰

129. Nothing in the *AMTO* Award suggested that the claimant investor needed to be involved in the nuclear sector in Latvia in order to invoke the ECT to protect its investment in that sector in Ukraine. The claimant’s main business activity in *AMTO* was to “act as an investment company,” with investments in Finland, Ukraine, the United States, and Latvia. There is no indication in the award that the *AMTO* claimant provided any services to the nuclear energy industry at all, let alone in Latvia.³⁸¹ Rather, the “investment-related activities” in the claimant’s home jurisdiction that the *AMTO* tribunal found sufficiently “substantial” consisted of the claimant’s holding and managing its varied investments. Uruguay’s characterization of *AMTO* is incorrect.

130. Uruguay’s argument that *AMTO* and *Pac Rim* support the notion that a claimant must employ permanent staff in order to qualify as having “substantial business activities” is similarly unfounded. While the *AMTO* tribunal viewed the employment of a small but permanent staff as evidence of substantial business activities,³⁸² the *AMTO* tribunal never suggested that the employment of permanent staff in an investor’s home jurisdiction was required for that investor to enjoy the benefits of the applicable treaty in that case.

131. The *Pac Rim* tribunal likewise did not suggest that permanent employees in an investor’s home jurisdiction are a prerequisite for BIT protection. That tribunal considered claims under CAFTA by a Nevada corporation that invested in two companies holding mining

380. *Id.* ¶ 70.

381. *Id.* ¶ 16. It is unclear why Uruguay interpreted *AMTO* to require that a claimant’s business activities in its state or organization be “related to the investment in question” to avoid falling within the first part of the ECT’s denial of benefits clause. The *AMTO* tribunal was describing an investment company, all the business activities of which were naturally “investment related.” *See id.* ¶ 69. The *AMTO* Tribunal’s concern was to confirm that the claimant had business activities in Latvia, not that those activities were necessarily of the same kind as *AMTO*’s activities in Ukraine. *See id.*

382. *AMTO v. Ukraine*, Final Award (**RL-070**), ¶ 69.

rights in El Salvador.³⁸³ The claimant’s principal factual witness acknowledged that the claimant, a holding company whose sole purpose was to hold assets, had changed its nationality from the Cayman Islands to the United States in part due to “the availability of international arbitration (under CAFTA and ICSID).”³⁸⁴ The *Pac Rim* tribunal found that El Salvador was entitled to deny the claimant the benefits of the treaty because the claimant was “akin to a shell company with no geographical location for its nominal, passive, limited and insubstantial activities.”³⁸⁵ While the lack of permanent employees was evidence weighing in favor of that conclusion, the *Pac Rim* tribunal did not hold, as Uruguay now suggests, that a company could not have “substantial business activities” within the meaning of CAFTA’s denial of benefits clause without permanent employees.

132. To the contrary, the *Pac Rim* tribunal suggested that “a traditional holding company” would have business activities sufficiently “substantial” to pass muster under a denial of benefits clause. In doing so, the *Pac Rim* tribunal acknowledged that “[g]enerally, such holding companies are passive, owing [sic] all or substantially all of the shares in one or more subsidiary companies which will employ personnel and produce goods or services to third parties” and that “[t]he commercial purpose of a holding company is to own shares in its group of companies, with attendant benefits as to control, taxation and risk-management for the holding company’s group of companies.”³⁸⁶ What seems to have been crucial to the *Pac Rim* tribunal’s decision, however, was the tribunal’s inability to find a distinction between the claimant’s activities before and after a change of corporate nationality, both of which it found equally insubstantial, especially where the change in nationality was for purposes of “treaty-

383. *Pac Rim v. El Salvador*, Decision on Jurisdictional Objections (**RL-91**), ¶¶ 1.1-1.2.

384. *Id.* ¶¶ 4.69, 2.22.

385. *Id.* ¶ 4.75.

386. *Id.* ¶ 4.72.

shopping.”³⁸⁷

133. In any event, Uruguay’s denial of benefits argument fails on the facts, because Italba is not a “mailbox” or “shell” company organized for the benefit of third parties “that have no economic connection” to the United States.³⁸⁸ The opposite is true: Italba’s two shareholders and officers, Dr. Alberelli and his wife Beatriz, both live in Florida.³⁸⁹ The company’s “continuous physical presence” in Florida is not disputed.³⁹⁰ Dr. and Ms. Alberelli actively run the company from their home, where they jointly make decisions about the management of Italba’s investments in Uruguay, Canada, Ecuador, Panama, and the United States.³⁹¹

134. Moreover, Italba is not a mere holding company:³⁹² it has actively engaged in business operations, including signing contracts in Florida and leasing satellite equipment in Florida. These activities involve several lines of business including the import and export of fabrics and clothing, switchboard services, satellite communications, and telemedicine services.³⁹³

387. *Id.* ¶ 4.73 (“[T]he Claimant’s case fails the simple factual test of distinguishing between its geographical activities before and after the change of nationality in December 2007. It is not possible. . . to identify any material difference between the Claimant’s activities as a company established in the Cayman Islands and its later activities as a company established in the USA: the location (or non-location) of the Claimant’s activities remained essentially the same notwithstanding the change in nationality; and such activities were equally insubstantial.”); *See also Id.* ¶¶ 4.69, 2.22.

388. *Ampal-American Israel Corp., v. Egypt*, Decision on Jurisdiction (**RL-112**), ¶ 125.

389. First Alberelli Witness Stmt. ¶¶ 6, 8-9; Beatriz Alberelli Witness Stmt. ¶ 3 n.3 (Articles of Incorporation of Italba Corporation (May 10, 1982) (**C-002**) at 5).

390. Counter-Memorial ¶¶ 9, 76; *Pac Rim v. El Salvador*, Decision on Jurisdictional Objections (**RL-91**), ¶ 4.72.

391. First Alberelli Witness Stmt. ¶¶ 8-13.

392. *Pac Rim v. El Salvador*, Decision on Jurisdictional Objections (**RL-91**), ¶ 4.75.

393. Memorial ¶¶ 13-15; First Alberelli Witness Stmt. ¶¶ 9-12; *see, e.g.*, Bilateral Confidentiality & Non Circumvention Agreement between IDS Long Distance Inc. and Italba (Jan. 26, 1999) (**C-235**); Reciprocal Carrier Services Agreement between IDS Long Distance, Inc. and Italba (May 3, 1999) (**C-236**); Bilateral Confidentiality & Non Circumvention Agreement between AT&T Latin America and Italba (Oct. 3, 2000) (**C-237**); Confidentiality Agreement between FPL FiberNet, LLC Corporation and Italba (Feb. 12, 2002) (**C-238**); Non-Disclosure Agreement between Atlas Telecom Network Inc. and Italba (Apr. 10, 2002) (**C-239**); Agreement between Go2Tel.com Inc. ad Italba (June 4, 2002) (**C-240**); Reciprocal Telecommunications Agreement between Floe Networks and Italba (Jan. 27, 2003) (**C-241**); Joint Venture Agreement between

135. For the foregoing reasons, Uruguay has not met and cannot meet its burden of showing that Italba lacks “substantial business activities” in the United States.

2) Italba is neither owned nor controlled by a non-U.S. national.

136. Uruguay also alleges that Italba is “owned and controlled by ‘persons of a non-Party’” because “an Italian national, Dr. Alberelli, owns half of Italba’s stock.”³⁹⁴ That Dr. Alberelli is a U.S. Lawful Permanent Resident and an Italian citizen is undisputed.³⁹⁵ Uruguay’s argument fails, however, because Italba’s other shareholder—Beatriz Alberelli—is a United States citizen. Mrs. Alberelli owns the other 50% of Italba’s stock.³⁹⁶

137. Mrs. Alberelli’s 50% shareholding in Italba is decisive. In the context of international investment law, and, in particular of a denial of benefits clause, “ownership” necessarily denotes a controlling ownership interest.³⁹⁷ Were it otherwise, even a small amount of non-controlling foreign ownership could contaminate a U.S. or Uruguayan company’s status as a protected investor. Such a result would go beyond the function of a denial of benefits clause, the intent of which is to guard against treaty shopping, not to disqualify properly

More Time SL and Italba (Mar. 27, 2003) (C-242); Agency Agreement between Global Communication Networks, Inc. and Italba (Aug. 1, 2003) (C-243); Lease Agreement between Carrier House Inc. and Italba (Aug. 1, 2003) (C-244); Equipment Purchase Agreement and Joint Venture Agreement between InterAmerica Telco Systems Inc. and Italba (Aug. 11, 2003) (C-245); Joint Venture Articles between InTel Communications LLC and Italba (Apr. 5, 2004) (C-246); Reciprocal Non-Disclosure Agreement between TeleNova Corporation and Italba (Apr. 11, 2002) (C-247); Mutual Non-Disclosure Agreement between Mercury Telecom Inc. and Italba (June 14, 2004) (C-248); Non-Disclosure Agreement between Opextel, LLC and Italba (C-249); Email from D. Los Santos to G. Alberelli (June 3, 2005) (C-250) (attaching presentation describing proposed business partnership to provide information-based medicine); Bilateral Confidentiality & Non Circumvention Agreement between Protel Enterprises Inc. and Italba (July 22, 2005) (C-251).

394. Counter-Memorial ¶¶ 80-81 (emphasis added).

395. *Id.* ¶ 80 (emphasis added); First Alberelli Witness Stmt. ¶ 4.

396. Counter-Memorial ¶ 81; *see also* U.S. Passport of Beatriz Alberelli (Dec. 30, 2016) (C-252).

397. *See* Kenneth J. Vandeveld, *U.S. International Investment Agreements* 160 (Oxford Univ. Press 2009) (CL-118), ¶ 4.3.9.2.

protected investors on the basis of *any*, non-controlling foreign ownership.³⁹⁸ As Professor Vandeveldel confirms, the word “owned” was first inserted before the word “controlled” in the denial of benefits clause of the U.S. Model BIT in 1994, in order to “render[] this clause consistent as a matter of phraseology with other BIT clauses,” but “the intent . . . is that the term ‘own’ refers to a controlling ownership interest.”³⁹⁹ The Treaty should be interpreted consistent with this intent.

138. Uruguay accordingly seems to emphasize its claim that Dr. Alberelli “controls” Italba. But this argument fails for much the same reason. Tribunals examining the word “controlled” in the context of determining corporate nationality have found that control is tied to a person’s or entity’s legal capacity to control the other entity.⁴⁰⁰

139. In Italba’s case, Dr. Alberelli and Ms. Alberelli hold equal voting rights.⁴⁰¹ As Dr. Alberelli does not have voting rights in excess of 50%, he does not have the legal capacity to control Italba. Italba therefore cannot be found to be controlled by a person of a non-party.⁴⁰²

140. Uruguay nevertheless insists that “Dr. Alberelli, and not his wife, has de facto

398. See generally Dolzer & Schreuer (**RL-66**), at 55; *Ampal v. Egypt*, Decision on Jurisdiction (**RL-112**), ¶ 125.

399. Kenneth J. Vandeveldel, *U.S. International Investment Agreements* 160 (Oxford Univ. Press 2009) (**CL-117**), ¶ 4.3.9.2.

400. See, e.g., *Aguas del Tunari v. Bolivia*, Decision on Respondents’ Objections to Jurisdiction (**CL-104**), ¶ 264 (concluding that “the phrase ‘controlled directly or indirectly’ means that one entity may be said to control another entity . . . if that entity possesses the legal capacity to control the other entity,” and that “[s]ubject to evidence of particular restrictions on the exercise of voting rights, such legal capacity is to be ascertained with reference to the percentage of shares held.”); *AIG Capital Partners, Inc. & CJSC Tema Real Estate Co. v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award (Oct. 7, 2003) (**CL-120**), ¶ 10.2.2 (observing that “when an investment is ‘controlled’ by nationals of one of the Treaty Parties . . . is not defined in the Treaty, but for corporate entities, voting control of the stock held is generally determinative of control—whosoever may own that stock.”).

401. First Alberelli Witness Stmt. ¶ 8; Beatriz Alberelli Witness Stmt. ¶ 3.

402. See, e.g., *Aguas del Tunari v. Bolivia*, Decision on Respondents’ Objections to Jurisdiction (**CL-104**), ¶ 264; *AIG Capital Partners, Inc. and CJSC Tema Real Estate Co. v. Kazakhstan*, Award (Oct. 7, 2003), (**CL-120**), ¶ 10.2.2.

control over Italba” because he is the company’s President and more visible agent.⁴⁰³ That is not correct.⁴⁰⁴ Italba’s shareholding structure is, in fact, no accident but designed to ensure that business decisions are made jointly by Italba’s equal shareholders.⁴⁰⁵ Beyond that, the clear standards for “control” recognized by other tribunals provide no basis for the Tribunal to tolerate Uruguay’s attempt to pry into the Alberellis’ marriage.

* * *

141. Uruguay has thus failed to establish either of the two elements jointly required to allow it to deny Italba the benefits of the Treaty. Uruguay cannot show that Italba does not conduct substantial business activities in the United States, or that it is owned or controlled by a person of a non-party. Uruguay’s jurisdictional objection under Article 17(2) accordingly fails. Uruguay must be held to its Treaty obligations to Italba.

C. Italba’s claims are timely.

142. As established in its Memorial, Italba’s claims in this arbitration all accrued on or after March 2015 because it was then that Mr. Herbon discovered that Uruguay had reallocated Trigosl’s Spectrum to a third company while Trigosl’s case before the TCA seeking the restoration of the Spectrum was still pending. That discovery meant: (a) that Uruguay was not simply slow in complying, but had in fact acted to frustrate the TCA Judgment and had no intention of ever complying with it; and (b) that Uruguay’s years of inaction on Trigosl’s applications for a conforming license and subsequent termination of the license had been in bad faith and also in breach of the Treaty.⁴⁰⁶ Italba sent Uruguay a notice of arbitration five months

403. Counter-Memorial ¶ 82.

404. Second Alberelli Witness Stmt. ¶ 7; Beatriz Alberelli Witness Stmt. ¶ 3.

405. First Alberelli Witness Stmt. ¶ 8; Second Alberelli Witness Stmt. ¶ 7; Beatriz Alberelli Witness Stmt. ¶ 3.

406. Memorial ¶¶ 99-103.

later on August 5, 2015.⁴⁰⁷ Italba’s claims are therefore timely under the three-year statute of limitations set forth in Article 26(1) of the Treaty.

143. Uruguay nevertheless argues that Italba’s claims, including the expropriation claim, fail under Article 26(1). To support that argument, Uruguay argues that all of Italba’s claims, including the expropriation claim, relate to a dispute with URSEC that was crystallized by URSEC’s January 2011 revocation of Trigosal’s Spectrum.⁴⁰⁸ But Uruguay position is based on a misunderstanding of Article 26(1). That provision reads as follows: “[n]o claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach . . . and knowledge that the claimant . . . has incurred loss or damage.”⁴⁰⁹

144. Thus, the key question is not when the dispute between URSEC and Italba arose but: (a) when the specific conduct alleged to be in breach of the Treaty occurred; and (b) when Italba knew or should have known that such conduct gave rise to a claim for a breach of the Treaty.⁴¹⁰ The mere fact that Italba and URSEC had a dispute in 2011 concerning whether URSEC was justified in terminating Trigosal’s license based under Uruguayan administrative law does not mean that the three-year period under Article 26(1) was there and then triggered for any claims that Italba might ever bring in connection with its investment in Uruguay. In fact,

407. *Id.* ¶¶ 97-98; Letter from Italba to Uruguay International Economic Affairs Secretariat & President of Uruguay (Aug. 5, 2015) (C-090); Letter from A. Yanos to Uruguay Minister of Economy & Finance (Oct. 15, 2015) (C-103).

408. Counter-Memorial ¶¶ 97, 103, 106, 109, 112, 116, 122.

409. Treaty (C-001), Art. 26(1).

410. Uruguay argues that the relevant cut-off date for statute of limitation purposes is February 16, 2013—three years before Italba submitted its request for arbitration to the Secretary-General—rather than August 5, 2012, three years before Italba sent its notice of arbitration to Uruguay. Counter-Memorial ¶ 88. The question is academic: Italba’s claims are timely either way because they did not arise until March 2015. It should be noted that even if Italba had learned of the reallocation of its frequencies in September of 2013, on the day that it happened, that would still bring Italba’s Notice and Request for Arbitration well within the limitations period. URSEC Resolution No. 220/013 (Sept. 5, 2013) (C-084).

Italba's expropriation claim does not arise out of the 2011 revocation of Trigosul's Spectrum.⁴¹¹

To the contrary, Italba's claims are based exclusively on Treaty breaches that either postdate the TCA Judgment entirely (Italba's expropriation and denial of justice claims) or whose nature as breaches only became clear after Italba learned of Uruguay's unannounced and bad faith reallocation of its Spectrum (Italba's other fair and equitable treatment, national treatment, or full protection and security claims).⁴¹²

1) Italba's Expropriation and Denial of Justice Claims Are Timely.

145. Italba's expropriation and denial of justice claims arise from Uruguay's frustration of the TCA Judgment of October 23, 2014 ordering the restoration of Trigosul's Spectrum.⁴¹³ As established in Italba's Memorial, Italba did not learn until March 2015 that Uruguay had no intention of complying with the TCA Judgment and had in fact transferred the Spectrum to Dedicado while Italba's rights were *sub judice*.⁴¹⁴ Accordingly, the statute of limitations for Italba's expropriation and denial of justice claims under Article 26 (1) began to run in March 2015.⁴¹⁵

146. In its Counter-Memorial, Uruguay nevertheless declares that "there can be no doubt that the alleged breach occurred in January 2011," when URSEC revoked Trigosul's

411. It is, of course, not for Uruguay to decide the theory of Italba's claim. *See generally ECE Projektmanagement International GmbH and Kommanditgesellschaft PANTA Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic*, PCA Case No. 2010-5, Award (Sept. 19, 2013) (CL-121), ¶ 4.743 ("The Tribunal is of the view that in principle it is for the investor to allege and formulate its claims of breach of relevant treaty standards as it sees fit. It is not the place of the respondent State to recast those claims in a different manner of its own choosing and the Claimants' claims accordingly fall to be assessed on the basis on which they are pleaded."). It should also be noted that a claim for wrongful termination in 2011 would in fact be moot because Italba, through Trigosul, has already challenged the 2011 revocation in Uruguay's highest administrative court, the TCA—and won. *See supra* Section II.A; *see also infra* Section IV.A.

412. *See infra* Section III.C; Memorial ¶ 79.

413. Memorial ¶¶ 75-80; TCA Judgment (Oct. 23, 2014) (C-076).

414. Memorial ¶ 101.

415. *Id.*

license to use the Spectrum.⁴¹⁶ That is wrong. Although URSEC revoked Trigosul's Spectrum in 2011, Trigosul obtained a complete legal remedy through the TCA's 2014 Judgment nullifying URSEC's action. Under Uruguayan law, the judgment declaring the revocation of Trigosul's Spectrum null and void had the effect of erasing the revocation retroactively, as if it had never existed.⁴¹⁷ Under international law as well, the TCA Judgment restoring the Spectrum to Trigosul before any Treaty claims were brought was every bit as much Uruguay's sovereign conduct as URSEC's revocation of Trigosul's frequencies; the TCA Judgment accordingly extinguished any potential Treaty claims that might have then been available to Italba as a result of the revocation.⁴¹⁸

147. Consistent with Trigosul's success before the TCA, Italba does not allege in this arbitration that Uruguay expropriated its investment through the 2011 revocation of Trigosul's Spectrum. Instead, Italba's expropriation and denial of justice claims concern Uruguay's frustration of the judgment of its own highest administrative court in favor of Trigosul *subsequent to* that court's ordering that Trigosul's Spectrum be restored.⁴¹⁹ Uruguay thus tries to apply the statute of limitations to expropriation or denial of justice claims that Italba has not actually made.⁴²⁰

148. Nor can Uruguay succeed in portraying its frustration of the TCA as the mere

416. Counter-Memorial ¶¶ 116-17.

417. See *Cristina Vásquez, Ejecución de la sentencia anulatoria, Cuarto coloquio contencioso de Derecho Público, Responsabilidad del Estado y jurisdicción*, Ed. Nueva Jurídica (Montevideo 1998) (C-253), at 53 (the annulment of an administrative act extinguishes per se and retroactively the legal situation created by the administrative act); see also TCA Judgment (Oct. 23, 2014) (C-076), at 15, 17, 19, 20-21 (declaring Uruguay's administrative act null and void and immediately reinstating Trigosul's rights with retroactive effect).

418. See ILC Draft Articles on State Responsibility for Internationally Wrongful Acts (2001) (CL-072), Art. 4(1) ("The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions . . .").

419. Memorial ¶¶ 77-80; see *infra* Sections IV.A, IV.B.

420. Counter-Memorial ¶¶ 112-13.

continuation of a dispute over the 2011 revocation of Trigosul’s licenses to use the Spectrum as Uruguay tries to suggest.⁴²¹ As a matter of law, Uruguay’s taking of Trigosul’s Spectrum did *not* continue.⁴²² The TCA Judgment nullified it.⁴²³

149. Uruguay’s reliance on *Corona Materials v. Dominican Republic* is therefore misplaced.⁴²⁴ In *Corona*, an investor premised its expropriation claim on the Dominican Republic’s failure to respond to a request for reconsideration of an earlier denial of an environmental permit for a mine.⁴²⁵ The reconsideration request fell within the CAFTA treaty’s limitations period, but the original denial did not.⁴²⁶ The *Corona* tribunal rejected the investor’s argument that the State’s failure to respond to the request for reconsideration could give rise to a separate breach from the failure to issue the requested permits,⁴²⁷ finding that the State’s failure to address the motion for reconsideration had been merely an “implicit confirmation” of the earlier permit denial.⁴²⁸ By contrast, the TCA Judgment was *not* an “implicit confirmation” of Uruguay’s 2011 taking of Trigosul’s Spectrum—it was an *explicit nullification* of that revocation that restored Trigosul’s license.⁴²⁹

150. Moreover, there is nothing problematic about the Tribunal considering claims based on treaty breaches that fall within the statute of limitations while earlier potential treaty

421. *Id.* ¶ 117 (suggesting that Uruguay’s frustration of the TCA’s 2014 judgment cannot give rise to a separate claim for breach of the Treaty because it is “an integral part” of the dispute on the allocation of frequencies).

422. Memorial ¶ 100; TCA Judgment (Oct. 23, 2014) (C-076), at 20-21.

423. *Id.*

424. Counter-Memorial ¶¶ 117-21.

425. *Corona Materials, LLC, v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award On The Respondent’s Expedited Preliminary Objections in Accordance With Article 10.20.5 Of The DR-CAFTA (May 31, 2016) (RL-114).

426. *Id.* ¶ 211.

427. *Id.* ¶¶ 201-10.

428. *Id.* ¶ 211.

429. Memorial ¶ 100.

breaches fall outside of the limitations period.⁴³⁰ In *Rusoro v. Venezuela*, for example, the tribunal observed that treaty breaches that themselves fall outside of an applicable limitations period may yet “provide the necessary background and context for adjudicating the case.”⁴³¹ In that case, various export restrictions and exchange control measures had targeted the claimant’s investment over the years preceding a nationalization decree.⁴³² Finding “no clear linkage” among the Respondent State’s various measures, the *Rusoro* tribunal considered that the correct approach was to “break[] down each alleged composite breach into individual breaches, each referring to a certain governmental measure, and to apply the time bar to each of these breaches separately.”⁴³³ The *Rusoro* tribunal rejected Venezuela’s attempt to force dismissal of the “whole dispute” where only some claims were barred as “contrary to the plain reading” of the applicable treaty, which “d[id] not forbid that an arbitral dispute include multiple claims.”⁴³⁴

151. By relating all of its breaches back to the 2011 revocation, Uruguay’s Counter-Memorial repeats the error Venezuela made in *Rusoro* of treating the applicable treaty’s limitations clause as applicable to “the entire dispute.”⁴³⁵ Uruguay’s limitations argument should meet with the same result because Article 26(1)’s text plainly applies the Treaty’s limitations period to individual *claims*:

430. See, e.g., *Rusoro Mining, Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (Aug. 22, 2016) (CL-021).

431. *Rusoro v. Venezuela*, Award (CL-021), ¶¶ 232-33; see, e.g., *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues (Dec. 6, 2000) (CL-122), ¶ 62 (finding that, where a State’s permanent course of action began before NAFTA came into force and “became breaches” after NAFTA’s entry into force, the tribunal had jurisdiction *ratione temporis* over breaches that occurred after NAFTA entered into force, even if those breaches related to pre-NAFTA conduct).

432. *Rusoro v. Venezuela*, Award (CL-021), ¶ 230.

433. *Id.* ¶¶ 230-31.

434. *Id.* ¶ 239 (“If a party submits multiple claims to a single arbitration, the time bar . . . can only apply to those individual claims where knowledge (actual or construed) of the breach and the resulting loss had occurred before the time bar kicked in. The remaining claims cannot be affected.”).

435. See *id.* ¶ 196. Unlike the *Rusoro* claimants, however, Italba has not actually brought any time-barred Treaty claims.

No *claim* may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 24(1) and knowledge that the claimant . . . or the enterprise . . . incurred loss or damage.⁴³⁶

152. Here, Italba’s actual expropriation and denial of justice *claims* are based on Uruguay’s refusal to comply with and frustration of the TCA Judgment. Italba only acquired knowledge of *that* breach in March 2015 when it discovered that Uruguay had allocated Trigosul’s Spectrum to a third party, even while proceedings for its return were pending before the TCA.⁴³⁷

153. Italba does not dispute that a claim alleging that Uruguay’s 2011 taking of Trigosul’s Spectrum constituted an expropriation under the Treaty could now be barred under Article 26(1), depending on the circumstances. For purposes of Italba’s actual expropriation claim, however, the 2011 revocation of Trigosul’s frequencies is no more than “background and context.”⁴³⁸ Nevertheless, Uruguay makes much of a March 29, 2011 email from Dr. Alberelli to the U.S. Embassy in Montevideo in which Dr. Alberelli questions “whether we will need to put the investment treaty into practice.”⁴³⁹ Uruguay argues that this email shows that Italba considered bringing a Treaty claim challenging the revocation of Trigosul’s license in 2011 and that Italba therefore “had or should have had knowledge of the alleged breach of the Treaty” no

436 Treaty (C-001), Art. 26(1) (emphasis added).

437. Uruguay suggests that Italba should have known that URSEC might reallocate Trigosul’s frequencies because Dr. Alberelli’s March 29, 2011 correspondence with the U.S. Embassy in Montevideo noted his concern that URSEC might put the Spectrum up for “public auction.” Counter-Memorial ¶¶ 107-108, 112-114. Uruguay’s argument lacks merit. Awareness of the potential for a Treaty breach is not the standard for Article 26(1)’s limitations period and in any case the actual date of the transfer (September 13, 2013) falls within the three-year limitations period. As for Dr. Alberelli’s concerns about a “*public* auction” (emphasis added), these tend to underscore Italba’s and Trigosul’s expectation that URSEC would not simply reallocate the Spectrum to a favored competitor without notice, let alone while the Spectrum was the object of litigation to which URSEC was a party before an Uruguayan court.

438. See *Rusoro v. Venezuela*, Award (CL-021), ¶ 233.

439. Email from G. Alberelli to K. Skillin et al. (Apr. 14, 2011) (C-071); Counter-Memorial ¶¶ 107-109.

later than March 2011.⁴⁴⁰ Uruguay's argument fails. Even if Italba could have brought a Treaty claim regarding the 2011 revocation of Trigosl's license, Italba did not do so and instead asked Uruguayan courts to correct Uruguay's mistakes.⁴⁴¹ Any claim that Italba might have had in respect of the January 2011 revocation of Trigosl's frequencies would have been extinguished by the TCA Judgment. Italba's current claims are premised on Treaty breaches quite distinct from those it might have raised in 2011. Italba could not have known in March 2011 that Uruguay would one day act in so shocking a manner as to actively frustrate the decisions of its own courts.

154. For all of these reasons, Italba's expropriation and denial of justice claims are timely under Article 26(1).

2) Italba's Fair and Equitable Treatment, Full Protection and Security, and National Treatment Claims Are Timely.

155. Italba's Fair and Equitable Treatment, Full Protection and Security and National Treatment claims are equally timely. These claims also accrued in March of 2015 for purposes of the Treaty's statute of limitations provision, when Italba discovered that Uruguay had secretly reallocated its frequencies to another party while its action seeking return of the Spectrum was still before the TCA.

156. Until that time, Italba and Trigosl had attributed Uruguayan regulators' inattentiveness to Trigosl's repeated applications for a conforming license to more-than-ordinary bureaucratic inefficiency and had credited URSEC officials' repeated reassurances that

440. Counter-Memorial ¶ 110.

441. Second Alberelli Witness Stmt. ¶ 51.

Trigosul's conforming license was just around the corner.⁴⁴² Italba and Trigosul similarly understood the 2011 revocation of Trigosul's Spectrum to be based on factual errors and were accordingly ready to rely on Uruguayan courts, and specifically the TCA, for a remedy.⁴⁴³

157. As noted, however, Italba's March 2015 discovery placed URSEC's dilatory conduct towards Trigosul over the preceding 12 years in a very different light.⁴⁴⁴ URSEC's secret reallocation of the Spectrum from under the TCA's nose demonstrated that Uruguayan authorities had *no intention* of respecting Trigosul's—and thus Italba's—rights.⁴⁴⁵ Instead, this unlawful reallocation exposed the Uruguayan State's conduct towards Italba's investment as having been lawless, contrary to due process, in bad faith, arbitrary and discriminatory—and thus in breach of the Treaty's guarantees of Fair and Equitable Treatment, Full Protection and Security, and National Treatment.

158. Uruguay's Counter-Memorial nevertheless challenges Italba's Fair and Equitable Treatment, Full Protection and Security, and National Treatment claims as untimely.⁴⁴⁶ Uruguay insists that Italba acquired or should have acquired knowledge of its Treaty breaches and resulting loss over the 2006-2011 time period over which Uruguay was failing to act on Italba and Trigosul's requests for a conforming license (in the process costing Italba important business opportunities), and no later than January 2011 when URSEC revoked Trigosul's license.⁴⁴⁷

159. Uruguay's arguments lack merit. As with Italba's expropriation claim, Uruguay again tries to hide behind Article 26(1)'s time bar by lumping all of its own misconduct into a

442. Memorial ¶¶ 9, 101-02; First Alberelli Witness Stmt. ¶¶ 31, 33, 38, 61, 89; First Herbon Witness Stmt. ¶¶ 15, 30, 50.

443. Memorial ¶ 102; First Alberelli Witness Stmt. ¶¶ 73, 76; First Herbon Witness Stmt. ¶¶ 36-43.

444. Memorial ¶ 79; First Alberelli Witness Stmt. ¶¶ 88-89; First Herbon Witness Stmt. ¶¶ 49-50.

445. Memorial ¶ 101; First Alberelli Witness Stmt. ¶¶ 88-89, Herbon Witness Stmt. ¶ 49.

446. Counter-Memorial ¶¶ 10-11, 93-94.

447. *Id.* ¶¶ 96-102.

single “dispute” or generalized “breach” relating back to the January 2011 license revocation or earlier.⁴⁴⁸ The problem for Uruguay, however, is that its argument is inconsistent with how Article 26(1)’s limitations provision works.

160. Crucially, Article 26(1)’s limitations clock does not start running until two necessary elements are present: (a) that the claimant has “acquired, or should have acquired, knowledge of the breach alleged;” and (b) that the claimant has “acquired, or should have first acquired . . . knowledge that the claimant . . . or the enterprise has incurred loss or damage.”⁴⁴⁹

161. It follows that Article 26(1)’s limitations period will not start to run if a claimant has acquired or should have acquired knowledge of one of these two requirements but not of the other. Put another way, neither knowledge of breach without knowledge of injury, nor knowledge of injury without knowledge of breach, can start the Article 26(1) clock running on a claim under the Treaty.⁴⁵⁰

162. The latter situation applies to Italba’s claims. While there is no question that Italba was *injured* by URSEC’s failure to act on Trigosl’s applications for a conforming license,

448. See, e.g., Counter-Memorial ¶ 104 (“There is no question that, in January 2011, Italba, which claims to be the owner of Trigosl, already had knowledge, through Dr. Alberelli, of the revocation and the economic consequences it would have for Trigosl . . . it had knowledge as of that date of the alleged breach of the Treaty.”) and ¶ 106 (“[B]eyond a shadow of a doubt . . . Italba was aware that there was *a dispute under the Treaty* since, at the latest, March 29, 2011.”) (emphasis added).

449 Treaty (C-001), Art. 26(1).

450. Tribunals have repeatedly interpreted analogous limitations clauses in exactly this way. For example, NAFTA’s statute of limitations provision is substantially similar to the three-year statute of limitations in the Treaty. NAFTA Article 1117(2) provides: “An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.” NAFTA tribunals have interpreted this clause to require knowledge of both breach and loss or damage to trigger the limitation period. See, e.g., *Glamis Gold Ltd. v. United States*, UNCITRAL, Award (June 8, 2009) (RL-075), ¶ 347 (citing commentary that “the three-year limitation period presumably runs from the later of . . . [knowledge of breach and of damage] . . . in the event that the knowledge of both events is not simultaneous”); *Pope & Talbot v. The Government of Canada*, UNCITRAL, Award in Relation to Preliminary Motion by the Government of Canada (Feb. 24, 2000) (CL-123), ¶ 11 (“Before time can begin to run in terms of NAFTA Article 1116(2) in respect of a claim by an Investor, **two matters must have come to its actual, or properly imputed, knowledge[:]** knowledge of the breach and knowledge that it has incurred loss or damage thereby.”) (emphasis added).

it was not until March of 2015 that Italba became aware that its injuries resulted from a discriminatory animus that caused URSEC's failure to act to rise from mere bureaucratic incompetence to the Treaty breaches upon which it bases its claims in this arbitration.

163. To be sure, Article 26(1) does not simply start the limitations period from when a claimant "first acquired" knowledge of both a breach and injury. The limitations clock will instead start ticking from when a claimant "should have" acquired that knowledge. In this case, however, there is no basis for finding that Italba "should have known" of Uruguay's breach any sooner than March of 2015. That is because Uruguay, through URSEC, affirmatively misled Trigosul and Italba.

164. As detailed in the Memorial and below, URSEC for years advised that a conforming license for Trigosul would issue "soon."⁴⁵¹ It was reasonable for Italba to be deceived.⁴⁵² At the time, Italba understood that the process of issuing conforming licenses to

451. Memorial ¶¶ 27, 30, 34, 52; First Alberelli Witness Stmt. ¶¶ 28, 31, 33, 38, 61; First Herbon Witness Stmt. ¶¶ 15, 17, 21, 30.

452. Uruguay complains that Italba "lacks documentary evidence" of URSEC officials' promises that URSEC was processing Trigosul's conforming license and that Trigosul would receive it in due course. Counter-Memorial ¶ 101. That is incorrect. Italba submitted sworn statements from Gustavo Alberelli and Luis Herbon detailing their meetings with various officials who gave them specific assurances that Trigosul would receive its conforming license. First Alberelli Witness Stmt. ¶¶ 31, 33, 38; First Herbon Witness Stmt. ¶¶ 15, 17, 21. Italba has also exhibited multiple written applications from Trigosul to URSEC seeking a conforming license, and Uruguay has not challenged their authenticity. *See, e.g.*, Letter from L. Herbon to J. Piaggio (July 6, 2005) (C-020); Letter from L. Herbon to J. Piaggio (Aug. 15, 2005) (C-021); Letter from L. Herbon to R. Martinez (Jan. 26, 2006) (C-022); Letter from L. Herbon to L. Lev (Mar. 23, 2006) (C-023); E-mail from L. Herbon to G. Alberelli (Jan. 31, 2006) (C-254); *see also* Counter-Memorial ¶ 165 n.254. Despite its obligation to respond in writing, URSEC instead gave repeated verbal assurances that Trigosul's license would be forthcoming. Uruguay may not now hide behind its own failure to follow its own regulations. *See* Decree No. 500/991 (C-109), Art. 106 ("Toda autoridad administrativa está obligada a decidir sobre cualquier petición que le formule el titular de un interés legítimo en la ejecución de un determinado acto administrativo") ("All administrative authorities are obliged to decide on any petition brought before same by the holder of a legitimate interest in the performance of a particular administrative act"); Law 15.869 (Ley Organica Del Tribunal De Lo Contencioso Administrativo) (C-255) Art. 8 ("Las peticiones que el titular de un derecho o de un interés directo, personal y legítimo formule ante cualquier órgano administrativo, se tendrán por desechadas si al cabo de ciento cincuenta días siguientes al de la presentación no se dictó resolución expresa sobre lo pedido. El vencimiento de dicho plazo no exime al órgano de su obligación de pronunciarse expresamente sobre el fondo del asunto."); *supra* Section II.C.2; *infra* Section IV.C.4(b). Finally, Dr. Alberelli and Mr. Herbon's testimony is consistent with URSEC's internal documents produced in this arbitration. URSEC Report (Mar. 30, 2006) (C-184), at 3.

other telecommunications companies was happening slowly over a period of years.⁴⁵³ Even URSEC's revocation of Trigosul's Spectrum did not necessarily mean that Trigosul would *never* receive a conforming license. URSEC's revocation of Trigosul's Spectrum appeared, at the time, to be based on factual mistakes concerning such matters as the location of Trigosul's offices, whether Trigosul had paid required fees, and whether Trigosul had permitted another company to operate in the Spectrum.⁴⁵⁴ Trigosul reasonably expected that, once the correct facts were established, the revocation would be rescinded, and that it would receive its conforming license in due course.⁴⁵⁵ The limitations period began to run only after Italba became aware of the true character of Uruguay's conduct as being in breach of the Treaty.

165. Uruguay also insists that the March 29, 2011 email from Dr. Alberelli to the U.S. Embassy in Montevideo is evidence that Italba knew by March 2011 of the Treaty breaches and resulting losses from URSEC's failure to act on Trigosul's requests for a conforming license. That argument lacks merit. First, Uruguay concedes that Dr. Alberelli's March 2011 email to the U.S. Embassy does not concern the subject matter of Italba's fair and equitable treatment,

453. Memorial ¶ 52; First Alberelli Witness Stmt. ¶¶ 59-61; First Herbon Witness Stmt. ¶ 30; *see also* URSEC Resolution No. 611/007 (Dec. 27, 2007) (C-041) (Telefonica); URSEC Resolution No. 157/010 (Mar. 25, 2010) (C-053) (Dedicado); URSEC Resolution No. 544/010 (Oct. 29, 2010) (C-054) (Telstar); URSEC Resolution No. 053/011 (Mar. 16, 2011) (C-055) (Rinytel). In addition, even where URSEC did not issue a separate conforming license, Italba was aware that URSEC had issued "certifications" to certain companies that confirmed that the existing licenses of those companies were the equivalent of Class A, B, C, or D licenses under the 2003 License Regulations. *See* Confidentiality Agreement between Telmex and Trigosul S.A. (June 21, 2007) (C-042), at 1-2 ("[Telmex's] licenses are current and the services are operational and they all conform to the subsequent regulations established by Resolution of the Executive of March 25, 2003 (Telecommunications License Regulations, TLR) capable of assimilation to Class A license in accordance with categorization under these Regulations and with certification issued by the General URSEC Management on September 23, 2004.") ("Las referidas licencias son vigentes, y operativos los servicios, en un todo conforme con el reglamento posterior establecido por Resolución del Poder Ejecutivo de 25 de marzo de 2003 (Reglamento de Licencias de Telecomunicaciones, RLT) asimilables a licencia Clase A de acuerdo con la categorización de dicho reglamento y con certificación expedida por la Gerencia General de URSEC el 23 de septiembre de 2004.").

454. Memorial ¶¶ 63-69.

455. This expectation was almost correct. Uruguay's judiciary, at least, *did* vindicate Trigosul's rights. Other organs of the Uruguayan State did not. *See* TCA Judgment (Oct. 23, 2014) (C-076), Memorial ¶¶ 77-80; *see infra* Section IV.A.1-2.

national treatment, or full protection and security claims. Rather, as is clear from the timing and content of that email, it solely concerns—as Uruguay itself put it—“Trigosul’s protest to URSEC concerning the revocation of its frequencies, the failure of URSEC to respond [to Trigosul’s challenge to the revocation], and the information it had received that URSEC planned to auction the frequencies that were revoked from Trigosul.”⁴⁵⁶ Most importantly, there is no evidence—either in the March 2011 email or otherwise—that Italba recognized prior to March 2015 that URSEC’s failure to issue a conforming license to Trigosul was motivated by discriminatory animus or that it was a breach of URSEC’s obligations under the Treaty. Finally, as discussed above, any hypothetical Treaty claims that Italba might have been able to bring based on URSEC’s failure to act on Trigosul’s applications would have been extinguished by the TCA Judgment, which cleaned the slate on Uruguay’s conduct.

166. For all of the foregoing reasons, Italba’s further Fair and Equitable Treatment, Full Protection and Security, and National Treatment claims are timely under Article 26(1).

3) In the alternative, the limitations period for Italba’s other fair and equitable treatment, full protection and security, and national treatment claims is tolled by a “continuing act.”

167. Alternatively, if the Tribunal were to find that Italba knew or should have known of Treaty breaches unrelated to Uruguay’s frustration of the TCA Judgment earlier than Article 26(1)’s three-year limitations period, the statute of limitations should be tolled under the “Continuing Act” doctrine.

168. Under the customary international law of state responsibility, a continuing act is “one which has been commenced but has not been *completed* at the relevant time” and that “can

456. Counter-Memorial ¶ 107.

continue and give rise to a continuing wrongful act in the present.”⁴⁵⁷ Article 2(1) of the Treaty contemplates its application on this basis by providing that the Treaty “applies to measures adopted or *maintained* by a Party.”⁴⁵⁸ International tribunals have regularly held that limitations periods may be tolled where a State’s international responsibility is engaged by a breach of a relevant treaty that is deemed “continuous.”⁴⁵⁹

169. As further detailed in Italba’s submissions, Uruguay’s continuing and interconnected measures—all of which are unrelated to Italba’s expropriation and denial of justice claims based on Uruguay’s frustration of the TCA Judgment—can be understood as a continuous breach of the Treaty that culminated in the destruction of Italba’s investment in March 2015.⁴⁶⁰

170. On this view, URSEC’s inaction on Trigosul’s requests for a conforming license can be viewed not as a single act (such as the denial of a permit), but as a continuous program of mistreatment of Italba’s investment that extended over a period of years. In hindsight, URSEC’s unresponsiveness, the unlawful 2011 revocation of Trigosul’s license, and the unannounced

457. *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, Report of the International Law Commission on the work of its fifty-third session, 2001 (CL-072), at 60 (Art. 14). The Commentary to ILC Article 14 defines a continuing act as “one which has been commenced but has not been *completed* at the relevant time” and explains that “conduct which has commenced sometime in the past, and which constituted . . . a breach at that time, can continue and give rise to a continuing wrongful act in the present.” *Id.*

458. Treaty (C-001), Art. 2(1) (emphasis added).

459. *See, e.g., Pac Rim Cayman v. El Salvador*, Decision on Respondent’s Jurisdictional Objections (RL-91), ¶¶ 2.91-92 (the continued withholding of permits and concessions was an omission extending over a period of time and amounting to a continuous act under international law); *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. Dominican Republic*, UNCITRAL, Preliminary Objections to Jurisdiction (Sept. 19, 2008) (CL-124), ¶ 94 (“to the extent that on the consideration of the merits an act is proved to have originated before the critical date but continues as such to be in existence after that date, amounting to a breach of a Treaty obligation in force at the time it occurs, it will come within the Tribunal’s jurisdiction.”); *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Award (May 24, 2007) (RL-59), ¶ 28 (“continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly”); *see also Id.* ¶ 27 (citing *Feldman v. Mexico*, ICSID Case No ARB/(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues (Dec. 6, 2000), as authority for the proposition that “state action beginning more than three years before the claim but continuing after that date” is not barred under Article 1116).

460. *See supra* Sections II.B, II.C.2-6.

transfer of the Spectrum to Dedicado that frustrated the TCA Judgment, share a common source: Uruguay's bad faith towards Trigosul, possibly animated by a desire to shield state monopoly ANTEL from competition.⁴⁶¹ Taken as a whole these measures may be found to constitute continuing treatment of Italba's investment in Trigosul that breaches the Treaty's guarantees of Fair and Equitable Treatment, Full Protection and Security and National Treatment. Such claims would toll Article 26(1)'s limitation period and be timely on this basis as well.

* * *

171. The Tribunal has jurisdiction over Italba's claims. Italba owns and controls Trigosul, under both the controlling Florida law as well as Uruguayan law. Italba's investment in Trigosul's license and rights to operate in the Spectrum is a qualifying investment protected by Uruguayan law—as demonstrated by the TCA Judgment. Uruguay has no basis to deny Italba the protections of the Treaty because Italba's business is "substantial" within the meaning of the Treaty's denial of benefits clause, and is neither owned nor controlled by a non-U.S. person. Finally, Uruguay's invocation of the Treaty's limitations period precludes only claims that Italba has not brought, while Italba's actual claims, based on breaches of the Treaty that were only discovered in March of 2015, are timely. As addressed in the next Section, Italba's claims are also meritorious.

IV. LIABILITY

A. Uruguay Unlawfully Expropriated Italba's Investment.

172. In its Memorial, Italba established that Uruguay's refusal to comply with the TCA Judgment reinstating Trigosul's rights to use the Spectrum—and its frustration of that

461. *See, e.g.*, Memorial ¶¶ 10, 38-41, 49 (n.99), 79 n.178. Uruguay's hostility towards Trigosul and Italba appears to have continued into this arbitration, as evidenced by the extraordinary conduct of Dr. Toma, a senior Uruguayan government official, who has been directly involved in soliciting testimony for use in this arbitration. *See supra* Sections II.C.5-6; *see also infra* Section IV.C.

Judgment—worked an unlawful expropriation of Italba’s investment through Trigოსul in those rights.⁴⁶²

173. In its Counter-Memorial, Uruguay does not attempt to dispute that a State’s frustration of a judgment of its own courts vindicating a foreign investor’s rights is a valid basis for a claim of expropriation.⁴⁶³ Uruguay’s strategy, instead, is to insist that no expropriation occurred.⁴⁶⁴ Uruguay thus variously argues: (a) that Italba, through Trigოსul, had no rights capable of being expropriated because URSEC’s allocation of the Spectrum to Trigოსul was “provisional and revocable in nature;”⁴⁶⁵ (b) that it “fully complied” with the TCA Judgment by attempting to give Trigოსul back its rights to use the Spectrum or equivalent frequencies;⁴⁶⁶ and, (c) that no expropriation can have occurred because Uruguay’s delays in implementing the order were not meant to be permanent.⁴⁶⁷

174. Uruguay’s arguments are consistently unavailing. As detailed below, Trigოსul’s rights to use the Spectrum were protected by law (as shown by the TCA Judgment) and

462. See Memorial ¶¶ 104-08.

463. See Counter-Memorial ¶¶ 282-86. Indeed, international tribunals have recognized that a State may expropriate rights that have been “crystallised” in an arbitral award or even a judgment of its own courts. The tribunal in *Saipem v. Bangladesh*, for example, concluded that the Bangladeshi Supreme Court’s declaration that an ICC arbitral award against a state-owned enterprise was a “nullity” had expropriated the investor’s contractual rights, which had been “crystallised” in the ICC award. *Saipem S.p.A. v. People’s Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award (June 30, 2009) (RL-76), ¶¶ 129-30, 202. The *Saipem* tribunal explained that the Bangladeshi court’s declaration was “tantamount to a taking” of the claimant’s rights under the Award because it “resulted in substantially depriving Saipem [the claimant] of the benefit of the ICC Award.” *Id.* ¶ 129. The *Saipem* tribunal characterized the Bangladeshi court’s action as a “measure[] having similar effects” to an expropriation, and one that accordingly fell within the scope of the applicable treaty’s protections against unlawful “Nationalization or Expropriation.” *Id.* ¶¶ 124, 129. The tribunal in *EnCana Corp. v. Ecuador* similarly observed that an expropriation could occur through a State’s courts’ decisions being “themselves overridden or repudiated by the State.” *EnCana Corp. v. Republic of Ecuador*, LCIA Case No. UN 3481, Award (Feb. 3, 2006) (CL-032), ¶ 194; see also *White Industries Australia Limited v. Republic of India*, UNCITRAL, Final Award (Nov. 30, 2011) (CL-125), ¶ 7.6.10 (concluding that the investor’s rights under an arbitral award constituted part of its original investment and, “as such, are subject to such protection as is afforded to investments by the BIT”).

464. See Counter-Memorial ¶¶ 29-30, 247-48, 251-52, 267, 282-86.

465. *Id.* ¶ 248.

466. *Id.* ¶ 267; see *infra* Section IV.A.2.

467. Counter-Memorial ¶¶ 282-86; see *infra* Section IV.A.3.

revocable only for grounds of public interest. Uruguay’s belated attempts to comply with that Judgment were both woefully inadequate and made only at the eleventh hour and in response to this arbitration. And Uruguay’s subjective “intent” is irrelevant where the effect of its conduct towards Italba and Trigosl has been an unlawful expropriation in breach of Article 6 of the Treaty.

1) There was nothing “provisional and revocable” about Italba’s and Trigosl’s rights in the TCA Judgment.

175. Uruguay’s suggestion that Trigosl’s licenses did not confer rights recognized or protected by Uruguayan law because they were provisional and revocable in nature is spurious.⁴⁶⁸ The Treaty broadly includes all legally-protected “licenses” within its definition of “investment.”⁴⁶⁹ That the TCA, Uruguay’s highest administrative court, nullified URSEC’s improper revocation of Trigosl’s licenses proves that Trigosl’s license created rights protected under domestic law.⁴⁷⁰

176. It should be recalled that Italba’s claim is not simply that Trigosl’s rights to use the Spectrum were expropriated, but rather that Italba’s investment in those rights—as “crystallized” in the TCA Judgment annulling their revocation by URSEC—was expropriated through URSEC’s non-compliance with and frustration of the Judgment.⁴⁷¹ Arguments about how Uruguay could not have expropriated “rights that do not exist” have even less relevance where those rights were crystallized in the judgment of Uruguay’s highest administrative

468. Counter-Memorial ¶¶ 207-10.

469. *See supra* Section III.A.2(a).

470. *Id.*

471. *See supra* Section III.C.

court.⁴⁷² The TCA Judgment was not precarious and revocable. It was final and binding.⁴⁷³ Uruguay expropriated Italba’s right to have the TCA Judgment not be eviscerated in much the same way as Saipem had a right to see its award against Petrobangla not be eviscerated.⁴⁷⁴ In addition, Uruguay’s claims as to the ease with which it could take Trigosl’s rights without compensation are impossible to square with its own description of the “complex” problem it faced in recovering those same rights from Dedicado and the ferocity of Dedicado’s own defense of its ability to prevent the government from terminating Dedicado’s rights.⁴⁷⁵

2) Uruguay never complied with the TCA Judgment.

177. Uruguay did not, as it claims, “fully compl[y] with the TCA Judgment.”⁴⁷⁶ It is undisputed that the TCA Judgment of October 23, 2014 was a final, non-appealable decision that annulled the 2011 URSEC and MIEM resolutions revoking the allocation of the 3425-3450 MHz and 3525-3550 MHz frequencies to Trigosl and Trigosl’s authorization to provide services,

472. Where, as here, URSEC was found to have revoked Trigosl’s license on invalid grounds, Uruguay cannot now re-litigate the issue by arguing that the revocation could have been upheld on the basis of the “public interest” or “the principle of efficient use of the spectrum.” See Counter-Memorial ¶ 268 (suggesting that “the administration could have ultimately revoked [Trigosl’s rights] subsequently due to reasons of general interest or for violation of the regulatory provisions, without having to pay any type of compensation.” (quoting Pereira Op. ¶ 288)). URSEC should have presented these arguments in the appropriate domestic forum: Uruguay’s highest administrative court, the TCA. It did not do so, nor did the TCA make any such findings. Uruguay’s attempt to raise these alleged grounds for revocation *ex post facto* in this arbitration is improper and a diversion from the issue that the Tribunal was constituted to resolve: whether Uruguay’s actual actions or omissions breached the guarantees in the Treaty. See *Tecmed v. Mexico*, Award (CL-009), ¶ 120 (holding that the arbitral tribunal’s “function is to examine whether the [State measure] violates the [Treaty] in light of its provisions and of international law. . . . That the actions of the Respondent are legitimate or lawful or in compliance with the law from the standpoint of the Respondent’s domestic laws does not mean that they conform to the Agreement or to international law”).

473. See *Evacuación Vista Dedicado*, File No. 2016-2-9-0000352 (SPC-041), at 40 (“ . . . the annulment in the aforementioned Judgment . . . obliges the Administration . . . to return the legal situation to that existing prior to the decision that was annulled for formal reasons.”); TCA Judgment (Oct. 23, 2014) (C-076), at 20-21; Counter-Memorial ¶ 260; Pereira Op. ¶ 213 (“The Administration was obligated by the TCA Judgment to act in accordance with it.”).

474. *Saipem v. Bangladesh*, Award (RL-76), ¶¶ 129-30, 202.

475. See *infra* Sections IV.A.2(a), IV.B.2, IV.C.4(a),(c).

476. Counter-Memorial ¶ 267.

thus obliging URSEC to restore the Spectrum to Trigosul.⁴⁷⁷ It is equally undisputed that URSEC never returned the 3425-3450 MHz and 3525-3550 MHz frequencies to Trigosul.⁴⁷⁸

178. The only possible question, then, is whether URSEC's *purported attempts* to comply with the TCA Judgment after the arbitration had commenced can excuse Uruguay from liability for its breach of Article 6. As detailed below, Uruguay cannot avoid its liability on the basis of its belated and inadequate gestures towards compliance with the TCA Judgment.

(a) Uruguay took no meaningful steps to comply before Italba commenced arbitration.

179. Uruguay's Counter-Memorial protests that URSEC "began the process of complying with the Judgment" in February 2015.⁴⁷⁹ The facts reveal this to be a very generous characterization.

180. By February 5, 2015, more than two months after URSEC contends that it received formal notification of the TCA Judgment (and three-and-a-half months after the Judgment itself), URSEC had taken no action to fulfill its obligation to return the Spectrum to Trigosul. Accordingly, on that day Trigosul's Director, Luis Herbon wrote to the President of URSEC to request that URSEC take all steps necessary to implement the TCA Judgment.⁴⁸⁰ URSEC did not respond and took no action to comply.⁴⁸¹

181. It was not until **seven** months after the TCA Judgment that Dr. Graciela Coronel,

477. TCA Judgment (Oct. 23, 2014) (C-076); *see also* Counter-Memorial ¶ 269.

478. Uruguay's argument that URSEC reported its purported compliance with the TCA Judgment in August 2016 (Counter-Memorial ¶ 281) is a *non sequitur*. URSEC's request that the TCA deem it compliant was an *ex parte*, self-serving submission made long after this arbitration had commenced. URSEC, Request to TCA (Aug. 3, 2016) (R-66). More than anything, it should be seen for what it was—an admission of guilt. In any event, Uruguay's *ex parte* application to an Uruguayan court cannot alter the unlawful status of the expropriation that Uruguay had effected prior to Italba's initiation of this arbitration.

479. Counter-Memorial ¶ 270; *see* Cendoya Witness Stmt. ¶ 104.

480. Letter from L. Herbon to G. Lombide (Feb. 5, 2015) (C-082).

481. URSEC certainly did not advise Trigosul that its Spectrum had already been allocated to another entity.

URSEC’s Manager of Legal and Economic Affairs, circulated an internal “memorandum” dated May 12, 2015, which merely reported on the effect of the TCA Judgment and Trigosl’s previous correspondence requesting URSEC’s compliance with the judgment.⁴⁸² Although touted as “compliance” with the TCA Judgment in Uruguay’s Counter-Memorial, this memorandum did not indicate any prior or forthcoming action by URSEC to effectuate the TCA Judgment reinstating Trigosl’s rights.⁴⁸³ Although the memorandum requested the opinion of URSEC’s technical staff, Uruguay acknowledges that URSEC did not even provide the case file

482. See URSEC, Notification File No. 2015/1/00070 (May 12, 2015) (R-50); Counter-Memorial ¶ 270. By Uruguay’s own admission, this would have been nearly six months after URSEC was formally notified of the TCA Judgment on November 27, 2014. See Counter-Memorial ¶ 270. While Uruguay now attempts to argue that this timeline was reasonable, in a meeting between URSEC officials and representatives of Italba that took place in Montevideo on March 2, 2016, after Italba filed its Request for Arbitration, Dr. Cendoya apologized to Italba for URSEC’s treatment of Trigosl, acknowledged that URSEC had not acted correctly, and claimed, incredibly, that the delay in complying with the TCA Judgment was because URSEC had “misplaced” Trigosl’s file. Second Alberelli Witness Stmt. ¶ 34 n.63.

483. See URSEC, Notification File No. 2015/1/00070 (May 12, 2015) (R-50). Uruguay’s translation of Dr. Coronel’s Memorandum in the English version of its Counter-Memorial is misleading. In paragraph 270 of the English version of the Counter-Memorial, Uruguay implies that Dr. Coronel ordered compliance with the TCA Judgment, translating the fourth paragraph of her memorandum as follows: “Through the written record above, said company appears requesting compliance with the aforementioned judgment, the registration of the company in the data transmission Service Providers Registry is ordered and *the necessary measures are taken to put it in the conditions where it was at the time that Resolution No. 001/011 was issued.*” This statement is in the same paragraph as Uruguay’s representation that it had “beg[u]n the process” of complying with the TCA Judgment, and just before a reference to the file being “passed to the technical services for them to study the issue of equivalence of the frequencies.” The natural inference drawn from this passage of the Counter-Memorial is that Dr. Coronel ordered that “the necessary measures” be taken and that the technical services were working to effectuate that instruction. However, the original Spanish is in the subjunctive, not the indicative, voice. Dr. Coronel did not actually order anything in this memorandum, but rather merely characterized what Trigosl was asking for (“*solicitando que en cumplimiento a la sentencia referida, se disponga la inscripción de la empresa en el Registro de Prestadores de Servicios de trasmisión de datos y se adopten las medidas necesarias para ser colocada en la situación en la que se encontraba al momento del dictado de la Resolución N° 001/011.*”). See URSEC, Notification File No. 2015/1/00070 (May 12, 2015) (R-50) (emphasis added). A correct translation appears in the translation exhibited to Uruguay’s Counter-Memorial. See URSEC, Notification File No. 2015/1/00070 (May 12, 2015) (R-50) (translation) (“said company *requested that, in compliance with the aforementioned judgment, an order be given to enroll the company in the Register of Data Transmission Services and to take the necessary measures for it to be placed in the situation that it was in when Decision N° 001/011 was issued.*”). Whether URSEC officials were able to comply with the TCA Judgment, or instead simply recognized that they had been asked to do so, is a significant distinction. See Pereira Op. ¶¶ 256-58 (noting that compliance with the Judgment was “highly complex” and “not easy” and presented a scenario in which “delicate problems arise”) (citing Duran Martinez).

to them until almost two months later—**nine months** after the TCA Judgment.⁴⁸⁴

182. URSEC’s inaction was unsurprising. Its failure to implement the TCA Judgment was not, as Uruguay suggests in its Counter-Memorial, just an instance of the wheels of government turning more slowly than private claimants might have wished.⁴⁸⁵ Rather, URSEC’s failure to ever advise Trigosl (or the TCA) that it had re-allocated the Spectrum to Dedicado while proceedings concerning rights in that Spectrum were pending before the TCA, can only be understood as demonstrating URSEC’s bad faith.⁴⁸⁶

183. As URSEC must have known, Uruguayan law did not allow it simply to revoke its allocation of the rights to use the Spectrum to Dedicado. Just like its original allocation of the Spectrum to Trigosl, URSEC’s allocation of Trigosl’s Spectrum to Dedicado could be undone only for valid reasons of public interest after due process and with compensation.⁴⁸⁷ The TCA Judgment was not binding on Dedicado because Dedicado had not been a party to, or been given notice of, those proceedings by URSEC.⁴⁸⁸

184. At the same time, it is clear that Dedicado would have vigorously defended its rights to use the Spectrum.⁴⁸⁹ In correspondence to URSEC responding to the proposed re-

484. See URSEC, Notification File No. 2015/1/00070 (May 12, 2015) (**R-50**); Cendoya Witness Stmt. ¶ 91 (“on July 7, the file was passed to the technical services”).

485. See Counter-Memorial ¶ 272; see Cendoya Witness Stmt. ¶ 92.

486. Considering that Mr. Herbon discovered the re-allocation of Trigosl’s Spectrum to Dedicado nearly 2 years after the fact, First Herbon Witness Stmt. ¶ 49, there is no reason to believe that URSEC would have ever advised Trigosl or Italba of the predicament in which it had placed itself. See Pereira Op. ¶ 200 (in which Uruguay’s expert contends that “it was not necessary to notify Trigosl of these actions”).

487. See *supra* Section III.A.2.

488. URSEC never notified Dedicado that the Spectrum it was then using remained the subject of litigation before Uruguay’s highest administrative court. See Counter-Memorial ¶ 272 (conceding that Dedicado was not given an opportunity to defend its own rights); Evacuación Vista Dedicado, File No. 2016-2-9-0000352 (**SPC-041**), at 69-70 (Prof. Delpiazzo explains that it is “unanimously accepted that a nullifying judgment is not binding on third parties that did not have the opportunity to appear in the lawsuit.”) Professor Delpiazzo is a leading authority on Uruguayan public law.

489. As Dedicado itself explained to URSEC, such a measure would compel Dedicado to spend approximately USD \$3 million to purchase and install new infrastructure, and could also cause Dedicado to lose customers.

transfer of the Spectrum back to Trigosl, Dedicado's counsel did not mince words, warning that the proposed action amounted to "an act of manifest unlawfulness" that would "cause substantial damage for which the State and the officials in question will have to assume liability."⁴⁹⁰

Crucially, Dedicado warned URSEC that the course of action it proposed would unlawfully "enforce a judgment issued in proceedings in which the appearing party was unable to appear" and "involve[] the inadmissible *ex officio* revocation of a firm and stable administrative decision."⁴⁹¹

185. Dedicado's counsel also appear to have shared Italba's understanding of URSEC's motives, describing URSEC's plan to return the Spectrum to Trigosl as having "come[] about within the framework of financial liability proceedings against the State as a defective defense strategy that cannot be concealed," describing it as "particularly revealing" that URSEC's action was "being proposed just a year and a half after" the TCA Judgment.⁴⁹² Underscoring its readiness to litigate, Dedicado also submitted to URSEC a supporting legal opinion from Dr. Carlos E. Delpiazso, a leading Uruguayan authority on public law and dean of the law faculty at the Catholic University of Uruguay, who warned that URSEC's efforts to apply the TCA Judgment against Dedicado, a non-party without notice of those proceedings, would be "manifest unlawfulness."⁴⁹³

186. In short, while the TCA Judgment nullified URSEC's revocation of Trigosl's

Evacuación Vista Dedicado, File No. 2016-2-9-0000352 (**SPC-041**), at 61; *see also id.* at 74 (Prof. Delpiazso explains that "any attempt to turn the clock back in an attempt to confiscate what [Dedicado] has already [] obtained will have consequences because, if this occurs, the legitimacy of the derecognition or forfeiture is inevitably compromised.").

490. *See* Evacuación Vista Dedicado, File No. 2016-2-9-0000352 (**SPC-041**) at 56. *See also id.* at 61 (warning that "Revocation would make the State and Officials Financially Liable").

491. *See id.* at 56.

492. *See id.* at 59-60.

493. *See id.* at 66-79.

rights in the Spectrum, yet could provide no legal basis for revoking the rights that had subsequently been re-assigned to Dedicado.⁴⁹⁴ URSEC—by its own actions—had placed itself in a position in which strict compliance with the TCA Judgment was functionally impossible.⁴⁹⁵ The only alternative at that juncture was to provide Italba with full compensation. This Uruguay did not do.

187. In its Counter-Memorial, Uruguay tries to escape these unavoidable facts by suggesting that the burden was somehow on Trigosul to “take legal action to prevent the re-allocation of the frequencies.”⁴⁹⁶ Uruguay never explains, however, why it would have been reasonable for Trigosul to expect URSEC to reassign frequencies that were the subject of active litigation to a third party, thus impairing its own ability to comply with an adverse TCA Judgment.

188. URSEC, on the other hand, was ideally placed to avoid the “complex situation” in which it ensnared itself.⁴⁹⁷ Trigosul’s case against URSEC before the TCA began in October of 2011.⁴⁹⁸ From that time forward, URSEC knew or should have known that its administrative action might be retroactively nullified by the TCA—as it eventually was.⁴⁹⁹ URSEC therefore acted at its own risk in allocating Trigosul’s frequencies to Dedicado while the TCA proceeding

494. *See id.* at 69-70 (Prof. Delpiazzo explains that it is “unanimously accepted that a nullifying judgment is not binding on third parties that did not have the opportunity to appear in the lawsuit.”)

495. Even Uruguay’s own witness, Mr. Cendoya, has acknowledged that there was no possibility of “immediate compliance” with the TCA Judgment because of the dilemma in which URSEC had placed itself. *See* Cendoya Witness Stmt. ¶ 92.

496. Counter-Memorial ¶ 259.

497. *See* Pereira Op. ¶¶ 256-58.

498. *See* Memorial ¶ 74; TCA Judgment (Oct. 23, 2014) (C-076), at 7.

499. *See* Graciela Ruocco, *IV Jornadas Académicas del TCA en homenaje al Prof. Mariano R. Brito* (F.C.U. Montevideo 2010) (C-107), at 44-45; Cristina Vazquez, *Ejecución de la Sentencia Anulatoria*, Cuarto Coloquio Contencioso de Derecho Público, Responsabilidad del Estado y Jurisdicción. (Nueva Jurídica 1998) (C-253), at 53 (an annulment of an administrative decision “extinguish[es] retroactively the legal situation originated by same. . . . [The] annulment judgment extinguishes per se the administrative decision.”).

was pending. Uruguay now protests that URSEC’s compliance with the TCA Judgment “was not administratively simple,” but the problem was of its own making.⁵⁰⁰

189. That Uruguayan administrative law may have placed no formal limit on URSEC’s time to comply with the TCA Judgment, as Uruguay argues in its Counter-Memorial, is irrelevant.⁵⁰¹ Full compliance with the TCA Judgment *in haec verba* was, at least under Uruguayan law, impossible, given the “complex” situation in which URSEC had placed itself.⁵⁰²

190. That URSEC tied its own hands did not, of course, excuse URSEC’s obligations under the TCA Judgment,⁵⁰³ still less Uruguay’s Treaty obligations to a foreign investor.⁵⁰⁴ Italba, for its part, was under no obligation to abandon rights protected under international law because URSEC had wrongly pre-judged the outcome of proceedings before the TCA. Thus, once Italba discovered the reality of the situation in March of 2015, there would have been no point in waiting any longer for Uruguay to comply with the TCA Judgment.⁵⁰⁵ URSEC’s own action had made compliance with the TCA Judgment impossible. Accordingly, on March 24, 2016—after URSEC had been unable to comply with the TCA Judgment for one year, 5 months

500. See Counter-Memorial ¶ 270.

501. See *Id.* ¶ 272. Uruguayan law nevertheless required URSEC to comply within a “reasonable” time. See Jaime Rodríguez-Arana, *El derecho fundamental al buen gobierno y a la buena administración de instituciones públicas*, Anuario de Derecho Administrativo (Fundación de Cultura Universitaria 2008), Vol. 15 (C-256), at 119.

502. See *supra* ¶ 176; Counter-Memorial ¶ 292.

503. URSEC expressly acknowledged that it was bound by the TCA Judgment. Evacuación Vista Dedicado, File No. 2016-2-9-0000352 (SPC-041), at 40 (“[T]he annulment in the aforementioned Judgment . . . obliges the Administration . . . to return the legal situation to that existing prior to the decision that was annulled for formal reasons.”).

504. Uruguay may not plead alleged compliance with Uruguayan law as a defense to its breach of obligations under the Treaty and international law. See *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/13, Decision on Liability and the Principles of Quantum (Dec. 30, 2016) (CL-126), ¶¶ 473-74 (holding that whether an expropriation had occurred under domestic law was irrelevant to whether the claimant had already been expropriated within the meaning under the investment treaty, because “[t]he concepts and formalities of domestic law and compliance with its rules are not decisive for the purpose of determining whether or not an expropriation within the meaning of international law has occurred.”). Still less, perhaps, can Uruguay plead non-compliance with domestic law as a defense to its international obligations.

505. See First Alberelli Witness Statement ¶¶ 88-89.

and a day—Italba registered this arbitration before ICSID seeking compensation for Uruguay’s expropriation of its investment.⁵⁰⁶

(b) Uruguay’s settlement offers after arbitration had commenced were inadequate, and Italba was not obliged to accept them.

191. Nor can Uruguay escape liability for its breach of Article 6 by pointing to its conduct after Italba commenced arbitration. Uruguay in its Counter-Memorial makes much of its post-arbitration “offers” to allocate to Trigosul frequencies other than Trigosul’s original Spectrum.⁵⁰⁷ The reality, however, is that these offers were inadequate and no substitute for compliance with the TCA Judgment—which URSEC had rendered impossible.

192. On April 5, 2016—eighteen months after the TCA Judgment, **and 12 days after ICSID registered this arbitration**—the President of Uruguay issued an Executive Order acknowledging that the TCA Judgment had reinstated Trigosul’s rights and directing URSEC to assign frequencies to Trigosul.⁵⁰⁸

193. Accordingly, on May 9, 2016, URSEC submitted a “proposal” to Italba.⁵⁰⁹ Although the TCA Judgment had nullified the revocation of Trigosul’s authorization to operate in the 3425-3450 MHz and 3525-3550 MHz frequency bands, URSEC’s proposal did not restore that Spectrum to Trigosul.⁵¹⁰ Instead, URSEC proposed to assign to Trigosul Dedicado’s former frequencies.⁵¹¹ These frequencies were, as confirmed by Dedicado’s petition to have URSEC

506. See Memorial ¶ 81.

507. See Counter-Memorial ¶¶ 269-81.

508. Executive Order IE 156 (Apr. 5, 2016) (C-094).

509. URSEC Proposal (May 9, 2016) (C-095).

510. TCA Judgment (Oct. 23, 2014) (C-076); URSEC Proposal (May 9, 2016) (C-095).

511. URSEC Proposal (May 9, 2016) (C-095). Documents produced by Uruguay indicate that URSEC made these proposed alternative frequencies available on or around January 2016. Notification from URSEC Department of Spectrum Administration to Department of Legal and Economic Matters (Jan. 29, 2016) (C-257).

replace them, significantly less valuable than Trigosl's original Spectrum, as Mr. Valle has explained in his Report.⁵¹² Trigosl accordingly rejected URSEC's inadequate proposal.⁵¹³

194. Ten days later, on May 19, 2016, Uruguay provided Italba with a draft URSEC resolution (backdated to May 9, 2016) premised on confiscating the right to use the Spectrum from Dedicado and returning it to Trigosl.⁵¹⁴

195. Italba was unwilling to accept the Spectrum on such terms.⁵¹⁵ It was clear that Trigosl could no longer count on a reliable and fair business climate in Uruguay.⁵¹⁶ Furthermore, the Spectrum that URSEC proposed to wrest from Dedicado was fundamentally different than the Spectrum in which Trigosl originally had rights, in that the Spectrum was now under a cloud of administrative irregularity and subject to potential litigation by Dedicado. It would have been very difficult—likely impossible—to enter into business deals on the basis of such uncertain rights.⁵¹⁷ Uruguay was also aware of the substantial risk that returning the frequencies to Trigosl would generate a conflict with Dedicado.⁵¹⁸ Rather than accepting the Spectrum encumbered by these risks, Italba elected to reject restitution as a potential remedy for

512. Expert Report of Luis Valle (May 12, 2017) (*Valle Report*) ¶ 102-105; First Alberelli Witness Stmt. ¶ 90.

513. Letter from A. Yanos to P. Reichler et al. (May 6, 2016) (**C-096**).

514. Draft URSEC Resolution (May 9, 2016) (**C-098**), at 3. Dedicado, for its part, understood the situation no differently from Italba and Trigosl. As Dedicado's counsel noted in a formal protest to URSEC, the proposal to transfer the Spectrum back to Trigosl came "nearly a year and a half after the ruling of the *Tribunal de lo Contencioso Administrativo*, as an obvious reaction to an arbitral proceeding seeking damages . . . against the State." See *Evacuación Vista Dedicado*, File No. 2016-2-9-0000352 (**SPC-041**), at 56.

515. Memorial ¶¶ 82-84.

516. See First Alberelli Witness Stmt. ¶ 91.

517. See, e.g., *supra* Section IV.A.1.

518. See Pereira Op. ¶ 304 (stating that the government initially offered Trigosl alternative frequencies "in order to avoid conflicts with Dedicado"). Indeed, Dedicado made clear to URSEC that it would assert its rights to the Spectrum, and contended that both the government and the officials involved would be financially liable for the damages Dedicado would suffer if the Spectrum were confiscated from it. See *Evacuación Vista Dedicado*, File No. 2016-2-9-0000352 (**SPC-041**), at 61-62.

Uruguay's expropriation.⁵¹⁹

196. For these reasons, the settlement offers Uruguay made after the start of arbitration would not have resulted in implementation of the TCA Judgment. Nor could either offer have restored Trigosl to the position it had occupied before URSEC's nullified revocation order. In this context, Italba's election to continue to pursue monetary compensation through this arbitration was entirely reasonable and proper.⁵²⁰

3) Uruguay's non-compliance with the TCA Judgment was not "temporary."

197. Uruguay argues that it cannot have expropriated Italba's investment because its "delay" in implementing the TCA Judgment was not sufficiently permanent to constitute an expropriation.⁵²¹

198. Citing to authorities holding that the deprivation inflicted by a taking must be "permanent" to constitute an expropriation, Uruguay argues that there can have been no expropriation where, in Uruguay's view, it offered to return Trigosl's frequencies and there was merely a "delay" in its intended compliance with the TCA Judgment.⁵²²

199. Uruguay's arguments again lack merit.

519. First Alberelli Witness Stmt. ¶ 91; Letter from A. Yanos to P. Reichler (May 31, 2016) (C-099).

520. In this connection, Uruguay's charge that Italba is trying to "extort an absolutely undeserved monetary compensation," Counter-Memorial ¶ 31, is both spiteful and unfounded. Italba does not want to do business in Uruguay anymore and, as set forth in this Reply and its prior submissions, considers that it deserves the compensation it seeks. Compensation is also the only remedy for expropriation contemplated by the Treaty, as well as the only remedy enforceable under Article 54 of the ICSID Convention. Given the ordeal Trigosl and Italba faced in dealing with URSEC, and that any "return" of their rights to the Spectrum would have been unlawful under Uruguay's domestic law, Italba's decision to continue to pursue compensation through this arbitration was entirely reasonable.

521. Counter-Memorial ¶ 285.

522. *Id.* Uruguay protests that "URSEC had every intention of complying with [the TCA Judgment], and never made any statement to the contrary." *Id.* ¶ 272; *see also Id.* ¶¶ 282-86. Uruguay's legal expert, Professor Pereira Campos, similarly notes the "the will of the State to comply," while acknowledging that "compliance with the Judgment on the part of the Administration was highly complex, given that the frequencies previously allocated to Trigosl had been allocated to Dedicado long after they had been revoked from the former company." Pereira Op. ¶¶ 257, 307.

200. To begin with, Uruguay’s subjective “intent” has little bearing on its liability under the Treaty.⁵²³ Article 6 of the Treaty does not apply an intent standard to a State’s liability for expropriation.⁵²⁴ Indeed, given the difficulty in attributing “intent” to a State as a whole, international tribunals have found that “[t]he effects of the host State’s measures are dispositive, not the underlying intent, for determining whether there is expropriation.”⁵²⁵

201. Regardless of Uruguay’s protestations that its officials *wanted* to comply with the TCA Judgment, they could not. The effect of URSEC’s re-allocation of Trigosl’s rights to use the Spectrum to Dedicado while proceedings concerning Trigosl’s rights to that Spectrum were pending before the TCA was that URSEC had placed itself in a position where restoration of Trigosl’s rights in the Spectrum, as required by the TCA Judgment, was not a practical possibility.⁵²⁶

202. Further, as explained above, URSEC’s offer to return “the same” Spectrum to

523. *See, e.g., Phillips Petroleum Co. Iran v. The Islamic Republic of Iran*, 21 Iran-U.S. C.T.R. 79, Award (June 29, 1989) (CL-127) ¶ 97 (holding that a State’s intent is “less important than the effects of the measures on the owner”); *Tecmed v. Mexico*, Award (CL-009), ¶ 116 (in assessing whether an expropriation has occurred, “[t]he government’s intention is less important than the effects of the measures on the owner of the assets or on the benefits arising from such assets affected by the measures”). Here, Uruguay’s purported efforts to comply with the TCA Judgment were ineffective and invisible to Italba, and therefore have no mitigating impact on the nature of Uruguay’s expropriation.

524. *Cf. SAUR International S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability (June 6, 2012) (CL-128) (“The BIT’s definition is therefore focused on the investor and not on the State . . . [n]either does the treaty’s definition require an intent to expropriate.”).

525. *Fireman’s Fund Insurance Company v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award (July 17, 2006) (RL-54), ¶ 176(f); *see also Tecmed v. Mexico*, Award (CL-009), ¶ 116 (“The government’s intention is less important than the effects of the measures.”); *Phillips Petroleum v. Iran*, Award (CL-127), ¶ 97 (“The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact . . . Therefore, the Tribunal need not determine the intent of the Government of Iran.”) (citing *Tippetts, Abbott, McCarthy, Stratton, v. TAMS-AFFA Consulting Eng’rs of Iran*, 6 Iran-U.S. C.T.R. 225).

526. *See* Counter-Memorial ¶ 270 (admitting that compliance with the Judgment “was not administratively simple, because the frequencies had been allocated to, and used by, Dedicado since September 2013, and it was necessary to find the right way to comply with the Judgment without causing another proceeding with Dedicado”); *see also* Pereira Op. ¶ 261 n.145, 262 (noting the “problems in relation to the execution of the judgment” in light of “the complex situation resulting from the frequencies previously allocated to Trigosl having been allocated to another company (Dedicado) at the moment the TCA Judgment was issued”); Dr. Cendoya Witness Stmt. ¶ 92 (admitting that “there could not be immediate compliance” with the TCA Judgment “taking into account that Dedicado had been allocated the original frequencies”).

Trigosul was a poisoned chalice. The frequencies might have been the same, but the rights Uruguay could offer in those frequencies—seized from Dedicado in violation of Uruguay’s own internal law—could never have been the same. Nor was Italba, through Trigosul, obliged to accept these dubious and devalued rights in settlement of the claims it had by then already brought in this arbitration.⁵²⁷ Uruguay had already expropriated Italba’s investment, and it was entirely within Italba’s rights to continue to pursue the remedy it elected to pursue before this Tribunal rather than settle its claim.⁵²⁸

203. Finally, Uruguay’s observation that international investment jurisprudence typically requires a taking to be “permanent” before it may qualify as an expropriation does not improve its position on the facts of this case.⁵²⁹ On Uruguay’s logic, it might be supposed that no expropriation claim would *ever* be ripe, so long as the State might one day pay for a seized investment.⁵³⁰ That is not the law. The requirement that a deprivation be “permanent” rather than “temporary” to constitute an expropriation does not allow a State to escape liability for expropriation simply because it might someday, somehow, reverse its measures. That result would be illogical and inconsistent with the settled principle of international investment law embodied in Article 6 of the Treaty, that compensation for an expropriation must be “*prompt, adequate, and effective.*”⁵³¹

204. The requirement that an expropriation be “irreversible and permanent”⁵³² is thus a

527. See *supra* Section IV.A.2(a), IV.B.2, IV.C.4(a), (c).

528. *Id.*

529. See Counter-Memorial ¶¶ 284-86; *but see S.D. Myers, Inc. v. Gov. of Canada*, UNCITRAL/NAFTA, Partial Award (Nov. 13, 2000) (CL-057), ¶ 283 (noting that “in some contexts and circumstances, it would be appropriate to view a deprivation as amounting to an expropriation, even if it were partial or temporary”).

530. See Counter-Memorial ¶¶ 284-86.

531. Treaty (C-001), Art. 6 (emphasis added). If a claimant was required to wait forever for a measure to become permanent, compensation could never be “prompt.”

532. *Tecmed v. Mexico*, Award (CL-009), ¶ 116.

qualitative one. Takings are sufficiently “permanent” to qualify as expropriations when they are “not ephemeral and temporary.”⁵³³ As the tribunal explained in *Servier v. Poland*, international investment law does not demand “that dispossession be permanent in the sense of continuing *ad infinitum*, although deprivation must possess a character which is more than transitory.”⁵³⁴

205. On the undisputed facts of this case, moreover, there can be no question that Uruguay’s negation of the TCA Judgment was “more than transitory.”⁵³⁵ Uruguay’s non-compliance with the TCA Judgment **permanently** eliminated Trigosul’s rights in the Spectrum.⁵³⁶ They were now with Dedicado. Moreover, Uruguay had failed properly to implement the TCA Judgment for a more than a year and a half when Italba finally sought arbitration under the Treaty.⁵³⁷ Further, URSEC had in fact taken the measures that frustrated the implementation of the TCA Judgment—by re-allocating Trigosul’s Spectrum rights to Dedicado—in September of 2013, more than **two years** before Italba sought arbitration.⁵³⁸ URSEC’s allocation of the Spectrum to Dedicado was not reversible except for cause and upon due process, creating what Uruguay’s own witnesses have characterized as a “complex situation”

533. See *Fireman’s Fund v. Mexico*, Award (RL-54), ¶ 176(d) (“The taking must be permanent, and not ephemeral or temporary.”).

534. *Les Laboratoires Servier, S.A.S., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v. Republic of Poland*, UNCITRAL, Award (Redacted) (Feb. 14, 2012) (CL-129), ¶ 577. Uruguay’s authorities are not to the contrary. See *LG&E Energy Corp. et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, (Oct. 3, 2006) (CL-046), ¶ 193 (“Similarly, one must consider the duration of the measure as it relates to the degree of interference with the investor’s ownership rights. Generally, the expropriation must be permanent, that is to say, it cannot have a temporary nature.”); *Tecmed v. Mexico*, Award (CL-009), ¶ 116 (“Under international law, the owner is also deprived of property where the use or enjoyment of benefits related thereto is exacted or interfered with to a similar extent . . . and so long as the deprivation is not temporary.”). Further, in *Glamis Gold v. United States*, the government’s temporary denial of the project was “quickly reversed,” and in *Cargill v. Mexico*, the “temporary” government measures eventually ceased. See *Glamis Gold v. United States*, Award (RL-75), ¶ 360; *Cargill Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (Sept. 18, 2009) (RL-79), ¶ 340.

535. *Servier v. Poland*, Award (Redacted) (CL-129), ¶ 577.

536. See *supra* Section IV.A.3.

537. See Memorial Section II.D.3.

538. URSEC Resolution No. 220/013 (Sept. 5, 2013) (C-084), at 2.

in which “there could be no immediate compliance.”⁵³⁹ Meanwhile, nothing in the record suggests that Uruguay would have had legal cause to revoke Dedicado’s license⁵⁴⁰—if it had, the situation created by URSEC’s allocation of the Spectrum to Dedicado while Trigосу’s rights in the same frequencies were *sub judice* would hardly have been so “complex.”⁵⁴¹

206. For these reasons, Uruguay’s frustration of the TCA Judgment nullifying the revocation of Trigосу’s rights in the Spectrum worked an expropriation of Italba’s investment under Article 6(1) of the Treaty.

4) Uruguay’s expropriation of Italba’s investment was unlawful.

207. Uruguay’s expropriation was also, as set out in Italba’s Memorial, an unlawful expropriation, because it satisfied none of Article 6’s four criteria for a lawful expropriation.⁵⁴² More specifically, Uruguay’s expropriation, effected through the frustration of a Uruguayan court’s Judgment, served no public purpose;⁵⁴³ was discriminatory;⁵⁴⁴ was made without

539. Pereira Op. ¶¶ 261-62; Cendoya Witness Stmt. ¶ 92.

540. To the contrary, the revocation of Dedicado’s license would have been unlawful. *See* Evacuación Vista Dedicado, File No. 2016-2-9-0000352 (SPC-041), at 72-75 (opinion asserted to URSEC by Prof. Delpiazzo).

541. *See* Pereira Op. ¶¶ 261-62.

542. *See* Memorial ¶¶ 109-21. Article 6 of the Treaty (C-001) provides that:

1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (“expropriation”), except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation; and (d) in accordance with due process of law and Article 5(1) through (3).
2. The compensation referred to in paragraph 1(c) shall: (a) be paid without delay; (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (“the date of expropriation”); (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and (d) be fully realizable and freely transferable.

See also Dolzer & Schreuer, *Principles of International Investment Law* (CL-115), at 137 (stating that the preconditions of a legal expropriation “must be fulfilled cumulatively”).

543. *See* Memorial ¶¶ 119-21.

544. *See id.* at ¶¶ 114-15.

payment of “prompt, adequate, and effective compensation;”⁵⁴⁵ and (consistent with URSEC’s contempt for and frustration of the TCA proceedings) was totally incompatible with due process of law.⁵⁴⁶

208. In its Counter-Memorial, Uruguay tries to dodge the unlawfulness of its expropriation by insisting that there was no expropriation at all.⁵⁴⁷ Once that argument fails, as it must,⁵⁴⁸ the unlawfulness of Uruguay’s expropriation follows unless Uruguay can show that it satisfied all four of Article 6’s requirements. Uruguay’s Counter-Memorial does not even come close.

(a) Uruguay expropriated Italba’s investment without a public purpose.

209. To be lawful, a State’s expropriation must be “clearly justified by the public interest.”⁵⁴⁹ The “precise contours of public purpose . . . lie with the internal constitutional and legal order of the State in question.”⁵⁵⁰ Here, Uruguay’s own judiciary explicitly ruled that the revocation of Trigосу’s rights to use the Spectrum was “unlawful” and therefore “irreparably null and void.”⁵⁵¹ Perpetuating such an unlawful state of affairs cannot be in the public interest.⁵⁵²

210. In its Counter-Memorial, Uruguay attempts to rehabilitate URSEC’s revocation of

545. *See Id.* ¶¶ 116-18.

546. *See Id.* ¶¶ 110-13.

547. *See Counter-Memorial* ¶ 247.

548. *See supra* Section IV.A.1-3.

549. F.V. García Amador, *State Responsibility: Fourth Report by the Special Rapporteur on International Responsibility*, Y.B. Int’l L. Commission, Doc. A/CN.4/119 (1959) (CL-030), at 15, ¶ 59.

550. *Guaracachi America, Inc. and Rurelec PLC v. Plurinational State of Bolivia*, PCA Case No. 2011-17, Award (Jan. 31, 2014) (CL-130), ¶ 437.

551. TCA Judgment (Oct. 23, 2014) (C-076), at 17, 19, 20.

552. *See Counter-Memorial* Section III.B.2.

Trigosul’s rights to use the Spectrum by alleging alternative grounds that it never raised in the TCA proceedings.⁵⁵³ Even if, *arguendo*, Uruguay could have pursued other grounds for revocation, the fact is that it did not do so, and this arbitration is not a forum for Uruguay to seek a second bite at the apple with respect to its own domestic administrative and regulatory enforcement proceedings.⁵⁵⁴

(b) Uruguay expropriated Italba’s investment in a discriminatory manner.

211. A State’s expropriation is discriminatory where the State unjustifiably treats foreign investors differently than similarly situated nationals.⁵⁵⁵ Although Uruguay attempts to argue that URSEC was justified in revoking Trigosul’s rights to use the Spectrum—a conclusion rejected by Uruguay’s own highest administrative court, the TCA—Uruguay makes no serious effort to argue that the expropriation of Italba’s investment, as effected through URSEC’s frustration of the TCA Judgment, was anything but discriminatory.⁵⁵⁶ Nor is it clear how Uruguay could make such a showing—there is no indication that URSEC ever wrongfully revoked the licenses of any of Trigosul’s competitors, let alone refused to return them in the face

553. See Counter-Memorial ¶ 241 (“[I]f URSEC had based the revocation on Trigosul’s reports . . . or on an inspection of the correct offices of the company, the lawsuit filed by Trigosul would have been dismissed.”).

554. See *Generation Ukraine Inc. v. Ukraine*, Final Award (RL-44), at ¶¶ 9.2-9.3. Even if—*quod non*—potential regulatory actions that Uruguay never took were relevant to this arbitration, it would be unreasonable for Uruguay to fault Trigosul for an alleged failure to operate at substantial capacity. To the contrary, and as discussed further in Sections II.C.4-7, Trigosul’s lost business opportunities and inability to offer competitive rates were a consequence of URSEC’s wrongful refusal to issue a conforming license to Trigosul.

555. See *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award (Sept. 16, 2015) (CL-015), ¶ 247; *ADC Affiliate Ltd. et al. v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award (Oct. 2, 2006) (CL-014), ¶¶ 441-43.

556. URSEC’s underlying re-allocation of Trigosul’s rights to operate in the Spectrum to Dedicado, a Uruguayan company and Trigosul’s direct competitor, without due process, was also discriminatory. See *infra* Section IV.C.4(d); First Alberelli Witness Stmt. ¶ 89; First Herbon Witness Stmt. ¶ 49; URSEC Resolution No. 220/013 (Sept. 5, 2013) (C-084), at 3-4. In *ADC v. Hungary*, the tribunal held that the unjustified transfer of airport operations and related activities from foreign investors to a domestic, state-appointed entity was a discriminatory expropriation. See *ADC v. Hungary*, Award (CL-014), ¶¶ 441-43, 476. Uruguay’s conduct here was virtually identical. None of Trigosul’s or Italba’s competitors were subjected to such treatment.

of a final court judgment.

(c) Uruguay expropriated Italba’s investment without prompt, adequate, and effective compensation.

212. An expropriation is *per se* unlawful if the State does not, at a minimum, make a good faith offer of prompt, adequate, and effective compensation.⁵⁵⁷ Further, it is “commonly accepted” that an expropriating State should propose payment to the investor “at the outset,” and, if such payment is not satisfactory to the investor, engage in good faith negotiations regarding compensation.⁵⁵⁸

213. Given these standards, Uruguay’s Counter-Memorial dwells at length on

557. See, e.g., *Crystallex Int’l Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (Apr. 4, 2016) (CL-020), ¶ 716 (“It is undisputed that no such compensation was either paid or offered to Crystallex. When a treaty cumulatively requires several conditions for a lawful expropriation, arbitral tribunals seem uniformly to hold that failure of any one of those conditions entails a breach of the expropriation provision”) (listing cases); *Rusoro v. Venezuela*, Award (CL-021), ¶¶ 410, 899 (failure to pay any compensation sufficient to support finding of unlawful expropriation); *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award (July 28, 2015) (CL-003), ¶ 498 (“As no compensation was paid, there is no need to decide whether the acquisition was for a public purpose, whether there was access to due process or, in the case of the Swiss BIT, whether the acquisition was non-discriminatory.”); *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award (Apr. 22, 2009) (CL-022), ¶¶ 98-107 (stating that, because of a breach of the obligation to pay compensation under the BIT, there was no need to consider the breach of other conditions); *ConocoPhillips Petrozuata B.V. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits (Sept. 3, 2013) (CL-023) ¶ 401 (concluding that a failure to make a good faith offer of compensation rendered expropriation unlawful); *Marion & Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case Nos ARB/08/1 & ARB/09/20, Award (May 16, 2012) (CL-025), ¶ 305 (“[W]hat makes the expropriation illegal is the failure in the duty to pay compensation.”); *Gemplus SA et al. v. United Mexican States*, ICSID Case Nos ARB(AF)/04/3 and ARB(AF)/04/4, Award (June 16, 2010) (CL-026), ¶¶ 8-25 (“The Tribunal concludes that these expropriations were unlawful under the BITs and international law, given the facts found by the Tribunal and the further fact that the Respondent did not meet the condition required by Article 5 of both treaties regarding the payment of adequate compensation”); *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v. Republic of Kazakhstan*, ICSID Case No ARB/05/16, Award (July 29, 2008) (CL-027), ¶ 706 (finding expropriation to be unlawful because even if compensation was paid, it remained inadequate); *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentine Republic*, ICSID Case No. ARB/97/3, resubmitted case, Award (Aug. 20, 2007) (*Vivendi II*) (CL-028), ¶ 7.5.21 (lack of compensation makes an expropriation unlawful); *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award (Feb. 17, 2000) (CL-029), ¶ 72 (stating that no matter how laudable State environmental expropriatory measures are, they remain illegal if the State does not pay compensation).

558. *ConocoPhillips v. Venezuela*, Decision on Jurisdiction and the Merits (CL-023), ¶ 362.

Uruguay's supposed "offers" of alternative frequencies to Italba and Trigosul.⁵⁵⁹ But these belated offers fell far short of the standard required by Article 6. As discussed above, Uruguay's purported efforts to "comply" with the TCA Judgment more than eighteen months after that court had issued a final ruling reinstating Trigosul's rights to use the Spectrum, were by no means "prompt."⁵⁶⁰ Nor was Uruguay's May 9, 2016 offer to provide Trigosul with an inferior "alternative" spectrum previously assigned to Dedicado compliant with the Treaty's requirements.⁵⁶¹

214. The same is true of Uruguay's May 19, 2016 offer potentially to return the Spectrum to Trigosul by seizing it from Dedicado. This offer of suspect and unusable rights came after more than eighteen months of Uruguay's noncompliance with the TCA Judgment and failure to engage in good faith negotiations regarding compensation.⁵⁶² Uruguay's offers are properly understood not as "compensation" for Uruguay's unlawful expropriation, but as an attempt to *settle* this arbitration on terms highly favorable to Uruguay.

(d) Uruguay expropriated Italba's investment without due process.

215. For an expropriation to have been conducted in accordance with due process, the expropriating State must provide an "actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions," including legal mechanisms such as

559. Counter-Memorial ¶¶ 26, 30, 242-43, 260, 265, 267, 277-78, 292.

560. *See supra* Sections II.A (¶ 25(ggg)-(ppp)), IV.A.2.

561. The standard of prompt, adequate, and effective compensation requires that the compensation "be adequate in amount, be paid promptly, and be effective in the manner and form of its payment to recompense the owner for the loss of the property or investment." *AIG Capital Partners v. Kazakhstan*, Award (CL-120), ¶ 12.1.3. Uruguay's offer of inferior frequencies was inadequate in value, unreasonably delayed, and ineffective in recompensing Trigosul and Italba of the loss of the right to operate in the Spectrum.

562. *See* Memorial ¶¶ 82-83; URSEC Proposal (May 9, 2016) (C-095); Draft URSEC Resolution (May 9, 2016) (C-098).

“reasonable advance notice, a fair hearing, and an unbiased and impartial adjudicator.”⁵⁶³

216. The difficulty for Uruguay in this case, of course, is that its expropriation of Italba’s investment was achieved through its failure to comply with—and actions to frustrate—just such a process. Uruguay’s conduct violated Italba’s due process rights with respect to the expropriation in two ways. Expropriation in defiance of a State’s own courts is in itself a textbook failure of due process.⁵⁶⁴ Moreover, by reallocating Trigosl’s rights to the Spectrum to Dedicado without notice while Trigosl’s claims before the TCA concerning the Spectrum were still pending, Uruguay denied Italba due process by making it impossible for Italba effectively to defend rights that it could not have known were being violated.⁵⁶⁵

217. In its Counter-Memorial, Uruguay struggles to reconcile URSEC’s conduct with due process by shifting the burden “to take legal action to prevent the re-allocation of the frequencies” to Trigosl, by asserting that it could have legitimately revoked Trigosl’s authorizations on other grounds, and by insisting that it in fact complied with the TCA Judgment.⁵⁶⁶ These arguments fail for the reasons given above.⁵⁶⁷ More broadly, the nature of Uruguay’s conduct in this case is such that Italba’s investment was expropriated not simply *without* due process, but *through* a frustration of due process.

* * *

563. *Crystallex Int’l Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (Apr. 4, 2016) (CL-020), ¶ 713 (quoting *ADC v. Hungary*, Award, ¶ 435).

564. In *Siag v. Egypt*, for example, the tribunal held that the investor suffered a denial of due process where Egypt failed to comply with numerous judicial rulings in the investor’s favor, including the Supreme Administrative Court of Egypt’s determination that the expropriatory measure was without legal basis. *See Waguih Elie, George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (June 1, 2009) (CL-016), ¶¶ 441, 454-55.

565. *Siag v. Egypt* is again directly on point, as the tribunal determined that the lack of prior notice to the investor of Egypt’s expropriatory measure and the investor’s lack of an opportunity to be heard on the matter until after the fact were a denial of due process. *See Id.* ¶¶ 442.

566. Counter-Memorial ¶¶ 252, 259, 268.

567. *See supra* Section IV.A.2.

218. Uruguay not only expropriated Italba’s investment in Trigosul through URSEC’s frustration of the TCA Judgment in which the rights at the heard of its investment had “crystallised,” but did so unlawfully in breach of each of Article 6’s criteria for a lawful taking.

B. Uruguay Has Denied Italba Justice By Frustrating The Judgment Of Its Own Highest Administrative Court.

219. As Italba established in its Memorial, Uruguay also breached its Article 5 obligation “not to deny justice in criminal, civil, or administrative adjudicative proceedings” by denying Italba justice through its frustration of and refusal to comply with the TCA Judgment.⁵⁶⁸ Uruguay does not—and cannot—dispute that the Treaty requires it to do justice to a U.S. investor such as Italba.⁵⁶⁹

220. Uruguay instead attempts to dodge liability for its breach of Article 5’s obligation to provide justice by arguing that, because Uruguay’s failure to execute the TCA Judgment was the failure of its Executive branch, as opposed to its Judiciary, Italba cannot invoke the denial of justice protections of the Treaty, and that, in any event, Italba had an obligation to exhaust a series of extraordinary “remedies” before it could claim a denial of justice.⁵⁷⁰ As further detailed below, both arguments fail: the Treaty unsurprisingly does not exempt Uruguay’s Executive from Uruguay’s Treaty obligations, while the pursuit of the alleged “remedies” Uruguay identifies would have been futile.

1) The Treaty binds Uruguay’s Executive no less than its courts.

221. Uruguay’s suggestion that its Executive branch cannot be liable for denying justice to a foreign investor because Article 5 of the Treaty refers only to the denial of “justice in

568. Memorial ¶¶ 126(a), 128-30.

569. See, e.g., Counter-Memorial ¶ 184. See also Memorial ¶ 129; see also Jan Paulsson, *Denial of Justice in International Law* (Cambridge Univ. Press 2005) (CL-131), at 168-70.

570. Counter-Memorial ¶¶ 288-92.

criminal, civil, or administrative adjudicatory proceedings” is incorrect.⁵⁷¹ The Treaty is indifferent as to Uruguay’s internal constitution and makes no distinction between the different branches of Uruguay’s government. It certainly does not purport to limit Uruguay’s obligation to provide justice to foreign investors to its Judiciary. Rather, *Uruguay*—and all organs of the State—are bound by Uruguay’s Treaty obligations. This is consistent with Article 4(2) of the International Law Commission’s Draft Articles on Responsibility for States for Internationally Wrongful Acts (2001), which provides that “[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions.”⁵⁷²

222. International arbitral decisions recognize that a denial of justice may result not only from the actions of a State’s courts, but also from the conduct of other branches of that State’s government or of its judicial system as a whole.

223. In its Memorial, Italba observed that the *Siag v. Egypt* tribunal found an “egregious denial of justice” where the claimants had obtained several judgments in their favor from Egyptian courts, but the government had failed to comply with those judgments.⁵⁷³ The tribunal in *Iberdrola Energía v. Guatemala* similarly rejected much the same argument that Uruguay advances in this case.⁵⁷⁴ The respondent in *Iberdrola* had argued that “denial of justice is not an irregularity that can be committed by a regulatory body that applies a regulation, but the deficient performance of a body that administers justice.”⁵⁷⁵ The tribunal disagreed, concluding:

571. *Id.* ¶ 288.

572. ILC Draft Articles on State Responsibility for Internationally Wrongful Acts (2001) (CL-072), Art. 4(1).

573. See Memorial ¶ 130; *Siag v. Egypt*, Award (CL-016), ¶¶ 454-55.

574. *Iberdrola Energía S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Award (Aug. 17, 2012) (CL-132), ¶ 442.

575. *Id.* ¶ 405.

[T]he denial of justice can[not] only occur as a result of judges' actions or in the course of judicial proceedings in which conflicts are resolved. . . .

The State cannot escape its responsibility for denial of justice simply by arguing that the state agency that denied access to justice is not part of the judicial system.⁵⁷⁶

224. This is not a novel idea. In the *Eliza Case* from 1863, the U.S.-Peruvian Claims Commission found that the United States had denied justice to a Peruvian claimant who had successfully obtained a judgment from a U.S. court where the federal marshal entrusted with executing that judgment was ineffective in enforcing the writ of execution.⁵⁷⁷ The Umpire concluded that the United States had denied justice where the U.S. federal marshal “had neglected the means at his disposal” and “[t]he sentence of the court was not made effective through the fault of the public officer who was under obligation to execute it.”⁵⁷⁸

225. Professor Jan Paulsson, in his treatise on denial of justice, has characterized attempts to limit denial of justice to the conduct of judicial officials as “indefensible.”⁵⁷⁹ As Professor Paulsson explained:

If justice has been denied by officials whose conduct is imputable to the state, it makes no sense to exclude liability because those officials do not have a particular title as a matter of national

576. *Id.* ¶¶ 442-43 (“[E]l Tribunal no está persuadido de que la denegación de justicia solamente pueda darse como consecuencia de actuaciones de los jueces o en el curso de procesos judiciales en los que se resuelvan conflictos. . . . El Estado no puede liberarse de su responsabilidad por denegación de justicia simplemente alegando que el órgano estatal que impidió el acceso a la justicia no forma parte del sistema judicial.”).

577. A. de Lapradelle and N. Politis, *Receuil des Arbitrages Internationaux*, Tome Deuxième (1856-1872) (A. Pedone, Ed., 1924) [French] (CL-133), at 271-72. The *Eliza Case* arose from the 1851 grounding of the *Eliza*, a Peruvian barque, in San Francisco Bay as a result of a local pilot’s error. Her owner successfully brought suit against the pilots’ association for the loss resulting from the stranding of his ship, and was awarded considerable damages. *Id.*

578. *Id.* at 274 (emphasis added) (translated from French: “[I]l avait négligé les moyens qu’il avait à sa disposition Le jugement du tribunal ne fut pas ramené à exécution par la faute du fonctionnaire public, qui était dans l’obligation de l’exécuter.”); see also Jan Paulsson, *Denial of Justice in International Law* (Cambridge Univ. Press 2005) (CL-131), at 170.

579. Jan Paulsson, *Denial of Justice in International Law* (Cambridge 2005) (CL-131), at 44.

regulation. . . . If it is established that justice has been so maladministered, it is impossible to see why the state should escape sanction because the wrong was perpetrated by one category of its agents rather than another.⁵⁸⁰

226. This principle finds support in other fields of international law as well.

227. For example, the European Court of Human Rights in *Timofeyev v. Russia* reached the same conclusion while interpreting the seemingly narrower “right to a fair trial” guaranteed by Article 6 of the European Convention on Human Rights:

It would be inconceivable that Article 6 § 1 should describe in detail procedural guarantees afforded to litigants—proceedings that are fair, public and expeditious—without protecting the **implementation of judicial decisions**; to construe Article 6 as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention. Execution of a judgment given by any court must therefore be regarded as an integral part of the “trial” for the purposes of Article 6.⁵⁸¹

228. This same recognition that justice is denied where judicial decisions are not implemented is found in an Advisory Opinion of the Inter-American Court of Human Rights interpreting Article 25 of the American Convention on Human Rights concerning the “Right to Judicial Protection” that Uruguay itself requested from that Court:

A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective. That could be the case, for example, when practice has shown its ineffectiveness: when the Judicial Power lacks the necessary independence to render impartial decisions or the means to carry out its judgments;

580. *Id.*

581. *Case of Timofeyev v. Russia*, ECHR, Judgment (Oct. 23, 2003), 43 ILM 768, (CL-134), ¶ 40 (emphasis added).

or in any other situation that constitutes a denial of justice, as when there is an unjustified delay in the decision; or when, for any reason, the alleged victim is denied access to a judicial remedy.⁵⁸²

These authorities speak directly to the facts of this case where Italba makes no complaint about its treatment by Uruguay's courts, but complains of Uruguay's failure to implement—and action to frustrate—the TCA Judgment.

229. Of course, if a State's failure *to execute* a judgment in favor of foreign investors amounts to a denial of justice under international law, so too must a State's *affirmative frustration* of such a judgment. Here, Uruguay has not only failed to execute the TCA Judgment in favor of Trigosul but—by assigning Trigosul's frequencies to Dedicado while Trigosul's appeal was pending and without notice to Trigosul—Uruguay acted in a way that made execution of the TCA Judgment impossible.⁵⁸³ Uruguay alone, through its administrative acts, put itself in this “complex situation”—to use Professor Pereira's phrase⁵⁸⁴—that made execution of the TCA Judgment impossible.

230. By contrast, none of the authorities relied on by Uruguay support its argument that a denial of justice is limited to acts of a State's Judiciary, to the exclusion of acts or failures

582. Inter-American Court of Human Rights, Advisory Opinion OC-9/87 (Oct. 6, 1987) (CL-043), ¶ 24. In its Counter-Memorial, Uruguay contends that this advisory opinion concerning denial of justice—issued at the request of Uruguay's government, no less—is insufficiently probative because it was rendered “in the context of human rights.” Counter-Memorial ¶ 291. This argument ignores the significant convergence between international human rights law and investment treaty law, particularly as it relates to the denial of justice, a central concern of international human rights law. See Timothy Nelson, *Human Rights Law and BIT Protection: Areas of Convergence*, 12:1 J. of World Investment & Trade 27, 28 (2011) (CL-135) (noting that “case law from one area of law is . . . in some cases . . . interchangeable”); see also *id.* at 41 (examining the award in *Pey Casado v. Chile*, ICSID Case No. ARB/98/2, and observing that, in reaching its conclusion that Chile had committed a denial of justice, the *Pey Casado* tribunal “not only took account of past Claims Tribunal jurisprudence but also specifically noted” jurisprudence of the European Court of Human Rights).

583. See *supra* Section IV.A. As noted above, URSEC would have had no legal basis to revoke the frequencies from Dedicado.

584. See, e.g., Pereira Op. ¶¶ 218, 258, 262.

to act of other branches of the government.⁵⁸⁵

231. Uruguay cites the award in *Corona Materials v. Dominican Republic*,⁵⁸⁶ which is surprising in light of the *Corona Materials* tribunal’s explicit recognition that “a denial of justice can originate in a State’s administrative act.”⁵⁸⁷

232. Uruguay also quotes the United States’ submission in *Spence v. Costa Rica*.⁵⁸⁸ In so doing, Uruguay misleadingly omits the words “for example” from the United States’ characterization of what may constitute a denial of justice: “A denial of justice arises, **for example**, when a State’s judiciary administers justice to aliens in a ‘notoriously unjust’ or ‘egregious’ manner ‘which offends a sense of judicial propriety.’”⁵⁸⁹ Far from providing an exhaustive definition of a “denial of justice,” as Uruguay attempts to suggest, the words “for example” make it clear that a denial of justice may arise under different circumstances.⁵⁹⁰

233. Uruguay also relies on *Arif v. Moldova* and *Oostergetel v. Slovakia*.⁵⁹¹ Both are inapposite. These cases concerned claims by investors premised on unfavorable court decisions; the tribunals in those cases were never required to decide whether acts by a government branch

585. Counter-Memorial ¶ 288, nn.554-55 (citing *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award (May 31, 2016) (**RL-114**), ¶ 248; *Spence International Investments, LLC, Berkowitz, et al. v. the Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Submission of the United States of America (Apr. 17, 2015) (**RL-111**), ¶ 13; *Mr. Franck Charles Arif v. the Republic of Moldova*, ICSID Case No. ARB/11/23, Award (Apr. 8, 2013) (**RL-99**), ¶ 445; *Jan Oostergetel and Theodora Laurentius v. the Slovak Republic*, UNCITRAL, Final Award (Apr. 23, 2012) (**RL-90**), ¶ 273.

586. Counter-Memorial ¶ 288 n.554.

587. *Corona Materials v. Dominican Republic*, Award (**RL-114**), ¶ 248. The passage quoted by Uruguay merely emphasizes that an administrative act, “particularly [at] the level of a first instance decisionmaker,” would not in and of itself constitute a denial of justice “when further remedies or avenues of appeal are potentially available under municipal law.” *Id.*; see Counter-Memorial ¶ 288 n.554. Trigoslul’s lack of effective remedies under municipal law is discussed *infra* at Section IV.B.2.

588. Counter-Memorial ¶ 288 n.555.

589. *Spence v. Costa Rica*, Submission of the United States of America (**RL-111**), ¶ 13 (emphasis added).

590. Uruguay also misleadingly attempts to present the United States’ example of a denial of justice as an exhaustive definition of the concept of denial of justice by italicizing the terms “*State’s judiciary administers justice*” for emphasis. Counter-Memorial ¶ 288. The Tribunal should not be deceived by such artifice.

591. *Id.* ¶ 288 n.555.

other than the Judiciary amounted to a denial of justice.⁵⁹² Neither case supports exempting Uruguay's Executive from Uruguay's Treaty obligation to not deny justice to U.S. investors under Article 5 of the Treaty.

2) Italba had already exhausted local remedies.

234. Uruguay also argues that Italba cannot bring a claim for denial of justice because Italba “did not even attempt to make use of the means of appeal available to it.”⁵⁹³ In fact, none of the legal instruments to which Uruguay claims Italba could have resorted can properly be characterized as an “appeal”—Italba had no need to appeal the TCA Judgment, a judgment *in its favor* from Uruguay's highest administrative court. And even if legal instruments were available to attempt to compel Uruguay's compliance with the TCA Judgment, Italba was not obliged to make every possible collateral attack on Uruguay's failure to comply with the judgment of its own courts.

235. The proposition that, after successfully litigating its claims all the way up to the highest court, a claimant should then have to bring forward another claim to execute its judgment leads to absurd outcomes. If the judgment on the claimant's enforcement action is not enforced either, should the claimant then bring forward yet another claim to enforce that judgment? The Umpire in the *Eliza Case*, discussed *supra* at paragraph 224, considered this same argument and rejected the position Uruguay now takes. In that case, the United States disputed the right of the

592. *Id.* In *Arif v. Moldova*, there was no evidence that Moldova's Executive acted in a way that would deny the claimant justice. To the contrary, the claimant's claims arose from adverse court decisions, which the Moldovan Ministry of Economy and Commerce itself sought to appeal. *See Arif v. Moldova*, Award (RL-99), ¶ 66. Similarly, *Oostergetel v. Slovakia* concerned complaints by the claimants about the actions of the Slovak Judiciary in bankruptcy proceedings. The question presented to the *Oostergetel* tribunal was “whether the judicial system of the Slovak Republic breached the BIT by refusing to entertain a suit, subjecting it to undue delay, administering justice in a seriously inadequate way, or by an arbitrary or malicious misapplication of the law.” *Oostergetel v. Slovak Republic*, Final Award (RL-90), ¶¶ 271, 274. While the *Oostergetel* tribunal certainly found that conduct by the judiciary may result in a denial of justice, at no point did it rule out that denial of justice could result from other kinds of state conduct as well.

593. Counter-Memorial ¶ 292; *id.* at n.563; Pereira Op. ¶¶ 312-14.

Peruvian Government to intervene on behalf of the owner of the *Eliza*, because he had not exhausted his legal remedies. The Umpire observed:

The obligation of a foreigner to exhaust the remedies of domestic law . . . ought to be understood in a reasonable manner: such obligation cannot render the rights of the foreigner illusory. After [the claimant] had obtained a definite judgment that a sum of money should be paid him, as the just indemnification for his damages and losses, which he had suffered through the fault of a pilot licensed under the laws of California, who for the payment of that sum had furnished sureties in fulfillment of a law of the State, one would have thought that the claimant had only to put the writ in execution. But such was not the case. **[The claimant], through that judgment, gained no more than the right to bring forward another claim, and I believe that he then had the right to seek from his government its interference on his behalf.**⁵⁹⁴

236. International investment tribunals have recognized that a denial of justice may be found where local remedies have not been formally exhausted but the pursuit of such remedies would be futile.⁵⁹⁵ Thus, the *Corona Materials* tribunal observed that “there is an exception to the requirement to exhaust local remedies, where seeking such an appeal domestically would be obviously futile or manifestly ineffective.”⁵⁹⁶ This is a long-standing and well-established

594. A. de Lapradelle and N. Politis, *Recueil des Arbitrages Internationaux, Tome Deuxième (1856-1872)* (A. Pedone, Ed., 1924) (CL-133), at 275 (emphasis added) (translated from French: “L’obligation d’un étranger d’épuiser les voies de recours du droit interne . . . doit être comprise d’une manière raisonnable : elle ne peut rendre illusoire le droit de l’étranger. Après que Montano eut obtenu une sentence définitive, en vertu de laquelle une somme d’argent devait lui être payée, comme la juste indemnité des dommages et pertes par lui éprouvés, en conséquence de la faute d’un pilote accrédité par les lois de Californie, pilote qui, pour le paiement de cette somme, avait fourni des sûretés en exécution d’une loi de l’Etat, on devait croire que le réclamant n’avait qu’à mettre le writ à exécution. Tel ne fut pas le cas. Montano, par la sentence, n’a rien gagné que le droit de former une autre réclamation, et j’estime qu’il avait alors le droit de demander à son gouvernement d’intervenir en sa faveur.”).

595. This is consistent with the accepted view that exhaustion of remedies is a question of merits, not admissibility. See *Arif v. Moldova*, Award (RL-99), ¶ 346 (“Even for claims for denial of justice, the exhaustion of local remedies is a question to be addressed with the merits of the dispute. It is a substantive standard, rather than a procedural bar.”). The tribunal may consider whether exhaustion of local remedies would have made any difference to the quality of justice obtained, given what even Uruguay calls a “complex situation”—*i.e.*, Uruguay’s inability to comply with the TCA Judgment. See Counter-Memorial ¶ 292.

596. *Corona Materials v. Dominican Republic*, Award (RL-114), ¶ 261; see also *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (Aug. 18, 2008)

exception in international law. As early as 1934, the arbitrator in the *Finnish Shipowners* case between Finland and Great Britain observed that it was “common ground” that the right to appeal was “not sufficient to bring in the local remedies rule; the remedy must be effective and adequate.”⁵⁹⁷

237. Consistent with this principle, the Commentary (5) to Article 44 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts notes that:

Only those local remedies which are “available and effective” have to be exhausted before invoking the responsibility of a State. The mere existence on paper of remedies under the internal law of a State does not impose a requirement to make use of those remedies in every case. In particular there is no requirement to use a remedy which offers no possibility of redressing the situation⁵⁹⁸

238. None of the “remedies” that, in Professor Pereira’s view, “academic legal doctrine has indicated . . . were at Trigosl’s disposal”⁵⁹⁹ would have been effective or required in this case. Professor Pereira never attempts to explain how further litigation would have resolved the core problem of URSEC’s “complex situation”—namely, that URSEC had tied its own hands and made compliance impossible by re-allocating the Spectrum to Dedicado, apparently without notice to either party, while the Spectrum was still subject to a pending appeal. In Professor

(**RL-72**), ¶ 400 (observing that “there is no obligation to pursue ‘improbable’ remedies”); *Saipem v. Bangladesh*, Award (**RL-76**), ¶ 182 (“The requirement of exhaustion of local remedies imposes on a party to resort only to such remedies as are effective. Parties are not held to ‘improbable remedies.’”) (citing *Duke Energy v. Ecuador*, Award (**RL-72**)); *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award (Mar. 10, 2015) (**CL-136**), ¶ 524 (denial of justice may be established without the exhaustion of local remedies where such remedies would be “clearly futile”).

597. *Claim of Finnish shipowners against Great Britain in respect of the use of certain Finnish vessels during the war* (Finland, Great Britain), III Reports of International Arbitral Awards 1479 (May 19, 1934) (**CL-137**), at 1494 (holding that Finnish shipowners whose ships had been used—and partially lost—by the British Government in the service of the Allies had exhausted their remedies by bringing an action before the Admiralty Transport Arbitration Board, even though they had the right to appeal to higher courts).

598. U.N. General Assembly, *Report of the International Law Commission on the Work of Its Fifty-third Session*, International Law Commission (2001), Supplement No. 10 (A/56/10) (**CL-138**), at 306 (emphasis added).

599. Pereira Op. ¶ 313.

Pereira’s world, Trigosul should have stayed in perpetual limbo, seeking to compel Uruguay to comply with the TCA Judgment and then, when Uruguay failed to honor an order compelling compliance, seeking another order to compel compliance with the order compelling compliance. That is, of course, absurd.

239. Some of Professor Pereira’s proposed “remedies” are truly extraordinary,⁶⁰⁰ and their effectiveness is contradicted by Professor Pereira’s earlier assertion in his report that “[i]t is debated whether the TCA has the power to enforce the decision.”⁶⁰¹ In fact, there is no mechanism under Uruguay law for the TCA to enforce a judgment against the State.⁶⁰²

240. Uruguay’s own actions in re-allocating the Spectrum to Dedicado created what Professor Pereira describes as a “complex situation,” and there is no reason to believe that Uruguay could have legally complied with the TCA Judgment at all. The reality is that, through URSEC’s pre-judging the results of the TCA litigation, Trigosul and Dedicado had been left with mutually irreconcilable rights to the Spectrum.⁶⁰³

* * *

600. Professor Pereira goes so far as to suggest that Trigosul could have initiated a criminal complaint against URSEC officials due to their failure to execute the TCA Judgment. *Id.* This confirms the inadequacy of the measures available to Trigosul to ensure the effectiveness of the TCA Judgment.

601. *Id.* ¶ 304.

602. *See, e.g.,* Juan Pablo Cajarville Peluffo, *Efectos de la sentencia anulatoria del Tribunal de lo Contencioso Administrativo*, Revista de Derecho Público, año 25, número 50 (Ed. FCU, Montevideo, 2016) (C-258) at 25 (“Lamentablemente, en nuestro país, el contenido de condena de la sentencia anulatoria se desdibuja y debilita por la injustificable negativa del Tribunal de lo Contencioso Administrativo a la adopción de medidas coactivas de ejecución de sus sentencias. . .”) (“Unfortunately, in our country the conviction content fo the annulment sentence is blurred and weakened by the unjustifiable refusal of the [TCA] to adopt coercive measures to enforce its judgments . . .”); Cristina Vazquez, *Ejecución de la sentencia anulatoria*, Cuarto coloquio contencioso de Derecho Público, Responsabilidad del Estado y Jurisdicción (Ed. Nueva Jurídica, Montevideo, 1998) (C-253) at 59 (“[N]uestro derecho no tiene una vía verdaderamente eficaz para lograr el cumplimiento de la sentencia anulatorio.”) (“[O]ur law does not have a truly effective way to achieve compliance with the annulment judgment.”); Alicia Castro, *Ejecución contra el Estado*, IX Jornadas Nacionales de Derecho Procesal (Ed. FCU, Montevideo, 1997) (C-259) at 74 (“[L]a tesis dominante en la práctica es la que acepta la declinatoria de competencia del T.C.A. para ejecutar sus decisiones anulatorias.”) (“[T]he dominant thesis in practice is the one that accepts the declining competence of the [TCA] to enforce its decisions for annulment.”).

603. *See supra* ¶ 176 nn.472-73; *see also* Evacuación Vista Dedicado, File No. 2016-2-9-0000352 (SPC-041), at 72-75 (opinion asserted to URSEC by Prof. Delpiazzo).

241. Italba, through Trigosul, prevailed before the TCA, but that court’s judgment had by then already been frustrated by URSEC’s unannounced re-allocation of the rights *sub judice* before the TCA to Dedicado. Uruguay is therefore responsible for denying Italba justice in violation of Article 5 of the Treaty.

C. Uruguay Breached Its Article 5 Obligation To Accord Italba Fair And Equitable Treatment.

242. Denial of justice was not Uruguay’s only breach of Article 5. Whether its motives were to protect Antel from competition or, perhaps also, to punish Trigosul for Italba’s refusal to pay a bribe to URSEC’s Ms. Fernandez, Uruguay repeatedly failed to adhere to the basic standards of due process, transparency, good faith, non-arbitrariness, and non-discrimination protected by the Treaty’s FET guarantee.⁶⁰⁴

243. Rather than defend its treatment of Italba’s investment head-on, Uruguay in its Counter-Memorial hides behind an unsustainably narrow reading of Article 5, according to which, Uruguay insists, only a denial of justice can engage the Treaty’s FET clause.⁶⁰⁵ Uruguay asserts that this pinched interpretation of Article 5 is “consistent with the practice of the United States in other bilateral treaties,” apparently embracing what it describes as the U.S. view of the

604. See Memorial ¶¶ 122-27; 135-166.

605. Counter-Memorial ¶¶ 184-85 (arguing that denial of justice is “the only FET requirement specified in the Treaty, and reflects the intention of both State Parties to limit the scope of the obligation in Article 5 on FET to the minimum standard of treatment, which includes the obligation not to deny justice, but does not extend to the other obligations alleged by the Claimant”), ¶ 186 (“The Claimant has not met its burden of proof in demonstrating that the FET obligation extends beyond what the Treaty specifies: the obligation ‘not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.’”).

It bears noting that, in arguing both that the Treaty’s FET standard extends only to the obligation to not deny justice and, as discussed *supra* Section IV.B.1, that a denial of justice claim can arise only through acts of the Judiciary, Uruguay seeks to convince this Tribunal to adopt an extraordinary position: that acts of Uruguay’s Executive (or, for that matter, its Legislature) are incapable of breaching the Fair and Equitable Treatment standard.

Treaty's FET clause.⁶⁰⁶

244. Uruguay's attempt to diminish its Article 5 obligations fails. As detailed below, Uruguay misunderstands the United States' traditional position on FET clauses as well as the import of the specific language of Article 5. Yet even if the Tribunal were to credit Uruguay's interpretation of Article 5's FET clause, Italba would nevertheless be entitled to protection against conduct that is lacking in due process, non-transparent, in bad faith, arbitrary, or discriminatory because the Treaty's MFN provision allows Italba to import the substantive protections of Article 3(2) of the Agreement between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection of Investments (the *Switzerland-Uruguay BIT*).⁶⁰⁷

1) United States treaty practice does not support Uruguay's restrictive interpretation of Article 5.

245. Uruguay rejects what it describes as Italba's "broader interpretation of the FET obligation" in favor of a reading of Article 5 by which only a denial of justice can engage the Treaty's FET clause.⁶⁰⁸ Although there is no evidence that Uruguay has ever interpreted Article 5's FET clause this way before, Uruguay claims that it is merely adopting the position of its Treaty counter-party "in other bilateral treaties from the same period as the Treaty with Uruguay."⁶⁰⁹ Yet even assuming that this Tribunal should be concerned about the position expressed by the United States on the content of the FET standard in the context of other treaties to which Uruguay was not a party, Uruguay overstates its case and mischaracterizes U.S. treaty

606. See Counter-Memorial ¶ 184 (claiming that "Uruguay shares the understanding of its counterparty regarding the agreed upon obligation").

607. Memorial ¶ 124 n.251.

608. As discussed above, Uruguay seeks to convince the Tribunal to adopt an extraordinary position that acts of Uruguay's Executive are incapable of breaching the FET standard. See *supra* Section IV.B.1.

609. See Counter-Memorial ¶ 184.

practice.

246. In this regard, Uruguay relies heavily on the submissions of the United States in *TECO Guatemala Holdings v. Guatemala* and *Spence v. Costa Rica*, disputes arising under different treaties.⁶¹⁰ A close examination of the U.S. State Department’s submissions in *TECO* and *Spence* confirms, however, that Uruguay’s treatment of Italba would violate Article 5’s FET clause even under the account of the “international minimum standard” adopted by the United States in those cases.

247. In *TECO*, the United States acknowledged that a State’s treatment of a foreign investment would fall short of the international minimum standard of treatment where that treatment amounted to, “for example . . . arbitrariness.”⁶¹¹ In addition, although the United States in *TECO* maintained that “good faith” alone is not a separate element of the minimum standard, it conceded that a duty of good faith “governing the . . . performance of legal obligations” is “well established in international law.”⁶¹²

248. Uruguay’s reliance on the U.S. State Department’s submission in *Spence* to argue that United States practice interprets the FET standard to protect only against denial of justice is equally misplaced. Uruguay again ignores the words “for example” within the U.S. submission, which says no more than that “[Article 10.5 concerns] the obligation to provide ‘fair and equitable treatment,’ which **includes, for example**, the obligation not to deny justice in criminal,

610. *Id.* ¶ 184 n.309.

611. *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Submission of the United States of America (Nov. 23, 2012) (**RL-094**), ¶ 6.

612. *Id.* ¶ 5. As Uruguay admits, the International Court of Justice has observed that “[t]he principle of good faith is . . . one of the basic principles governing the creation and performance of legal obligations.” *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, 1988 I.C.J. 69 (Dec. 20, 1988) (**RL-35**), ¶ 94 (internal quotation marks omitted) (citing *Nuclear Tests (New Zealand v. France)*, 1974 I.C.J. Reports at 268 (¶ 46), 473 (¶ 49)). As described below, Italba’s good faith claim is squarely based on Uruguay’s bad faith performance of legal obligations, including its obligation to comply with the TCA Judgment. *See infra* Section IV.C.2.

civil or administrative adjudicatory proceedings.”⁶¹³ The U.S. submission in *Spence* thus supports precisely the opposite of Uruguay’s position: the obligation not to deny justice is but *one example* among several component elements *included* within the FET standard.⁶¹⁴

249. Nor, of course, should it be overlooked that the *TECO* and *Spence* tribunals both rejected the U.S. position on the FET standard (and, by implication, Uruguay’s in this case). In *TECO* the tribunal found that:

[T]he minimum standard of FET under Article 10.5 of CAFTA-DR is infringed by conduct attributed to the State and harmful to the investor if the conduct is arbitrary, grossly unfair or idiosyncratic, is discriminatory or involves a lack of due process leading to an outcome which offends judicial propriety. . . . The Arbitral Tribunal agrees with the many arbitral tribunals and authorities that have confirmed that such is the content of the minimum standard of treatment in customary international law. . . . There is no doubt in the eyes of the Arbitral Tribunal that the principle of good faith is part of customary international law . . .⁶¹⁵

250. The *Spence* tribunal likewise rejected the narrow interpretation of CAFTA’s FET clauses advanced by the United States, observing that “a violation of the customary international law minimum standard of treatment” would include “manifest arbitrariness and blatant unfairness,” and that protection against “gross denial of justice, bad faith, a complete lack of due process, evident discrimination, a manifest lack of reasons, or other similar conduct . . . forms

613. See *Spence v. Costa Rica*, Submission of the United States (RL-111), ¶ 13 (emphasis added). See also *supra* ¶ 232.

614. See *id.*; see also *supra* ¶ 232. As in *TECO*, the U.S. submission in *Spence* denies that a “freestanding” obligation of good faith forms part of the international minimum standard but freely concedes that “good faith is ‘one of the basic principles governing the creation and performance of legal obligations.’” . See *Spence v. Costa Rica*, Submission of the United States (RL-111), ¶ 17; *TECO Guatemala Holdings v. Guatemala*, Submission of the United States of America (RL-094), ¶ 5. That is, of course, precisely the sort of conduct absent in this case. See *infra* Section IV.C.4(b).

615. *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award (Dec. 19, 2013) (CL-139), ¶¶ 454-56. On Guatemala’s application for annulment, the *TECO* Annulment Committee concluded with respect to this issue that “the Tribunal did correctly identify the applicable law and set out its content.” *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23 (Annulment Proceedings), Decision on Annulment (Apr. 5, 2016) (CL-140), ¶ 316.

part of the customary international law minimum standard of treatment.”⁶¹⁶

251. Beyond *TECO* and *Spence*, other examples of U.S. treaty practice not selected for emphasis by Uruguay in its Counter-Memorial further demonstrate the U.S. recognition that the customary international law minimum standard of treatment guaranteed by Article 5 of the Treaty also includes a prohibition on arbitrary and discriminatory measures.⁶¹⁷

252. To the extent it is relevant, then, U.S. practice actually *supports* Italba’s position to the extent that the minimum standard of treatment under customary international law requires Uruguay to exercise good faith in the performance of its legal obligations, and prohibits at least arbitrary, unreasonable, and discriminatory conduct.

2) Uruguay’s restrictive interpretation of Article 5 is inconsistent with the Treaty language of Article 5.

253. But Uruguay’s focus on practice under other treaties is ultimately a distraction. The *best* starting point for interpretation of Article 5’s meaning is the language of the Treaty itself, the only authoritative expression of the State Parties’ agreement at the time of signing. Article 31(1) of the Vienna Convention on the Law of Treaties instructs that, “[a] treaty shall be interpreted in good faith **in accordance with the ordinary meaning to be given to the terms of the treaty** in their context and in the light of its object and purpose.”⁶¹⁸ And the plain language of Article 5 flatly contradicts Uruguay’s restrictive reading of Article 5’s FET clause.

616. *Spence International Investments, LLC, Berkowitz, et al. v. the Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Oct. 25, 2016) (RL-117), ¶ 282.

617. See Kenneth J. Vandavelde, *U.S. International Investment Agreements* (Oxford Univ. Press 2009) (CL-117), at 266-67. Whether the United States considers the prohibition on arbitrary and discriminatory measures to be an element of the Fair and Equitable Standard specifically is irrelevant, given that it recognizes this prohibition as required by the customary international law minimum standard of treatment.

618. Vienna Convention on the Law of Treaties (May 23, 1969) (RL-32), Art. 31(1) (emphasis added). Uruguay is unable to point to any evidence of its own contemporaneous interpretation of Article 5, and is content to state now that it “shares the understanding” of the United States—an understanding it misconstrues. Counter-Memorial ¶ 184; *see supra* Section IV.C.1. This Tribunal should avoid putting much stock in Uruguay’s self-serving after-the-fact characterization of its position.

254. As defined in Article 5, the minimum standard of treatment required by the Treaty is “treatment in accordance with customary international law, **including** fair and equitable treatment and full protection and security.”⁶¹⁹ The Treaty further clarifies that this “‘fair and equitable treatment’ **includes** the obligation not to deny justice.”⁶²⁰ The ordinary meaning of the verb “include” is to introduce not an exhaustive list, but an illustrative one.⁶²¹ It necessarily follows that the drafters of Article 5 understood that the Treaty’s FET clause was *not limited* to an obligation to do justice to foreign investors.⁶²²

255. Annex A to the Treaty further corroborates this reading of Article 5, noting that “[w]ith regard to Article 5, the customary international law minimum standard of treatment of aliens refers to **all customary international law principles that protect the economic rights and interests of aliens.**”⁶²³ This language confirms that the word “includes” was picked purposely, and that the drafters did not intend to exclude any relevant principles of customary international law from Article 5.⁶²⁴

619. Treaty (C-001), Art. 5(1) (emphasis added).

620. *Id.* at 5(2)(a) (emphasis added).

621. See *Black’s Law Dictionary* 880 (Tenth Ed. 2014) (CL-141) (defining “include” to mean “To contain as a part of something. **The participle including typically indicates a partial list.**” (emphasis added)).

622. Had the State Parties to the Treaty desired to limit the FET standard to the protection from denial of justice alone, as Uruguay argues was their intent, it would have been easier to draft a “denial of justice clause.” One need not read the Treaty much further for clear evidence that the drafters knew the difference between a definition and an illustrative list—“full protection and security” is defined as follows:

(b) “full protection and security” **requires** each Party to provide the level of police protection required under customary international law.

Treaty (C-001), Art. 5(2)(b) (emphasis added). The drafters could similarly have defined Fair and Equitable Treatment to “require” the Parties not to deny justice. The drafters’ deliberate decision to instead use the open-ended term “includes” in Article 5’s FET clause must be given effect when interpreting and applying the Treaty. The drafters’ decision is understandable in light of the fact that, as Uruguay does not appear to dispute, customary international law is “constantly in a process of development.” Counter-Memorial ¶ 188.

623. Treaty (C-001), Annex A (emphasis added).

624. Annex A also clarifies the meaning of “customary international law” under the Treaty, and may serve to “constrain the unfettered discretion of the adventurist arbitrator by reference to the constraints of a wider

256. As for the content of those “customary international law principles that protect the economic rights and interests of aliens,” the Tribunal may look to a well-established body of international investment jurisprudence.⁶²⁵ Investment-treaty jurisprudence strongly supports the recognition of basic norms of due process, transparency, good faith, non-arbitrariness and non-discrimination as part of the customary international law minimum standard.⁶²⁶

body of law,” restraining subjective arbitral discretion based on capacious words like “fair” and “equitable.” Campbell McLachlan, *Is There an Evolving Customary International Law on Investment?*, 31:2 ICSID Review 257 (Spring 2016) (CL-142), at 258; *see also Mondev v. United States*, Award (CL-013), ¶ 119 (noting that the tribunal “may not simply adopt its own idiosyncratic standard of what is ‘fair’ or ‘equitable’, without reference to established sources of law”). The reference to customary international law is thus a helpful clarification of a standard rather than a limiting definition, as Uruguay would have it. *Cf. Mondev v. United States*, Award (CL-013), ¶ 119.

625. International investment tribunals routinely look to investment-treaty jurisprudence as a guide to the content of the customary international law norms incorporated into bilateral investment treaties and enforced through their decisions. *Cf. Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award (June 29, 2012) (CL-036), ¶¶ 216-17 (noting that reliance on arbitral awards is an “efficient manner for a party in a judicial process to show what it believes to be the law”). Uruguay attempts to introduce a false conflict by suggesting that international investment awards cannot create customary international law. Counter-Memorial ¶¶ 185-86. But nothing prevents this Tribunal from following the routine practice of international investment tribunals that consists of examining investment-treaty jurisprudence as indirect evidence of the content of customary international law. *See Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award (Sept. 27, 2016) (CL-143), ¶ 351 (A tribunal may “rely on other, indirect evidence in order to ascertain the content of the customary international law minimum standard of treatment; . . . [s]uch indirect evidence includes, in the Tribunal’s view, decisions taken by other NAFTA tribunals that specifically address the issue of interpretation and application of Article 1105(1) of NAFTA, as well as relevant legal scholarship.”). Even Uruguay recognizes that arbitral awards can “illustrate” customary international law when they are based on an examination of customary international law. Counter-Memorial ¶ 186 n.315.
626. *See, e.g., Waste Management Inc. v. United Mexican States II*, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004) (CL-033), ¶ 98 (examining NAFTA Article 1105, which incorporates the customary international law minimum standard, and observing that “the minimum standard of treatment of fair and equitable treatment is infringed . . . if the conduct is arbitrary grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.”); *Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award (Nov. 6, 2008) (CL-040), ¶ 187; *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award (Apr. 12, 2002) (CL-045), ¶ 143; *Tecmed v. Mexico*, Award (CL-009), ¶ 162; *Metalclad Corp. v. United Mexican States*, Award (CL-010), ¶ 99; *Crystallex v. Venezuela*, Award (CL-020), ¶¶ 579, 581 (a host State would “incur liability under the [bilateral investment treaty] if the treatment of the investor in the process leading to the denial was unfair and inequitable, because it was arbitrary, lacking transparency or consistency”); *Rumeli v. Kazakhstan*, Award (CL-027), ¶ 609 (same); *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (Jan. 14, 2010) (CL-038), ¶ 284 (same); *LG&E Energy Corp. v. Argentine Republic*, Decision on Liability (CL-046), ¶ 128 (same); *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award (Mar. 17 2006) (CL-018), ¶¶ 307-09 (same); *Nordzucker A.G. v. Republic of Poland*, UNCITRAL, Second Partial Award (Jan. 28, 2009) (CL-

257. In its Counter-Memorial, Uruguay attempts to declare some of this jurisprudence inapposite by invoking a doctrinal distinction between “autonomous” FET clauses and those, like that in Article 5, explicitly linked to customary international law.⁶²⁷ The Tribunal should not be detained by the pursuit of a mystical distinction that “is more theoretical than real.”⁶²⁸ In practice, international investment tribunals have repeatedly found that the customary international law minimum standard of treatment and the general FET standard have converged as a result of a constant process of development.⁶²⁹ This is no less the case under U.S. bilateral investment treaties, under which the U.S. and respondent states routinely link the FET clause to the customary international law minimum standard of treatment.⁶³⁰

047), ¶¶ 9, 84. It bears noting that Italba’s claims under the FET standard—including arbitrariness, discrimination, lack of due process, absence of good faith, lack of transparency, and denial of justice—are fairly described as routine in investment treaty arbitration, and routinely successful.

627. Counter-Memorial ¶¶ 192-94.

628. *Rumeli v. Kazakhstan*, Award (CL-027), ¶ 611.

629. See, e.g., *Rusoro v. Venezuela*, Award (CL-021), ¶ 520 (“The whole discussion of whether Art. II.2 of the BIT incorporates or fails to incorporate the [customary international law minimum] Standard when defining [fair and equitable treatment] has become dogmatic: there is **no substantive difference** in the level of protection afforded by both standards.”) (emphasis added); *Rumeli v. Kazakhstan*, Award (CL-027), ¶ 611 (“The Arbitral Tribunal considers that this precision is more theoretical than real. It shares the view of several ICSID tribunals that the treaty standard of fair and equitable treatment is **not materially different** from the minimum standard of treatment in customary international law.”) (emphasis added); Cf. *SAUR International S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability (June 6, 2012) (CL-128), ¶¶ 491, 494 (noting that the distinction is “rather dogmatic and conceptualistic” and concluding that “it has become irrelevant whether the FET standard be interpreted in accordance with its ‘ordinary meaning,’ as is required by the Vienna Convention, or in accordance with customary international law; in both cases **the standard of conduct to be expected from the State is the same**”) (“En consecuencia, ha devenido indiferente que el concepto de TJE se interprete de acuerdo con su ‘sentido corriente’—tal como exige la Convención de Viena—o de acuerdo con el derecho internacional consuetudinario—en ambos casos **el estándar de conducta exigible al Estado es el mismo . . .**”) (emphasis added); *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award (Oct. 31, 2012) (RL-93), ¶ 419 (“[T]he actual content of the Treaty standard of fair and equitable treatment is **not materially different** from the content of the minimum standard of treatment in customary international law, as recognised by numerous arbitral tribunals and commentators.”) (citation omitted) (emphasis added); *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (July 24, 2008) (RL-071), ¶ 592 (“[T]he actual content of the treaty standard of fair and equitable treatment is **not materially different** from the content of the minimum standard of treatment in customary international law.”) (emphasis added).

630. See, e.g., *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award (May 12, 2005) (CL-051), ¶ 284 (under US-Argentina BIT: “the Treaty standard of fair and equitable

258. Given the substantive convergence of the customary international law minimum standard and a more general or “autonomous” FET standard, any remaining theoretical distractions are irrelevant. The uncontroversial standards that Italba seeks to vindicate in this case are protected by Article 5 in any event.

3) In the alternative, Italba may invoke the protections of the Switzerland-Uruguay BIT pursuant to the Treaty’s MFN Clause.

259. Even if the Tribunal were to find a meaningful difference between the customary international law minimum standard and an “autonomous” FET standard, the level of treatment owed to Italba in this case would nevertheless be that articulated in awards applying autonomous FET standards. Specifically, Article 4’s MFN provision allows Italba to rely on the FET standard provided in Article 3(2) of the Switzerland-Uruguay BIT, which does not reference the customary international law minimum standard of treatment but simply provides, in relevant part, that “[e]ach Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the investors of the other Contracting Party.”⁶³¹

treatment and its connection with the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law”); *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award (July 14, 2006) (**RL-053**), ¶ 361 (under US-Argentina BIT: “[T]he minimum requirement to satisfy this standard has evolved and the Tribunal considers that its content is substantially similar whether the terms are interpreted in their ordinary meaning, as required by the Vienna Convention, or in accordance with customary international law.”); *Duke Energy v. Ecuador*, Award (**RL-072**), ¶¶ 335-37 (under US-Ecuador BIT: agreeing with the *Azurix* tribunal and concluding that “the standards are essentially the same”); *Murphy Exploration and Production Company International v. Republic of Ecuador [III]*, PCA Case No. 2012-16 (formerly AA 434), Partial Final Award (May 6, 2016) (**CL-144**), ¶¶ 205-08 (under US-Ecuador BIT: “This debate is more theoretical than substantial. It is clear from the repeated reference to ‘fair and equitable’ treatment in investment treaties and arbitral awards that the FET treaty standard is now generally accepted as reflecting recognisable components, such as: transparency, consistency, stability, predictability, conduct in good faith and the fulfilment of an investor’s legitimate expectations. . . . The international minimum standard and the treaty standard continue to influence each other, and, in the view of the Tribunal, these standards are increasingly aligned. . . . The Tribunal finds that there is no material difference between the customary international law standard and the FET standard under the present BIT.”).

631. Article 4(2) of the Treaty (**C-001**) provides that “[e]ach Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale

260. It is uncontroversial that an investor may import more favorable substantive protections of another treaty through the use of an MFN provision.⁶³² This is no less the case when the imported protections pre-date the MFN provision in the Treaty.⁶³³ In its Counter-Memorial, then, Uruguay does not appear to contest Italba’s ability to import the FET standard provided in the Switzerland-Uruguay BIT, but argues instead that invoking these protections would make no difference.⁶³⁴

261. Uruguay’s reliance on *ADF Group v. United States* to argue that the autonomous standard of the Switzerland-Uruguay BIT cannot affect the content of the Treaty’s FET standard is nevertheless misplaced.⁶³⁵ In *ADF*, the claimant attempted to invoke the provisions of the United States’ bilateral investment treaties with Albania and Estonia to argue that the United States owed it more favorable treatment than under the customary international law standard incorporated into NAFTA.⁶³⁶ Despite being presented with evidence suggesting that the U.S.-Albania and U.S.-Estonia BITs also incorporated the customary international law minimum standard of treatment,⁶³⁷ the *ADF* tribunal found it unnecessary to resolve the issue of whether

or other disposition of investments.” See also Memorial ¶ 124 n.251 (quoting the Switzerland-Uruguay BIT (CL-037)).

632. See, e.g., *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award (Aug. 27, 2009) (CL-039), ¶¶ 157, 164-67 (applying the MFN provision of the Turkey-Kazakhstan BIT to import from another BIT a “self-standing treaty obligation as opposed to the customary international minimum standard”); *Rumeli v. Kazakhstan*, Award (CL-027), ¶ 575 (applying the MFN provision of the Turkey-Kazakhstan BIT to import the FET clauses of the UK-Kazakhstan BIT). This Tribunal is not called to rule on the question of whether an MFN provision can be used to import more favorable procedural rights.

633. See *Bayindir v. Pakistan*, Award (CL-039), ¶ 160 (“As noted by the Respondent, the FET provision to which the Claimant more specifically referred, namely Article II(2) of the Pakistan-UK BIT, pre-dates the MFN clause in the Treaty. In and of itself that chronology does not appear to preclude the importation of an FET obligation from another BIT concluded by the Respondent.”).

634. Counter-Memorial ¶ 195 n.335.

635. *Id.*

636. *ADF Grp. Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Award (Jan. 9, 2003) (CL-035), ¶¶ 77-80.

637. *Id.* ¶ 107.

those treaties were more favorable than NAFTA, because it found NAFTA’s MFN provision inapplicable because of the nature of ADF’s claims.⁶³⁸ Here, by contrast, Uruguay has presented no evidence that its BIT with Switzerland contains any provision limiting its FET standard to the international minimum standard. Having insisted on a distinction between “autonomous” FET clauses and those anchored to the “international minimum standard,” Uruguay should not be allowed to set that reasoning aside when it is inconvenient.⁶³⁹

* * *

262. In light of the foregoing, Italba may base Article 5 claims on Uruguay’s violations of the customary international law minimum standard of treatment through conduct that was lacking in due process, non-transparent, in bad faith, arbitrary, or discriminatory. To the extent that such claims fall outside that minimum standard, Italba may nevertheless assert them as breaches of the “autonomous” FET standard of the Switzerland-Uruguay BIT by operation of the Treaty’s MFN provision.⁶⁴⁰

4) Italba’s claims based on denial of due process, bad faith, arbitrary conduct and discrimination are meritorious.

263. Once Uruguay’s attempt to artificially constrict the scope of Article 5 is set to one side, it is clear that, as established in Italba’s Memorial, Uruguay’s conduct in fact breached

638. *Id.* ¶ 199(5) (finding that, pursuant to NAFTA Art. 1108(7)(c), NAFTA’s MFN provision was inapplicable to a dispute concerning “procurement by a Party”).

639. *See supra* Section IV.C.2. It is worth noting that Uruguay’s haste to cast doubt on the proposition that the Treaty’s FET clause protects investors against conduct that is lacking in due process, non-transparent, absent good faith, arbitrary, or discriminatory leads it into contradiction. On the one hand, Uruguay insists that the Tribunal should not consider arbitral awards rendered under treaties that *do not contain* an explicit link of the FET clause to the customary international law minimum standard when applying Article 5. Counter-Memorial ¶¶ 190-95. At the same time, Uruguay argues that it is also inappropriate to conclude that the *absence* of this very same kind of language in the Switzerland-Uruguay BIT—on which Italba can rely by virtue of the Treaty’s MFN provision—creates a more protective “autonomous” FET standard. *Id.* ¶ 195 n.335. Both cannot be true: either the explicit reference to the customary international law minimum treatment standard results in a different and less protective standard or it does not.

640. *See supra* Section IV.C.3; Memorial ¶ 124 n.251.

Article 5 with respect to all the aspects of the FET standard articulated in the preceding section.⁶⁴¹

264. In its Counter-Memorial, Uruguay protests that it was under no obligation to inform Trigosl of the reassignment of Trigosl’s frequencies to Dedicado, was under no obligation to adjust Trigosl’s license, and that its conduct towards Trigosl should be seen as retrospectively justified because of the limited scale of Trigosl’s operations.⁶⁴² Uruguay, as noted, also insists that it “fully complied” with the TCA Judgment and that it never discriminated against Trigosl or Italba.⁶⁴³ These arguments fail for the reasons previously discussed and below.⁶⁴⁴

(a) Uruguay’s treatment of Italba’s investment in Trigosl failed to respect due process.

265. Uruguay’s decision to reassign Trigosl’s right to operate in the Spectrum to Dedicado without providing any notice to Trigosl, even as those rights were subject to pending litigation before the TCA, violated Trigosl’s right to due process under the FET standard, which required that Trigosl be given actual notice of impending acts affecting its legal rights.⁶⁴⁵

266. In its Counter-Memorial, Uruguay nevertheless insists that it was under no obligation to inform Trigosl of the reassignment of Trigosl’s frequencies because Dr. Alberelli was aware that the frequencies may be auctioned publicly if they were revoked,⁶⁴⁶ and because

641. See Memorial ¶¶ 131-50.

642. Counter-Memorial ¶ 258 n.484, ¶¶ 29, 168, 229-32.

643. *Id.* ¶¶ 247, 264, 267, 294, ¶ 242 n.443.

644. See *supra* Section IV.A-B; *infra* Section IV.C.4.

645. See Memorial ¶¶ 131-34; see also *Middle East Cement v. Egypt*, Award (CL-045), ¶ 143; *Tecmed v. Mexico*, Award (CL-009), ¶ 162; *Metalclad v. Mexico*, Award (CL-010), ¶ 91.

646. See Counter-Memorial ¶¶ 108, 113, 258.

Trigosul “*was not the holder of any right* with respect to the use of the frequency.”⁶⁴⁷ Both of these arguments should be rejected.

267. Dr. Alberelli’s alleged awareness that frequencies might be auctioned *publicly* if they were revoked⁶⁴⁸ did not place Italba or Trigosul on notice that the Spectrum would be or had been directly reallocated—without notice from URSEC—while the TCA Judgment was pending. While Uruguay characterizes the distinction between a public auction and a direct reallocation as “completely irrelevant,”⁶⁴⁹ this distinction is of paramount importance to a party seeking to protect its rights.

268. Dr. Pereira’s argument that notice was “*not necessary*” because Trigosul “*was not the holder of any right* with respect to the use of the frequency sub-blocks”⁶⁵⁰ is likewise incorrect, because Trigosul *was*—as Dr. Pereira cannot deny—at the very least the *holder of a claim* with respect to the frequencies that it was actively litigating before the TCA. In fact, the TCA retroactively upheld Trigosul’s claim.⁶⁵¹

269. By reallocating the right to use the Spectrum while Trigosul’s claim was still pending before the TCA, URSEC made the process Trigosul and Italba received before the TCA illusory because—at least under Uruguayan law—there could be no remedy: URSEC’s reallocation of the frequencies made compliance with the TCA Judgment impossible.⁶⁵² Absent relief through this arbitration, the harm done was “irreparable.” URSEC’s conduct was

647. Pereira Op. ¶ 200 (emphasis in original).

648. See Counter-Memorial ¶¶ 108, 113 (“[I]t is completely irrelevant that the frequencies were not put up for sale at public auction but rather directly reallocated What is relevant is that *in 2011* Dr. Alberelli was already aware that the frequencies that had been revoked from Trigosul were going to be allocated to another company.” (emphasis in original)), 258.

649. *Id.* ¶ 113.

650. Pereira Op. ¶ 200 (emphasis in original).

651. TCA Judgment (Oct. 23, 2014) (C-076).

652. See *supra* Section IV.B.2.

simultaneously in violation of Article 91 of Decree No. 500/991, which requires that any administrative resolutions that give rise to irreparable harm shall be notified *personally* to the interested party.⁶⁵³

270. Even if Uruguayan law allowed this kind of administrative subterfuge, international law does not. Basic notions of due process require notice of impending administrative acts affecting a legal or property right.⁶⁵⁴ URSEC's direct reallocation of the rights to the Spectrum, without notice to Trigosl, even as these rights were subject to a pending claim before the TCA, therefore amounts to a denial of due process in violation of the Treaty's guarantee of fair and equitable treatment.⁶⁵⁵

(b) Uruguay's treatment of Italba's investment in Trigosl was non-transparent and not in good faith.

271. This same conduct demonstrates Uruguay's failure to act transparently and in good faith with respect to Italba's investment.⁶⁵⁶ But URSEC's failure in this regard was not

653. See Memorial ¶ 133; Decree No. 500/991 (Sept. 27, 1991) (C-109), Art. 91 (“Las resoluciones que . . . causen gravamen irreparable . . . serán notificadas personalmente al interesado La notificación personal en la oficina se practicará mediante la comparecencia del interesado, su apoderado, o persona debidamente autorizada para estos efectos.”) (“Resolutions . . . resulting in irreparable damage . . . shall be notified personally to the interested party The personal notification shall take place in the office [of the issuing authority] through the appearance of the interested party, its representative, or a person duly authorized for that purpose.”). A host state's failure to abide by its own legal system can also result in a breach of fair and equitable treatment. See *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability (Dec. 27, 2010) (CL-017), ¶ 333.

654. See *Middle East Cement v. Egypt*, Award (CL-045), ¶ 143; *Tecmed v. Mexico*, Award (CL-009), ¶ 162; *Metalclad v. Mexico*, Award (CL-010), ¶ 91.

655. This same conduct also amounts to a failure by Uruguay to act transparently, as required by the FET standard. See *Metalclad v. Mexico*, Award (CL-010), ¶ 99.

656. See Memorial ¶¶ 138-40; *Tecmed v. Mexico*, Award (CL-009), ¶ 153; see also *Saluka v. Czech Republic*, Partial Award (CL-018), ¶ 303; *Total v. Argentina*, Decision on Liability (CL-017), ¶ 333; *TECO v. Guatemala*, Award (CL-139), ¶ 456. Nontransparency and the absence of good faith each in principle constitute distinct violations of the FET standard. Although they can arise independently, Uruguay's deceitful conduct in this case closely entangles them. Uruguay's failure to act in good faith inhered in URSEC's non-transparent approach to Trigosl, resulting in a “complete lack of candour or good faith on the part of the regulator in its dealings with the investor” in breach of both those elements of the FET standard. *TECO v. Guatemala*, Award (CL-139), ¶ 458.

limited to its frustration of the TCA Judgment.⁶⁵⁷ As set out in Italba’s Memorial, URSEC had by then already perpetrated what can only be understood as a scheme of active deception of Trigosul and Italba that was only discovered years after it began.⁶⁵⁸ Uruguay’s failure to communicate to Trigosul that a license conforming to the 2003 License Regulations would never be issued, its active concealment of its decision never to act on Trigosul’s repeated applications, and its revocation of Trigosul’s license on the basis of facts that it knew to be false demonstrated a failure to act in good faith and a “complete lack of transparency and candour in an administrative process” that “offends judicial propriety,” all in violation of Uruguay’s Article 5 FET obligations to act transparently and in good faith.⁶⁵⁹

272. In its Counter-Memorial, Uruguay insists it had no obligation to grant Trigosul a conforming license.⁶⁶⁰ This is hard to credit. Uruguay’s own Regulations on Administration and Control of the Radioelectric Spectrum, as approved in Decree 114/003 expressly provide for the “adaptation” of prior authorizations, and require URSEC to issue rules for the adjustment of licenses granted prior to the implementation of the new regulatory system.⁶⁶¹ Documents that Uruguay produced in this arbitration further confirm that URSEC knew it was required to issue

657. With respect to the TCA Judgment, URSEC did not act in good faith when it: (1) frustrated the TCA Judgment by making compliance impossible more than a year before that litigation concluded through an undisclosed re-allocation of Trigosul’s frequency allocation; (2) nevertheless represented to Italba and Trigosul that it would comply with the TCA Judgment, even though it had in fact already made compliance impossible by allocating the Spectrum to Dedicado without notice to Trigosul; and then (3) made “offers” of (a) inadequate frequencies and (b) frequencies that—through its own actions—it could not have revoked from Dedicado without serious legal consequences.

658. Memorial ¶¶ 136-37.

659. *Waste Management v. Mexico II*, Award (CL-033), ¶ 98; *Nordzucker v. Poland*, Second Partial Award (CL-047), ¶¶ 84-85; *TECO v. Guatemala*, Award (RL-103), ¶ 458.

660. Counter-Memorial ¶¶ 157-59, 168; Cendoya Witness Stmt. ¶ 28.

661. Decree 114/003 (C-017) Art. 38 (requiring URSEC to “dictate regulations for the regularization of authorizations and permits granted before the new system approved through this Regulation became effective.”).

conforming licenses under the new regulations.⁶⁶² Uruguay's position in this arbitration that conforming licenses were not necessary and would never be issued is also difficult to reconcile with the expectations of Trigosl's potential counterparties who were unwilling to do business with Trigosl *unless* it obtained the conforming license called for in URSEC's regulations.⁶⁶³

273. Yet even if, as Uruguay now claims, Trigosl did not actually need a conforming license, the undisputed facts are that Trigosl believed it did and repeatedly communicated that belief to URSEC over a number of years.⁶⁶⁴ Under Uruguay's own law, URSEC was at a minimum obligated to respond within a reasonable time to applications from parties seeking agency action.⁶⁶⁵ It would have been simple enough for URSEC to advise Trigosl that no such license was needed. Instead, on Uruguay's own account, URSEC allowed Trigosl to spend the

662. A March 2006 internal URSEC report analyzing Trigosl's requests for a conforming license stated: "In this sense, we must keep in mind that **everything related to the conforming licenses of telecommunications service operators is in the process of being evaluated**. . . . [O]nce the conforming licenses are granted, if Trigosl wishes to provide a telecommunication service different from the one it does, it should obtain authorization from the Regulatory Unit." See URSEC Report (Mar. 30, 2006) (C-184), at 3 (emphasis added) ("En este sentido debemos tener presente que se encuentra en proceso de evaluación todo lo referido a la adecuación de licencias de operadores de servicios de telecomunicaciones. . . . Que efectuada la adecuación de licencia de telecomunicaciones, en la medida que TRIGOSUL S.A. desee prestar un servicio de telecomunicaciones diferente al que ya efectiviza, deberá obtener la autorización de esta Unidad Reguladora.").

663. See Decree 114/003 (C-017), Art. 38; see also Memorial ¶ 24; First Alberelli Witness Stmt. ¶ 27; First Herbon Witness Stmt. ¶ 14; Letter from A. Cherp to A. Jansenson, G. Alberelli and L. Herbon (Jan. 8, 2003) (C-016) ("[O]ur investment group Eastern Pacific Trust cannot move forward with concluding our agreements with Trigosl until we receive the certified copy of the actual License to be issued by URSEC.").

664. See *supra* ¶ 25 (p, q, u-z, aa-dd, ii); see also Memorial ¶¶ 27, 30-35; First Alberelli Witness Stmt. ¶¶ 28-35, 37-39.

665. See Decree 500/991 (Sept. 27, 1991) (C-109), Art. 106 ("All administrative authorities are required to decide on any petition filed by the holder of a legitimate interest in the execution of a given administrative act, after the appropriate proceedings for proper examination of the case are conducted, within the term . . . ordered by law or the applicable regulations."); *Id.* at Art. 107 ("The proceedings for proper examination of the case referred to in the preceding article shall be completed, in the case of the petitions, within the term of thirty days from the date on which the petition was filed. (Law 13,032 of December 7, 1961, Article 406; law 14,106 of March 14, 1973, Article 676 and law 15,869 of June 22, 1987, Article 11)."); see also Horacio Cassinelli, *El interés legítimo como situación jurídica garantida en la Constitución uruguaya, Derecho Constitucional y Administrativo* (La Ley Uruguay, Montevideo, 2010) (C-260), at 337. The letters that Trigosl submitted to URSEC requesting a conforming license qualify as "formal requests" for such a license pursuant to Uruguayan administrative law, which requires that requests be made to an administrative body, in writing, be submitted to the authority competent to decide or propose a decision on the request, and identify the name and domicile of the applicant, the request, and the facts and legal basis for the request. Decree 500/991 (Sept. 27, 1991) (C-109) Arts. 19, 119.

better part of a decade pursuing agency action that it did not need, and to its prejudice.⁶⁶⁶

274. It should be noted that URSEC's conduct in this case was substantially more egregious than the "lack of open and frank communication" that that the tribunal in *Nordzucker v. Poland* found to constitute a "lack of transparency which [the host State] was under the BIT obliged to show in its dealings with a[n] . . . investor."⁶⁶⁷ While *Nordzucker* concerned only a state's silence about its intentions—the Polish government hinted to bidders in a privatization process that it would require a higher bid without making clear them that their refusal "to increase the price was not a mere part of the negotiation, but an actual deal-breaker"⁶⁶⁸—URSEC actually spent years *assuring* Trigosl and Italba that a conforming license would soon be issued even though this was not the case.⁶⁶⁹ Whether URSEC misled Trigosl and Italba about its intentions alone, or also about the applicable law, makes little difference under Article 5: Uruguay's conduct was profoundly non-transparent and not in good faith.⁶⁷⁰

(c) Uruguay's treatment of Italba's investment in Trigosl was arbitrary.

275. As Italba demonstrated in its Memorial, Uruguay's conduct with respect to Trigosl was also arbitrary.⁶⁷¹ URSEC acted arbitrarily by: (a) failing to issue Trigosl a conforming license in spite of Trigosl's repeated applications; (b) revoking Trigosl's license under false pretenses and without any legal basis; and (c) refusing to comply with the TCA

666. Counter-Memorial ¶¶ 22, 24, 181.

667. *Nordzucker A.G. v. Republic of Poland*, UNCITRAL, Second Partial Award (Jan. 28, 2009) (CL-047), ¶ 84.

668. *See Id.* ¶ 59.

669. *See* First Herbon Witness Stmt. ¶¶ 15, 17, 21, 22, 30; First Alberelli Witness Stmt. ¶¶ 27-28, 31, 33, 38.

670. In addition to misleading Trigosl into believing that URSEC would soon issue a conforming license, an URSEC official demanded that Trigosl pay a bribe in July 2006 to "expedite" the issuance of its conforming license. *See* First Herbon Witness Stmt. ¶ 22; First Alberelli Witness Stmt. ¶ 39.

671. *See* Memorial ¶¶ 141-46.

Judgment and rendering compliance with that judgment impossible.⁶⁷²

276. Uruguay protests that its conduct was justified because “Trigosul did not operate continuously for long periods of time, while it had all the necessary authorizations to do so.”⁶⁷³ In fact, Uruguay knew both that Trigosul was waiting for an action from URSEC that it believed was necessary and still believes was necessary, and that Trigosul was losing valuable business opportunities while it waited.⁶⁷⁴ It was an arbitrary and harmful exercise of URSEC’s discretion not to *act* on Trigosul’s repeated requests and either: (a) grant the conforming license to which Trigosul was entitled; or (b) deny the request because (as Uruguay now claims) no new license was needed.⁶⁷⁵ By failing to act, URSEC arbitrarily kept Trigosul in limbo for years and caused Italba to lose valuable opportunities.⁶⁷⁶

277. Uruguay’s insistence that it “fully complied with the TCA Judgment” is false, as detailed at greater length above.⁶⁷⁷ The irreducible fact of the matter is that, by re-allocating Trigosul’s frequencies to Dedicado while they were the subject of Trigosul’s appeal before the TCA, URSEC made it impossible for itself to comply meaningfully with the TCA Judgment.⁶⁷⁸

672. *Id.* ¶¶ 144-46.

673. Counter-Memorial ¶ 217.

674. *See supra* Sections II.C.2, II.C.4-5, II.C.7. Uruguay argues that Trigosul was “in no way disadvantaged under the 2003 regulations” because its business failures were the result of its own “lack of clients, its inability to generate any income or profits, and its incapacity to negotiate strategic alliances with other companies that were legally possible and commercially sustainable,” and that it was justified in revoking Trigosul’s license and rights to the Spectrum on the basis that “Trigosul did not make—nor was it capable of making—efficient use of the spectrum.” Counter-Memorial ¶¶ 176, 213. Both of these arguments ignore the reality that it was Uruguay’s own arbitrary and discriminatory course of action that prevented Trigosul from operating because it believed it lacked the necessary conforming license.

675. *See* Counter-Memorial ¶¶ 22, 24, 168, 181.

676. *See supra* Sections II.C.4-5, II.C.7; *see also* Memorial Sections II.B-C.

677. Counter-Memorial ¶ 267; *see also Id.* ¶ 292.

678. *See supra* Sections IV.A.2(a), IV.B.2, IV.C.4(a), (c).

Such an act truly “shocks . . . a sense of judicial propriety.”⁶⁷⁹ URSEC either knew or should have known the potential legal consequences of “double-booking” the Spectrum while it was still subject to a pending appeal before the TCA, and should be held accountable for its arbitrary decision to prejudice the outcome of the TCA litigation.

(d) Uruguay’s treatment of Italba’s investment in Trigosl was discriminatory.

278. As established in Italba’s Memorial and above, Uruguay breached Article 5’s FET standard (as well as Article 3’s National Treatment and Article 4’s Most-Favored Nation Treatment guarantees) through URSEC’s less favorable treatment of Italba as compared to other domestic and foreign investors.⁶⁸⁰

279. Uruguay’s “categorical” denial that it did not treat Trigosl differently is belied by the facts.⁶⁸¹ While URSEC consigned Trigosl to a lengthy, costly, and ultimately fruitless wait for an adjustment of its license to conform to the 2003 License Regulations—despite URSEC’s legal obligation to respond to such applications⁶⁸²—URSEC evidently responded to

679. *Elettronica Sicula SpA (ELSI) (United States v. Italy)*, Judgment (July 20, 1989) ICJ Reporter 15 (CL-048), ¶ 128.

680. *See supra* Sections IV.C.1-4; *see also* Memorial ¶¶ 147-49; 151-59. The elements required to establish that conduct is discriminatory are closely similar under either standard—a successful claim of discrimination under Article 5 requires Italba to show that: (a) Italba’s investment was treated less favorably than the comparable investment; (b) its investment is in like circumstances with another comparable investment; and (c) there was no justification for the less favorable treatment. *See* Memorial ¶¶ 149-54; *Total v. Argentina*, Decision on Liability (CL-017), ¶ 210 (“In order to determine whether treatment is discriminatory, it is necessary to compare the treatment challenged with the treatment of persons or things in a comparable situation”); *Lemire v. Ukraine*, Decision on Jurisdiction and Liability (CL-038), ¶ 261. The only difference between the National Treatment standard and the MFN standard is the nationality of the “comparable investment”: a domestic company under the National Treatment standard, and a foreign company under the MFN Standard. Under both the National Treatment and MFN standards, the burden is on Uruguay to justify less favorable treatment of a foreign investor. *See Feldman v. Mexico*, Award (CL-056), ¶¶ 176-78, 187 (“Here, the Claimant in our view has established a presumption and a *prima facie* case that the Claimant has been treated in a different and less favorable manner than several Mexican owned cigarette resellers, and the Respondent has failed to introduce any credible evidence into the record to rebut that presumption.”); *see also* Memorial ¶ 154. In the present case, Uruguay’s conduct breached the Treaty under either test.

681. Counter-Memorial ¶ 171.

682. *See supra* ¶ 164 n.452.

requests for administrative action from numerous Trigosl competitors.⁶⁸³ Nor did URSEC wrongfully revoke the licenses of Trigosl's competitors and fail to return them in the face of a court judgment.⁶⁸⁴ It will not serve for Uruguay to point to Trigosl's limited business operations in Uruguay as justification for its discriminatory measures.⁶⁸⁵ As detailed above and in Italba's Memorial, URSEC's discrimination repeatedly hamstrung Trigosl's business, causing the losses accounted for in Compass Lexecon's Report.⁶⁸⁶ Uruguay should not be allowed to escape liability for its Treaty breaches by invoking the damage it has caused in its own defense.

* * *

280. Uruguay's treatment, through URSEC, of Italba's investment in Trigosl was without due process, non-transparent and not in good faith, arbitrary, and discriminatory. Uruguay's discriminatory treatment of Italba's investment also violated Article 3's National Treatment and Article 4's Most-Favored Nation Treatment guarantees.

D. Uruguay Failed To Afford Italba's Investment Full Protection And Security.

281. Uruguay's Counter-Memorial does not appear to contest Italba's full protection and security claim on the merits. Italba accordingly reaffirms its position that Uruguay breached its obligation to afford Italba's investment full protection and security by permitting URSEC to destroy Italba's investment by: (a) ignoring the judgment of the TCA reinstating Trigosl's rights under its license; (b) reassigning Trigosl's rights to a competitor while administrative proceedings concerning those rights were pending before the TCA; (c) revoking Trigosl's

683. See Memorial ¶ 155.

684. See *supra* Section IV.A.4.b.

685. Counter-Memorial ¶¶ 29, 212, 229-32.

686. See *supra* Sections II.C.4-7.

license without any legal basis; and (d) refusing to issue Trigosl a license conforming to the 2003 License Regulations.⁶⁸⁷

282. Echoing its arguments about the scope of Article 5’s FET clause, however, Uruguay insists that the Treaty excludes “legal protection” from the scope of Article 5’s full protection and security clause. Specifically, Uruguay contends that the Contracting Parties deliberately decided to limit the content of the Treaty’s full protection and security standard to “police” protection of foreign investments.⁶⁸⁸ Uruguay’s argument fails because the Contracting Parties also included an MFN clause in the Treaty. Therefore, the legal protections afforded to Italba’s investment can be derived both by operation of the Treaty’s MFN clause as well as from the body of international investment jurisprudence holding that the standard of full protection and security encompasses the legal security of foreign investments.⁶⁸⁹

283. The Treaty’s MFN clause, Article 4(2), provides that “[e]ach Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of

687. Memorial ¶ 175.

688. Counter-Memorial ¶¶ 197-203.

689. See, e.g., *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No ARB/05/22, Award (July 24, 2008) (**RL-71**), ¶ 729 (in finding that the Republic had violated its obligation to provide full protection and security, the tribunal reasoned that the full protection and security standard “implies a State’s guarantee of stability in a secure environment, both physical, commercial and legal[,]” and explaining that it would be “unduly artificial to confine the notion of ‘full security’ only to one aspect of security, particularly in light of the use of this term in a BIT, directed at the protection of commercial and financial investments”); see also *Total v. Argentina*, Decision on Liability (**CL-017**), ¶ 343 (finding that a plain reading of the terms of the BIT, in accordance with Vienna Convention Article 31, showed that “the protection provided for by Article 5(1) to covered investors and their assets is not limited to physical protection but also to legal security”); *Frontier Petroleum Servs. Ltd. v. Czech Republic*, UNCITRAL, Final Award (Nov. 12, 2010) (**CL-068**), ¶ 263 (holding that “the duty of protection and security extends to providing a legal framework that offers legal protection to investors—including both substantive provisions to protect investments and appropriate procedures that enable investors to vindicate their rights”); *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award (Sept. 13, 2001) (**CL-011**), ¶ 613 (finding that the government’s “actions and inactions . . . were targeted to remove the security and legal protection of the Claimant’s investment” and were thus in breach of its obligation to provide full protection and security).

investments.”

284. More favorable treatment than that available under at least Uruguay’s account of Article 5’s full protection and security clause is unambiguously available to investors covered by the Venezuela-Uruguay *Acuerdo Para La Promoción y Protección Recíproca de Inversiones* (*Venezuela-Uruguay BIT*). Article 4 of the Venezuela-Uruguay BIT provides that

Each Contracting Party shall, in accordance with the norms and standards of International Law, accord investments by investors of the other Contracting Party in its territory fair and equitable treatment, and shall guarantee them full security and legal protection and shall refrain from obstructing, through arbitrary or discriminatory measures, their administration, management, maintenance, use, enjoyment, development, sale or liquidation.”⁶⁹⁰

285. The full protection and security clause contained in Article 4 of the Venezuela-Uruguay BIT therefore guarantees that investments by investors shall receive full security and legal protection without the limits that, Uruguay insists, the Treaty imposes on Article 5’s full protection and security clause.⁶⁹¹

286. In turn, Italba is entitled to rely upon Article 4 of the Venezuela-Uruguay BIT by operation of the MFN clause contained in Article 4(2) of the Treaty.⁶⁹² The Treaty’s MFN clause expressly guarantees that Italba’s investment shall not receive treatment less favorable than that afforded by Uruguay to investments of any third state investors.

690. Venezuela-Uruguay Treaty (May 20, 1997) (**CL-065**), Art. 4 (emphasis added) (“Cada Parte Contratante, de conformidad con las normas y criterios del Derecho Internacional, acordará a las inversiones de inversores de la otra Parte Contratante en su territorio, un trato justo y equitativo, les garantizara seguridad y protección jurídica plenas y se abstendrá de obstaculizar con medidas arbitrarias o discriminatorias su administración, gestión, mantenimiento, uso, disfrute, ampliación, venta o liquidación.”).

691. *Id.*

692. Treaty (**C-001**), Art. 4(2) (“Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”).

287. There should be nothing surprising about this conclusion. International investment tribunals have held that an MFN clause must be construed in accordance with the same basic treaty interpretation rules as other clauses.⁶⁹³ In *National Grid v. Argentina*, for example, the tribunal stated:

[T]he Tribunal will interpret the Treaty as required by the Vienna Convention. Article 31 of the Convention requires an international treaty to “be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.” . . . The Convention does not establish a different rule of interpretation for different clauses. The same rule of interpretation applies to all provisions of a treaty, be they dispute resolution clauses or MFN clauses.⁶⁹⁴

288. The “object and purpose” of the Treaty in this case is, in relevant part, to furnish a “stable framework for investment” and to “provid[e] effective means of asserting claims and enforcing rights with respect to investment[.]”⁶⁹⁵ The MFN clause should be construed to advance that objective.

289. The “ordinary meaning” of Article 4(2) itself is that the Contracting Parties’ intended that U.S. and Uruguayan investors “shall” each benefit from the “treatment no less favorable than” that which either Treaty party grants to investors from third States.⁶⁹⁶ Article 4(2), applied in accordance with its ordinary meaning thus clearly requires that Italba should be able to access the same protections made available to Venezuelan investors under the Uruguay-

693. See OECD, *Most-Favoured-Nation Treatment in International Investment Law*, (CL-145), at 16.

694. *National Grid plc v. The Argentine Republic*, UNCITRAL, Decision on Jurisdiction (June 20, 2006) (CL-146) ¶ 80; see also *Bayindir v. Pakistan*, Award (CL-039), ¶ 155 (applying Article 31(1) of the Vienna Convention in deciding to import a fair and equitable treatment clause from another treaty).

695. Treaty (C-001), Preamble.

696. See *id.* at Art. 4(2). “Treatment” is understood to mean “the rights and privileges granted and the obligations and burdens imposed by a Contracting State on investments made by investors covered by the treaty.” *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction (May 16, 2006) (CL-147) ¶ 55.

Venezuela BIT.

290. Uruguay objects that the protections of the Uruguay-Venezuela BIT cannot be accessed by operation of the Treaty’s MFN clause because they are from an older treaty. This sort of argument has been rejected before.⁶⁹⁷ The most cursory review of the Treaty also reveals that the United States and Uruguay explicitly limited the MFN clause’s applicability to certain Articles.⁶⁹⁸ Article 5 was not one of them. Article 4(2)’s MFN clause accordingly allows Italba to benefit from the provisions of the Uruguay-Venezuela BIT obliging Uruguay to provide for the *legal* security of its investment. Uruguay’s conduct breached that standard for the reasons discussed above and in Italba’s prior submissions.⁶⁹⁹

* * *

291. Uruguay’s conduct towards Italba’s investment in Uruguay breached Article 6 of the Treaty by unlawfully expropriating that investment, Article 5 by failing to accord Italba’s investment fair and equitable treatment, Articles 3 and 4 by failing to accord Italba treatment no less favorable than accorded to other investors in like circumstances, and Article 5 by failing to afford Italba’s investment with full protection and security. As discussed in the next section, Uruguay owes Italba full reparation for its multiple Treaty breaches.

V. QUANTUM

292. In its Memorial, Italba established that the standard of compensation applicable to Uruguay’s breaches of the Treaty is the customary international law standard of “full reparation.”

697. See, e.g., *Bayindir v. Pakistan*, Award (CL-039), ¶ 160 (“As noted by the Respondent, the FET provision to which the Claimant more specifically referred, namely Article II(2) of the Pakistan-UK BIT, pre-dates the MFN clause in the Treaty. In and of itself that chronology does not appear to preclude the importation of an FET obligation from another BIT concluded by the Respondent.”).

698. See Treaty (C-001), Arts. (21)(2) and (7); *id.* at Annex F, ¶¶ 2 and 4.

699. See *supra* Sections IV.C.1-3; Memorial ¶¶ 167-75.

Pursuant to that standard, Mr. Dellepiane has calculated that Uruguay must pay Italba compensation in the amount of USD \$61.1 million (including compounded interest calculated on the basis of the weighted average cost of capital of a telecommunications provider in Uruguay) for Uruguay's breaches of the Treaty. That sum consists of the fair market value of the expropriated rights as of March 1, 2015, the date of the expropriation, and damages for the historical profits that Italba would, in all probability, have received between 2006 and 2015 but for Uruguay's breaches.

293. In its Counter-Memorial, Uruguay denies any obligation to pay Italba compensation:

- *First*, Uruguay argues that compensation is governed by Article 6 of the Treaty (the standard of compensation for a lawful expropriation), notwithstanding the fact that, in this case, Italba's claim for the loss of its investment is based on an unlawful and discriminatory expropriation carried out without compensation or due process and in violation of the orders of Uruguay's own courts.
- *Second*, Uruguay argues that the valuation date should be no later than January 19, 2011, because that was the date Uruguay initially terminated Trigosul's rights to use the Spectrum—completely ignoring the fact that the termination order was annulled by the Uruguayan courts, as if it never happened.
- *Third*, Uruguay contends that no compensation is owed because, it says, Trigosul's rights to use the Spectrum were worthless. Uruguay insists that Trigosul's rights were terminable at will without compensation—an ironic position for Uruguay to insist upon given the TCA Judgment annulling Uruguay's termination of the same license. Undaunted, Uruguay also sees support for the alleged worthlessness of Trigosul's rights in the Spectrum in the fact that it transferred those rights in the Spectrum to Dedicado without any payment—an argument that ignores the fact that Dedicado itself has made clear that it would not accept any attempt by Uruguay to take the rights in the Spectrum back without compensation. Uruguay further finds support for the alleged worthlessness of Trigosul's license in the limitations set forth in Trigosul's original license—ignoring the fact that Trigosul would in all probability have had a conforming license that would have given the company the flexibility it needed to provide the services Uruguay now claims Trigosul was barred from providing, but for Uruguay's Treaty breaches.
- *Fourth*, Uruguay denies any responsibility for Italba's claims for historical lost profits. Uruguay protests that the damages Italba seeks to collect for these failed

projects are too speculative—ignoring that it was Uruguay’s own conduct that prevented Italba from closing the deals in the first place.

- *Finally*, Uruguay argues that Italba should only be awarded interest based on the risk free rate, ignoring the compensatory nature of interest and its role as an essential part of the full reparation owed for Uruguay’s treaty breaches.

294. In this section Italba explains why Uruguay’s defenses on Quantum are meritless.

In particular, this section will show:

- a. Uruguay’s attempt to avoid the customary law standard for compensation cannot succeed because Tribunals consistently have held that where the host state has failed to provide compensation for an expropriation, failed to expropriate in accordance with due process, and/or denied justice in the context of the expropriation, only the “full reparation” standard can provide the claimant with the compensation owed under customary international law;
- b. Uruguay’s attempt to push the valuation date back to January 2011 cannot succeed because it was only in March 2015 that Uruguay made clear that it could not and would not comply with the TCA Judgment;
- c. Uruguay’s attempt to portray Trigosul’s rights to use the Spectrum as worthless must fail because: (i) Uruguay’s claim that it was entitled to terminate Trigosul’s rights at will without compensation is flat out wrong under Uruguayan law and belied by the very facts of this case—where the TCA Judgment invalidated Uruguay’s attempt to terminate Trigosul’s license; (ii) Uruguay’s repeated references to the fact that Dedicado allegedly did not pay for the rights to use the Spectrum taken from Trigosul is again flat out wrong—Dedicado swapped other frequencies to obtain Trigosul’s rights and, although those rights were unquestionably worth less than Trigosul’s rights (as Dedicado’s vigorous defense of those rights shows), it is nonetheless clear that it did not pay “nothing”; and (iii) Uruguay’s repeated references to the alleged limitations in Trigosul’s rights to use the Spectrum ignore the fact that if Uruguay had acted in good faith and issued Trigosul the conforming license it sought, those limitations would not have existed—in short, in the “but for” valuation scenario required by the customary international law standard of full reparation, Uruguay must be assumed to act lawfully, such that the supposed limitations in Trigosul’s rights to use the Spectrum would not have existed
- d. Uruguay’s attempt to use the calamitous impact of its own unlawful conduct on the ability of Italba to commercialize Trigosul and its rights to use the Spectrum cannot be allowed to succeed. Such circular logic turns the notion of a “but for” valuation scenario required by the customary international law standard of full reparation on its head because, in that scenario, the Tribunal must assume that Uruguay would have regulated Trigosul in good faith. In that scenario, Italba

would have received the historical lost profits it would in all probability have received but for Uruguay's breaches; and

- e. Uruguay's attempt to avoid responsibility for the effects of its non-payment of prompt compensation by arguing that interest should accrue only at the risk free rate must also fail because interest at a rate equal to the cost of capital (or, in the alternative, equal to Uruguay's borrowing rate) is a necessary part of the "full reparation" required by customary international law given that Uruguay's unlawful conduct has prevented Trigosul from reinvesting the money it should have received as compensation for Uruguay's conduct.

A. Compensation For Uruguay's Treaty Breaches Must Be Determined Under The "Full Reparation" Standard Of Customary International Law.

295. As established in the Memorial, Italba's claims are all for breaches of the Treaty.

The Treaty specifies no standard of compensation or other remedy for its own breach. Italba must therefore be compensated for Uruguay's unlawful expropriation of Italba's investment and for Uruguay's other breaches of the Treaty, pursuant to the customary international law standard of "full reparation."⁷⁰⁰

700. See Memorial ¶¶ 176-79 (citing *Case Concerning The Factory at Chorzów (Claim for Indemnity)*, Permanent Court of International Justice, PCIJ Series A, No 17, Judgment on the Merits (Sept. 13, 1928) (CL-070) at 29 (emphasis added); *Vivendi II*, Award (CL-028), at ¶ 8.2.7 ("Based on these principles, and absent limiting terms in the relevant treaty, it is generally accepted today that, regardless of the type of investment, and regardless of the nature of the illegitimate measure, the level of damages awarded in international investment arbitration is supposed to be sufficient to compensate the affected party fully and to eliminate the consequences of the state's action."); *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (Sept. 22, 2014) (CL-071), ¶¶ 678-81). Uruguay's argument that Trigosul relinquished its right to compensation by rejecting Uruguay's offers "to allow Trigosul to carry out its data transmission services on similar frequencies, as well as on the frequencies originally allocated to it" is meritless. See Counter-Memorial ¶¶ 403-05. First, because Uruguay made both offers after Italba commenced this arbitration, they should be understood as settlement offers rather than as steps taken to comply with Uruguay's Treaty obligations or to make restitution for Uruguay's breaches of the Treaty. See *supra* Section IV.A.2. Second, URSEC's May 9, 2016 proposal to Italba was deficient because it involved frequencies inferior to those in Trigosul's original Spectrum—the same frequencies, in fact, that Dedicado successfully asked to have replaced with Trigosul's. See URSEC Proposal (May 9, 2016) (C-095); see *supra* Section IV.A.2. Third, the draft URSEC resolution provided to Italba on May 19, 2016, in which URSEC offered to return the "same" frequencies to Trigosul, was a poisoned chalice because it would have entailed confiscating those rights from Dedicado in violation of Uruguayan law; any "rights" obtained in this matter would have come under a cloud of administrative irregularity. See Draft URSEC Resolution (May 9, 2016) (C-098) at 3; see *supra* Section IV.A.3. Trigosul would not have been able to conduct business on the basis of such dubious and devalued rights in the Spectrum. For all of these reasons, Italba was entitled to reject Uruguay's "offers" and remains entitled to full reparation for Uruguay's breaches of the Treaty pursuant to customary international law. In any case, it is doubtful that restitution remains a "primary" judicial remedy in modern international investment law. See *e.g.*, *Sistem Muhendislik Insaat Sanayi ve Ticaret A.S. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award (Sept. 9, 2009) (RL-077), ¶ 158 ("It is questionable

296. Under this standard, the compensation awarded must be such that all consequences of Uruguay’s unlawful acts are “wiped out” and Italba is restored to the situation that would in all probability have existed “but for” Uruguay’s unlawful conduct.⁷⁰¹ Accordingly, compensation for the harm caused to an investment by a treaty breach is calculated in a “but-for” scenario, a hypothesized world in which the respondent State’s wrongdoing and the economic consequences of that wrongdoing never took place. The difference in value between the “but-for” and the “actual” or historical scenario in which the breach occurred yields the full reparation owed to a successful investor claimant.

297. In its Counter-Memorial, however, Uruguay argues for applying the standard of compensation prescribed in Article 6 of the Treaty, which requires compensation “equivalent to the fair market value of the expropriated investment immediately before the expropriation took place.”⁷⁰²

298. Uruguay’s reliance on the Article 6 compensation standard is incorrect. Article 6 of the Treaty is irrelevant in the context of a Treaty breach, because it prescribes a standard of

whether an arbitral tribunal has the power to order a State to restore expropriated property to its original owner. In any event, restoration of expropriated property is plainly no longer the primary judicial remedy in cases of expropriation, if it ever was. Monetary compensation is the normal remedy, and its role is precisely to take the place of restitution.”) (internal quotation omitted).

701. See *Case Concerning The Factory at Chorzów* (Claim for Indemnity), Permanent Court of International Justice, PCIJ Series A, No 17, Judgment on the Merits (Sept. 13, 1928) (CL-070) at 29; *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentine Republic*, ICSID Case No ARB/97/3, resubmitted case, Award (Aug. 20, 2007) (*Vivendi II*) (CL-028), ¶ 8.2.7 (“Based on these principles, and absent limiting terms in the relevant treaty, it is generally accepted today that, regardless of the type of investment, and regardless of the nature of the illegitimate measure, the level of damages awarded in international investment arbitration is supposed to be sufficient to compensate the affected party fully and to eliminate the consequences of the state’s action.”); *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (Sept. 22, 2014) (CL-071), ¶¶ 678-81; Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Report of the International Law Commission on the work of its fifty-third session, 2001 (CL-072), Part 2, Ch. 1, Art. 31, cmt. 3.

702. See Counter-Memorial ¶¶ 327-33.

compensation only for lawful expropriations.⁷⁰³

299. Arbitral tribunals have consistently rejected the argument Uruguay asserts here. In *Crystallex v. Venezuela*, the respondent State argued that “the treaty-based compensation should be applied to any conduct resulting in a deprivation of rights so long as it is established under the BIT.”⁷⁰⁴ The tribunal disagreed, holding that “as a general matter . . . the standard of compensation contained in . . . the Treaty is not the appropriate standard of compensation in cases of *breaches* of that provision.” Instead, the *Crystallex* tribunal considered that the “full reparation” principle of customary international law governed the assessment of quantum, as a consequence of its decision on liability.⁷⁰⁵

B. Full Reparation Should Be Calculated As Of March 1, 2015.

300. As established in Italba’s Memorial, the most appropriate valuation date in this case is March 1, 2015.⁷⁰⁶ That is the date on which Uruguay’s unlawful expropriation and other

703. See Memorial ¶ 177. See also *ConocoPhillips v. Venezuela, Decision on Jurisdiction and the Merits (CL-023)* at ¶ 342 (“The Tribunal, coming back to the terms of the BIT, does not consider that the extent of the compensation payable in respect of an unlawful taking of an investment . . . is to be determined under Article 6(c); that provision establishes a condition to be met if the expropriation is in all other respects in accordance with Article 6. So, in the *Chorzów Factory* case, the Court did not determine reparation in accordance with the provisions of the Convention before it, because it was concerned with a dispossession in breach of those provisions.”); *Rusoro v. Venezuela, Award (CL-021)* at ¶ 640 (“The compensation provided for in [the Treaty] only covers cases of expropriation. In all other breaches, absent any specific Treaty language, damages must be calculated in accordance with the rules of international law.”); *Crystallex v. Venezuela, Award (CL-020)* at ¶¶ 841-53.

704. *Crystallex v. Venezuela, Award (CL-020)*, ¶ 744.

705. *Id.* ¶ 846; see also *Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award (Feb. 7, 2017) (CL-148)*, ¶ 160 (holding that “the appropriate standard of compensation . . . is the customary international law standard of full reparation. Article III(1) only describes the conditions under which an expropriation is considered lawful; it does not set out the standard of compensation for expropriations resulting from breaches of the Treaty.”); *ADC Affiliate Ltd. et al. v. Republic of Hungary, ICSID Case No ARB/03/16, Award (Oct. 2, 2006) (CL-014)*, ¶ 483 (“Since the BIT does not contain any *lex specialis* rules that govern the issue of the standard for assessing damages in the case of an unlawful expropriation, the Tribunal is required to apply the default standard contained in customary international law in the present case.”).

706. See Memorial ¶¶ 181-82.

Treaty breaches were revealed in full, and thus is a reasonable and appropriate valuation date.⁷⁰⁷

Where, as here, a respondent State has committed multiple breaches whose full scope was not immediately discovered, the Tribunal may select a reasonable valuation date based on the circumstances. March 1, 2015 is therefore the most appropriate valuation date because it is the date on which Italba discovered that URSEC had placed itself in a position from which it could not comply with the TCA Judgment restoring Trigosl's right to use the Spectrum, and on which the full extent of Uruguay's other breaches of the Treaty was accordingly revealed. As of that date, any remaining value to Italba's investment in Trigosl was destroyed.

301. The valuation date should not be January 19, 2011, as Uruguay demands.⁷⁰⁸

Although that is indeed the day before URSEC's revocation of Trigosl's rights to use the Spectrum, that revocation is not the expropriation for which Italba seeks relief in this arbitration. As noted, the TCA Judgment would have cured any expropriation effected by that revocation. Uruguay thus replicates a fundamental error from its jurisdictional arguments in its argument on

707. Italba stands by its reservation of rights to submit a revised valuation in the event that a valuation of its investment conducted as of the date of the Tribunal's award yields a more favorable result. See Memorial ¶ 181 n.348. If so, the full reparation required by customary international law could only be achieved at the later date. Otherwise, Italba would not be left in a worse position than if Uruguay had not breached the Treaty and Uruguay, in turn, would be left with a windfall reward for its breach of the Treaty. Such a result would be incompatible with the general principle of law that one may not profit from one's own wrong (*nullus commodum*). See *ADC Affiliate Ltd. et al. v. Republic of Hungary*, ICSID Case No ARB/03/16, Award (Oct. 2, 2006) (CL-014), ¶ 497 (“[A]pplication of the *Chorzów Factory* standard requires that the date of valuation should be the date of the Award and not the date of expropriation, since this is what is necessary to put the Claimants in the same position as if the expropriation had not been committed.”); *Papamichalopoulos and Others v. Greece*, 16 E.H.R.R. 440, Judgment on Admissibility and Merits (June 24, 1993) (CL-150), ¶¶ 35-46. Uruguay's attempt to characterize a shift in valuation date to the date of the award as “exceptional” misses the mark. See Counter-Memorial at ¶ 158 n.626. The tribunal in *ADC v. Hungary* observed that this issue only arises in a situation where an expropriated asset's value increases after the expropriation. See *ADC v. Hungary*, Award (CL-014) at ¶ 496. If that proves the case here, however, Italba is entitled to compensation that captures any appreciation in value that it would have received *but for* Uruguay's breach.

708. See Counter Memorial ¶¶ 325-26. Uruguay's reliance on *Metalclad v. Mexico* and *Tecmed v. Mexico* is misplaced. See Counter-Memorial ¶¶ 330-32. Both cases were decided prior to the Award in *ADC v. Hungary*, which clarifies the distinction between the Treaty standard of compensation and the “full reparation” standard of customary international law. In any event, neither case involved circumstances such as those here and in *ADC*, where the investment increased in value after being unlawfully expropriated, causing “full reparation” under the customary international law standard to diverge from the treaty's standard of compensation. See *Metalclad v. Mexico*, Award (CL-010), ¶ 118; *Tecmed v. Mexico*, Award (CL-009), ¶¶ 183-89.

quantum.

C. Under The Full Reparation Standard, Italba Is Entitled To Compensation Equal To The Value Of Trigosul’s Rights To Use The Spectrum In A “But-For” Scenario In Which Uruguay’s Breaches Did Not Occur.

302. With respect to Italba’s expropriation and denial of justice claims, both of which hinge on Uruguay’s frustration of the TCA Judgment, full reparation means restoring to Italba the Fair Market Value of Trigosul—equivalent, in this case, to the value of Trigosul’s rights to use the Spectrum—at the time of valuation, *but for* the economic impact of Uruguay’s unlawful conduct. Based on data obtained from comparable and contemporaneous auctions of comparable telecommunications rights in Argentina and Uruguay, Mr. Dellepiane determined that value to be USD \$38.8 million, calculated as of March 1, 2015.⁷⁰⁹

303. In its Counter-Memorial, Uruguay refuses to enter into the relevant “but-for” valuation scenario premised on assuming a finding of liability. Instead, Uruguay dwells at length on the fact that Trigosul was not historically profitable and thus, Uruguay says, had a FMV of zero.⁷¹⁰ Uruguay’s arguments misapprehend—perhaps deliberately—Italba’s claims in this case. There is no dispute that Trigosul did not generate profits.⁷¹¹ Trigosul’s value was embodied in its rights to use the Spectrum.⁷¹² Italba has shown that Uruguay’s breaches of the Treaty prevented Trigosul from realizing the inherent value of its rights to use the Spectrum—and thus destroyed the value of Italba’s investment.⁷¹³ Pursuant to the principle of full reparation, the compensation awarded should restore to Italba the value it would have held *but for* Uruguay’s

709. See Second Dellepiane Report ¶¶ 13, Table 1, 61, Table IV.

710. See Counter-Memorial ¶¶ 307.

711. See *supra* Section II.C.4-7.

712. See *supra* Sections II.C.4-7; see also Dellepiane Report ¶¶ 11, 34-35.

713. See *supra* Section IV.

unlawful conduct.⁷¹⁴

304. Uruguay makes several arguments in an attempt to avoid an award of compensation reflecting the inherent value of the frequencies encompassed by Trigosul's rights in the Spectrum, which, as Mr. Valle explains in his report, is suitable for wireless broadband transmission at the 4G standard and already used for that purposes in other countries.⁷¹⁵

305. Uruguay and Econ One particularly focus on trying to invalidate Compass Lexecon's comparable valuation analysis by claiming: (a) that Trigosul's rights "had no value in themselves" because they were "revocable at any time without compensation;" and (b) that Trigosul could not use its frequencies to provide mobile broadband data transmission.⁷¹⁶ On these grounds, Uruguay's experts dismiss Compass Lexecon's valuation as "fundamentally wrong" for being "based solely on the technical properties of the radio spectrum" and, they claim, "ignoring the regulatory comparability of the authorizations and licenses."⁷¹⁷ Uruguay further insists that "the 'price' paid by Dedicado to receive the frequencies is a better indication" of the value of Trigosul's rights to use the Spectrum "than the prices paid at the auctions cited by

714. *See id.*

715. Valle Report ¶¶ 19-30, 42, 75, 87.

716. *See* Counter-Memorial ¶¶ 340, *et seq.* Uruguay also objects that the auctions in Argentina and Uruguay which Compass Lexecon uses for its comparable valuation analysis "occurred after the valuation date." *See* Counter-Memorial ¶¶ 354. In fact, only one such auction, in June of 2015, took place after the correct valuation date of March 1, 2015. *See* Dellepiane Report ¶¶ 43, 146. That said, Mr. Dellepiane's use of information derived from this auction is not in conflict with the principle that "an investment is assessed as it existed at [the date of valuation] and changes to the investment subsequent to the valuation date are ignored." *See* Counter-Memorial ¶¶ 355 (quoting S. Ripinski & K. Williams, *Damages in International Investment Law* (2008) p. 243) (RL-67). No post-expropriation change to the value of Trigosul's rights to use the Spectrum is being included in the valuation of those rights. Rather, the auctions used in Mr. Dellepiane's analysis straddle the valuation date and serve as evidence of the value of Trigosul's rights "as they existed" on that valuation date. *See* Dellepiane Report ¶¶ 40-41. *See, e.g., Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award (Feb. 7, 2017) (CL-148), ¶ 477 ("To value the asset on the date of the award, the Tribunal may use information available after the date of the expropriation . . . the use of ex post information allows for a valuation that is closer to reality and less speculative than one that relies on projections based on information available on the date of the expropriation.").

717. Econ One Report ¶ 147.

the Claimant,” and that since Dedicado obtained Trigosul’s frequencies “for free,” the “‘price’ was zero.”⁷¹⁸

306. Uruguay is wrong on all counts.

1) The supposed revocability of Trigosul’s rights to use the Spectrum would not have impaired the value of those rights in a “but-for” valuation scenario.

307. *First*, as for the revocability of Trigosul’s rights to use the Spectrum, URSEC’s revocation of Trigosul’s rights to use the Spectrum was annulled by Uruguay’s own highest administrative court. Uruguay’s frustration of the TCA Judgment is in turn the basis for Italba’s expropriation and denial of justice claims. In a “but-for” scenario where, by definition, Uruguay would have honored the TCA Judgment, Trigosul’s rights might well have been “revocable,” but they certainly would *not* have been revocable “at any time” or for any reason or without a right to compensation.⁷¹⁹ If further evidence of those legal principles is needed, one need only look to the position taken by Dedicado in response to Uruguay’s threat to return the rights in the Spectrum to Trigosul.⁷²⁰

308. The same truth is shown in the TCA Judgment reversing URSEC’s attempt to revoke Trigosul’s rights. Uruguay’s claim that Trigosul’s rights to use the Spectrum “had no value” because of their “precarious” character is thus demonstrably false in a “but-for” valuation

718. Counter-Memorial ¶ 364; Econ One Report, ¶ 16.

719. *See supra* Section III.A.2(b); *see also supra* ¶ 107 n.353; Constitution of the Oriental Republic of Uruguay of 1967 (as amended in 2004) (C-108), Art. 312; Carlos Delpiazzo, *Derecho de las Telecomunicaciones* (Ed. Universidad de Montevideo, Facultad de Derecho, Montevideo, 2005) (C-231), at 52; Augusto Durán, *Un caso de revocación de oficio de una autorización para construir* in Carlos Delpiazzo and Graciela Ruocco, *Tratado Jurisprudencial y Doctrinario. Actos y Contratos de la Administración, Tome II* (Ed. La Ley Uruguay, Montevideo, 2013) (C-232), at 441-42; Augusto Durán, *Situaciones jurídicas subjetivas* (Ed. La Ley Online Uruguay, Online citation: UY/DOC/486/2009) (C-229); Augusto Durán, *Límites a la concesión de actividades públicas* 79, *Estudios de Derecho Administrativo*, number 9 (Ed. La Ley Uruguay, Montevideo, 2014) (C-233), at 79-80; Augusto Durán, *La autorización en la pesca* 51, in *Casos de Derecho Administrativo*, Vol. VI (Montevideo, 2010) (C-234), at 51

720. *See supra* Section IV.A.2(a).

scenario where it must be assumed that Uruguay would comply with its own court's order rather than unlawfully expropriate and deny justice to foreign investors.⁷²¹

309. More broadly, the Tribunal may consider that governments are not in the business of issuing worthless licenses, and that investors are not in the business of litigating to protect them.⁷²² Trigosul's rights were valuable because, but for Uruguay's breaches, they allowed Trigosul to operate over the Spectrum and, under Uruguayan law, could be revoked only for a proper legal basis, in accordance with due process of law, and for compensation.⁷²³

2) Trigosul's rights in a "but-for" valuation scenario would in all probability have allowed it to provide mobile broadband data transmission services.

310. Furthermore, Trigosul's licensing status would "in all probability" been very different *but for* Uruguay's breaches of the Treaty.⁷²⁴

311. As set out above and in Italba's Memorial, URSEC's inaction and deception with regard to Trigosul's repeated applications for a conforming license breached Articles 3, 4, and 5 of the Treaty. But for Uruguay's breaches, Trigosul would in all probability have received the conforming license to which it was entitled under URSEC's 2003 licensing regulations.

721. Counter-Memorial ¶ 340.

722. *See supra* Section IV.A.2(a); *see also* Evacuación Vista Dedicado, File No. 2016-2-9-0000352 (**SPC-041**), at 74 (Dedicado's warning that it would take legal action against URSEC to defend its own rights in the Spectrum).

723. *See supra* Sections II.C.4-7, IV.A.1. Other entities certainly recognized the economic value of Trigosul's rights as seen, *inter alia*, by Antel's attempt to acquire Trigosul's rights to operate in the Spectrum in 2006. *See supra* Introduction, ¶ 25(ee), Section II.C.2; Memorial ¶¶ 38-41.

724. *See Case Concerning The Factory at Chorzów (Claim for Indemnity)*, Permanent Court of International Justice, PCIJ Series A, No 17, Judgment on the Merits (Sept. 13, 1928) (**CL-070**) at 29 (emphasis added). That being said, even under its original authorization to use the Spectrum, Trigosul was authorized to provide "point to point" and "point to multipoint" data transmission services. *See* Memorial ¶ 16. As Mr. Valle explains in his Report, PTP and PTMP services would encompass the provision of wireless internet access for homes and businesses. PTP and PTMP services would also include the provision of essential "backhaul" services for other operators. *See* Valle Report ¶¶ 16, 47. Uruguay is therefore wrong to characterize these rights as worthless, even if they are by no means the full set of "but-for" rights relevant to valuation in this case. *See* Valle Report ¶ 27.

312. Uruguay now disputes that Trigosul needed a conforming license, but this issue is actually irrelevant to the valuation of Trigosul’s rights to use the Spectrum in the “but-for” scenario. On the one hand, Uruguay’s experts concede that “if Trigosul had been issued a ‘conforming license,’ it would have been a Class B license.”⁷²⁵ On the other hand, if the Tribunal actually credits Uruguay’s position that Trigosul did not really need a conforming license, then Trigosul should simply be valued *as if it* had had a Class B License all along. In either case, the distinction is irrelevant. In determining the quantum of compensation owed for Uruguay’s breaches, the Tribunal should accordingly proceed on the assumption of a “but-for” scenario in which Trigosul either would have had a Class B license or could have engaged in all activities authorized by such a license without having to obtain one.⁷²⁶

313. As set out in Uruguay’s 2003 telecommunications regulations, a Class B license authorizes the holder to provide “*all* data transmission services that are technically and legally feasible under current law.”⁷²⁷ Notably, Uruguay’s regulatory definition of the scope of a Class B license does not distinguish between transmissions to fixed or mobile points, but simply

725. See also Econ One Report ¶ 26 (“a Class B license corresponds to the type of authorization that Trigosul had”). See also Econ One Report ¶ 46 n.58 (“As we mention above, if Trigosul had been issued a ‘conforming license,’ it would have been a Class B license.”). Econ One shy away from the next necessary step, valuing Trigosul’s rights on the assumption of liability, which necessary entails assuming that Trigosul would have a Class B license or, on Uruguay’s view, rights equivalent to those available under such a license. the assumption of liability (there can be no quantum otherwise)—which necessarily entails Trigosul having a Class B license or equivalent rights.

726. Uruguay’s argument that “any similarity between the mobile telecommunications market in Uruguay and Argentina is irrelevant,” Counter-Memorial ¶ 359, is therefore flat wrong. In the “but-for” scenario relevant to compensation for Uruguay’s breaches, that is precisely the comparison that matters. Although Uruguay further seeks to undermine Compass Lexecon’s comparables analysis by arguing that its telecommunications market is “not comparable” to Argentina’s, see Counter-Memorial ¶¶ 359-63, most of the examples it gives are irrelevant to mobile telecommunications. See Second Dellepiane Report at ¶¶ 44-46. Antel’s unique role as a “leading legal monopoly company in the provision of mobile and fixed telephony and broadband internet services,” see Counter-Memorial ¶ 360, proves too much. It is far more relevant to liability—or at least to the motive for Uruguay’s breaches than to anything else. See *supra* ¶¶ 17-21.

727. See Reglamento De Administración Y Control Del Espectro Radioeléctrico (Mar. 25, 2003); Decree No. 114/000 (Mar. 25, 2003); Decree No. 115/003 (Mar. 25, 2003) (C-017).

authorizes “all data transmission services that are technically and legally feasible.”⁷²⁸ In his report, telecommunications expert Luis Valle accordingly concludes that the range of services that would be authorized by a Class B license would include the transmission of mobile broadband data, a use for which Trigosul’s Spectrum had been designated by the International Telecommunications Union (*ITU*).⁷²⁹

314. In this regard, Uruguay’s insistence that Trigosul could not have provided mobile broadband services without a Class A license for “mobile telephony” is not well founded.⁷³⁰ Even before the 2003 Telecommunications Regulations defined four “Classes” of licenses, URSEC’s regulatory practice had been to license wireless broadband services separately from “broadcasting services (radio and television) and telephony.”⁷³¹

315. This was a sensible approach. “Telephony” is generally understood to refer to

728. Reglamento De Administracion Y Control Del Espectro Radioelectrico (Mar. 25, 2003); Decree No. 114/000 (Mar. 25, 2003); Decree No. 115/003 (Mar. 25, 2003) (**C-017**); Valle Report ¶ 38.

729. Valle Report ¶¶ 18, 73. Uruguay has been an ITU Member State since 1902. *See* ITU Website, List of Member States, “Uruguay” (**C-261**). Under Uruguayan law, URSEC is obliged to pay regard to the Radio Regulations of the International Telecommunications Union in allocating the radio electric spectrum. *See Reglamento De Administracion Y Control Del Espectro Radioeléctrico*, Decree No. 114/003 (Mar. 25, 2003) (**C-017**) at 3, 4. *See also* ITU. 2012. *Radio Regulations*, p. 118 (**CLEX-114**).

730. Econ One state that they were instructed to consider that wireless broadband services to mobile telephones, “fall under a Class A license for mobile telephony.” *See* Econ One Report ¶ 146. Yet none of the passages in Mr. Cendoya’s witness statement that Uruguay’s experts cite, at paragraph 146, note 221 of their Report, as supporting this proposition quite does so. *See* Cendoya Witness Statement ¶¶ 18 (authorizations are limited to indicated services); 24 (acknowledges that Class A licenses cover “Class A, mobile telephony” while Class B cover “wireless data transmission”); 63 (nonsequitur that “Dedicado has provided wireless fixed data transmission services with an authorization and allocation similar to that of Trigosul, without having a Class B license and, at the time, it managed to develop a successful business”); 83 (acknowledges that frequencies were given to Dedicado during pendency of proceedings before the TCA); 140 (insists that Trigosul is limited to its PTP and PTMP authorization); 144 (insists that Trigosul is limited to its PTP and PTMP authorization).

731. *See, e.g.*, URSEC Resolution 768/999 of September 9, 1999 (**C-262**) at 1; URSEC Resolution 748/999 of August 31, 1999 (**C-263**) at 2; URSEC Resolution 182/999 of March 23, 1999 (**C-264**) at 1; URSEC Resolution 1085/000 of October 5, 2000 (**C-265**) at 2. These URSEC resolutions respectively authorize Novamell (Dedicado), Elford (Telefónica Móviles del Uruguay) and Telstar to install and operate a “wireless broadband network for the non-exclusive provision of data transmission services, which does not involve the provision of broadcasting services (Radio and television) or telephony, subject to the availability of Radioelectric spectrum.” [“la instalación y operación, con carácter comercial de una red inalámbrica de banda ancha para la prestación en forma no exclusiva del servicio de transmisión de datos, que no involucre la prestación de servicios de radiodifusión (radio y televisión) o telefonía, supeditada a la disponibilidad de espectro radioeléctrico”]

“the science of transmitting voice over a telecommunications network.”⁷³² Telephony is thus a distinct service from the provision of mobile broadband. In fact, as Mr. Valle explains, the two frequently use completely different frequencies: it is not unusual for “telephony” to be transmitted on 3G frequencies, while mobile broadband data flows over 3.5G or 4G frequencies.⁷³³ By confusing the distinction between telephony and broadband that is recognized in URSEC’s own regulatory practice, Uruguay and Econ One seek artificially to depress the value of Trigosul’s but-for rights to use the Spectrum.⁷³⁴

316. Uruguay’s related attempt to argue that Trigosul’s Spectrum would have been incompatible with the provision of mobile broadband fails as well.

317. Uruguay argues in this regard that “the popular iPhone 7 is not compatible with” Trigosul’s Spectrum, and declares it “inconceivable that a telephone operator with authorization to provide 4G LTE services would operate today at a frequency incompatible with the iPhone 7.”⁷³⁵ Here again, Uruguay’s argument is misleading, because an arms-length purchaser of Trigosul and its rights to use the Spectrum in the but-for scenario would, as Mr. Valle explains, look not simply to existing devices, but to foreseeable future development of mobile

732. See U.S. Federal Communications Commission “Glossary of Telecommunications Terms” (C-266).

733. Valle Report ¶ 42.

734. Even in a but-for valuation scenario, the extent of Trigosul’s rights to use the Spectrum for mobile broadband is, as Compass Lexecon explains, not ultimately decisive as to the valuation of Trigosul’s license. This is because an operator interested in acquiring Trigosul’s rights to use the Spectrum for FMV would likely already have the necessary authorizations or plan to obtain them. Such a purchaser would be willing to pay up to the FMV of the right to use Trigosul’s Spectrum. See Second Dellepiane Report ¶¶ 9 n.12, 28 n.33. That, during negotiations for a potential acquisition of Trigosul’s rights, Antel’s Deputy Commercial Director did not question Luis Herbon’s description of Trigosul’s Spectrum as being useful for the provision of mobile broadband is consistent with this understanding. After all, Antel would have had every incentive to argue that Trigosul’s frequencies were not useful for mobile broadband in an effort to negotiate down the price. See email exchange between Luis Herbon and Osvaldo Novoa, dated July 12, 2006 (CLEX-137). See Valle Report, ¶¶ 38-41.

735. Counter Memorial ¶ 358.

technology.⁷³⁶

318. Indeed, as Mr. Valle details in his Report, the frequencies lying within Trigosul's Spectrum are increasingly being adapted for mobile broadband on a worldwide basis.⁷³⁷ The International Telecommunications Union (ITU) has accelerated this trend by identifying the Spectrum as appropriate for such uses, a factor that would cause investors reasonably to rely on the Spectrum's foreseeable compatibility with mobile devices.⁷³⁸ Such prospects would have significantly increased the strategic value of Trigosul's rights to use the Spectrum, especially where, but for Uruguay's breaches, those rights were of indefinite duration.⁷³⁹ Simply put, an investor acquiring Trigosul for its rights to use the Spectrum would look not to the iPhone7 but to the future.⁷⁴⁰

736. Valle Report ¶ 74 (“Cuando las organizaciones internacionales, como la UIT, y las agencias gubernamentales comienzan a identificar una banda para un nuevo uso, como fue en su momento el de brindar datos móviles en la banda 3,4-3,8 GHz, lo hacen considerando que los fabricantes de dispositivos móviles deben ser capaces de desarrollar en el futuro cercano, si aún no lo han hecho, compatibilidad para el nuevo uso en dicha banda. Consecuentemente, la industria da por descontado que la compatibilidad de los dispositivos móviles será alcanzada.”).

737. See Valle Report ¶ 75 (noting commercial mobile broadband operations over the 3.5 GHz band in countries including Bahrain, Belgium, Canada, the Phillipines, United Kingdom, and Spain); ¶¶ 77-80 (noting similar developments in China, Finland, and Japan).

738. Valle Report ¶ 74; see also *Id.* ¶¶ 77, 79, 80-81 (discussing the comercial development of the 3.5GHz band for mobile broadband use in inter alia Japan, China and the United Kingdom).

739. See Second Dellepiane Report ¶¶ 52-53 (“Although it is true that most mobile devices were not compatible with this band as of the date of valuation, the value of the Authorization must take into account the contemporary expectations and perspective for the 3.5 GHz band, given the rapid emergence of 5G data technology and ITU's specifications for this band in relation to the deployment of mobile networks. As these expectations unfold, operators work with equipment manufacturers to make equipment and networks gradually compatible. Thus, given the evolution of standards at the ITU, the 3.5 GHz band would have a strategic value for mobile operators.”)

740. In his second Report, Mr. Dellepiane has carefully adjusted his valuation to account for technical differences in the properties of Trigosul's Spectrum and lower frequencies. Specifically, Mr. Dellepiane has adjusted his FMV valuation to incorporate the difference in value resulting from the potentially greater capital expenditures required to support mobile telephony over the frequencies held by Trigosul, relative to the capital expenditures required to support operations over lower frequencies. Notably, the application of such an adjustment results in a valuation of Trigosul's license that is only 7.4% lower than Compass Lexecon's original valuation. See Second Dellepiane Report ¶¶ 13, 61; see also *Id.* ¶ 56.

3) URSEC’s transfer of Trigosul’s rights to Dedicado was not for USD \$0 and also is not an appropriate guide to the fair market value of Trigosul’s rights in the “but-for” valuation scenario.

319. Uruguay also tries to sow confusion by suggesting that URSEC’s unlawful transfer of Trigosul’s rights to Dedicado should have something to do with the valuation of those rights. Specifically, Uruguay rather brazenly argues that the most “comparable transaction” to a sale of Trigosul’s rights for FMV is none other than URSEC’s transfer of Trigosul’s frequencies to Dedicado in September 2013.⁷⁴¹ Dedicado, Uruguay argues, used the same frequencies “for the same service that Trigosul was authorized to provide” and also held the right to use them “on a provisional and revocable basis. Characterizing the allocation of the frequencies to Dedicado as having been made “for free” URSEC argues that “the ‘price’ paid by Dedicado to receive the frequencies”—and thus, on Uruguay’s view—their FMV, was zero.⁷⁴²

320. This is not correct. *First*, as shown above, Trigosul’s rights to use the Spectrum were not revocable not at will, but only on legal grounds subject to due process. *Second*, but for Uruguay’s breaches, Trigosul’s rights to use the Spectrum would in all probability have included the right to provide substantially more valuable services under a Class B license. *Third*, URSEC’s transfer of the Spectrum to Dedicado was not even a market transaction at all, but an administrative action ostensibly taken in response to Dedicado’s request for replacement frequencies, in light of technical challenges that it encountered in operating over the same frequencies in the same 3600-3625 MHz and 3675-3700 MHz band that URSEC later “offered” to Trigosul in an attempt to settle this arbitration.⁷⁴³ *Finally*, even if one were to imagine that the

741. Counter-Memorial ¶ 364.

742. *Id.*

743. See URSEC. 2013. *Resolution 220/2013 (CLEX-023)* (basing its petition on the grounds that “... es imprescindible adoptar las medidas tecnológicas que permitan que nuestra red inalámbrica de datos disponga de canales contiguos, optimizando el recurso del espectro de las radiocomunicaciones, llegando a

transfer of Trigosul’s rights to Dedicado was a “market” transaction, it would still not be the case that Dedicado obtained Trigosul’s rights “for free.” To the contrary; it obtained them in exchange for its old rights.⁷⁴⁴ While those rights were not as valuable as Trigosul’s rights, they were—at least according to Uruguay—worth something.

D. In The “But-For” Valuation Scenario, URSEC Would Have Acted As A Reasonable, Good-Faith Regulator.

321. There is yet another important and broader dimension to a “but-for” valuation scenario in which Uruguay’s treaty breaches are assumed away. In a “but for” scenario, URSEC must be assumed to have adopted a very different attitude towards Italba and Trigosul. In a “but-for” valuation scenario, a State must be assumed to behave in accordance with its legal obligations and with its own law.⁷⁴⁵

322. Accordingly, the Tribunal must assume that, rather than discriminate against Trigosul and Italba in a manner devoid of good faith, URSEC would in a “but-for” valuation scenario administer Uruguay’s telecommunications law in good faith and in pursuit of the public

velocidades máximas y a su vez minimizando las bandas de guarda”; b) “... la necesidad de lograr una adecuada separación entre las frecuencias de ida y de vuelta y a la vez, evitar la partición espectral que impide el adecuado despliegue de nuevas tecnologías y obtener los mayores anchos de banda posible y aumentar la eficiencia en el uso de la banda.”); see also Memorial ¶ 82; URSEC Proposal (May 9, 2016) (C-095); Counter-Memorial ¶ 26

744. Contrary to Uruguay’s suggestion, *see* Counter-Memorial ¶ 357 (citing Letter from A. Yanos to P. Reichler et al (May 6, 2016) (C-096)), there is no contradiction between this conclusion and Italba’s rejection of Dedicado’s second-hand frequencies as “virtually worthless” in the context of settlement discussions. Dedicado’s rights were objectively less useful than Trigosul’s—otherwise Dedicado would not have asked to swap frequencies. *See also* Valle Report ¶¶ 98-105. But for Trigosul and Italba, specifically, after suffering from Uruguay’s multiple breaches of the Treaty over the better part of a decade, and already seeking compensation in this arbitration, they were indeed virtually worthless.

745. This reflects not just the principle of full reparation for the breach that is to be redressed by full reparation but also the general principle of international law that “a State cannot reduce its liability for a wrongful act . . . on the basis of another wrongful act.” *See, e.g., Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (October 5, 2012) (CL-150), ¶ 541; *Tippetts, Abbott, McCarthy, Stratton (TAMS) v. TAMS-AFFA Consulting Engineers of Iran, et al.*, Case No. 7, Award No. 141 7-2 (June 22, 1984) (CL-151), 6 Iran-U.S. C.T.R. 219 at 228 (“It is a well-recognized principle in many municipal systems and in international law that no one should be allowed to reap advantages from their own wrong, *nullus commodum capere de sua injuria propria.*”).

interest. As defined in Uruguayan law, that public interest unsurprisingly includes advancing the efficient use of the telecommunications Spectrum.⁷⁴⁶

323. This does not mean, of course, that URSEC would have treated Trigosl with favoritism similar to that apparently shown to Antel (or even Dedicado), but simply that URSEC would not have engaged in conduct that breached the Treaty’s guarantees of fair and equitable treatment and full protection and security, as detailed above and in Italba’s Memorial.⁷⁴⁷

Accordingly, in a “but-for” valuation scenario, URSEC would not have for years neglected Trigosl’s applications for a conforming license. It would have acted: either to grant the application as the 2003 URSEC Regulations required, or on the view of its own law adopted by Uruguay in this arbitration, to deny the application as unnecessary.⁷⁴⁸ All told, in a “but-for” valuation scenario, it must be assumed that URSEC would have exercised its regulatory powers and discretion in furtherance of its official objectives of advancing the efficient use of the Spectrum.⁷⁴⁹

324. This means that it would, in a “but-for” valuation scenario have been appropriate to expect reasonable regulatory adaptations of the authorizations granted. Thus, if the parameters of Trigosl’s license restricted it from providing a more valuable service than the frequencies allocated to it would support, it is reasonable to expect that necessary authorizations would have

746. *See, e.g.*, Decree 114/003, Radioelectric Spectrum Regulation (C-017) at 1. (“NOW, WHEREAS: I) the management, defense and supervision of the Radio Electric Spectrum are essential in order to make an efficient use of such scarce resource, and to promote the development, optimization and usage of new radio electric services, networks and technologies.”); Article 72 Law 17,296 (C-013) at 1 (defining as one of URSEC’s objectives “Equal provision of services, with regularity, continuity, and quality”); Article 86 of Law 17,296 (C-013) at 3 (“In terms of telecommunications services, URSEC shall have the following responsibilities and legal powers... c. To manage, defend, and control the national radio spectrum”).

747. *See supra* Sections IV.C-D; Memorial ¶¶ 122-149.

748. *See supra* Sections II.C.2, III.C.2, IV.C.4(b).

749. On *either* view of the requirements of the URSEC regulations, a “but-for” URSEC that acted in good faith would have treated Trigosl and Italba’s applications very differently in ways that would have allowed Italba’s foregone transactions to go forward.

been forthcoming, in keeping with URSEC’s statutory objective of advancing the efficient use of the Spectrum.⁷⁵⁰ In this regard, Mr. Valle notes that it is common for telecommunications regulators to adjust the scope of pre-existing authorizations to facilitate the provision of new services where telecommunications technology may evolve faster than formal legislation.⁷⁵¹

325. Where Trigosul’s Spectrum is in a frequency band that is both technically suited for 4G and that the International Telecommunications Union (with Uruguay’s adherence) in 2012 designated for mobile uses, it is reasonable to conclude that but for Uruguay’s breaches of the Treaty, URSEC would in all probability have issued any official authorizations necessary for Trigosul to use its Spectrum for mobile broadband data transmission.⁷⁵²

* * *

326. For the foregoing reasons, Trigosul’s rights to use the Spectrum would, but for Uruguay’s breaches of the Treaty, in all probability have encompassed provision of not only PTP and PTMP but also mobile broadband data transmission services.⁷⁵³ The frequency auctions that occurred in Argentina and Uruguay between March 2013 and June 2015 are therefore reasonable and appropriate comparators for the FMV of Trigosul’s license, as adjusted in Compass Lexecon’s first and second reports.⁷⁵⁴ Based on Compass Lexecon’s analysis, Trigosul’s rights

750. *See, e.g.*, Decree 114/003- Radioelectric Spectrum Regulation (C-017) at 1. (“NOW, WHEREAS: I) the management, defense and supervision of the Radio Electric Spectrum are essential in order to make an efficient use of such scarce resource, and to promote the development, optimization and usage of new radio electric services, networks and technologies.”); Article 72 Law 17,296 (C-013) at 1 (defining as one of URSEC’s objectives “Equal provision of services, with regularity, continuity, and quality”); Article 86 of Law 17,296 (C-013) at 3 (“In terms of telecommunications services, URSEC shall have the following responsibilities and legal powers... c. To manage, defend, and control the national radio spectrum”).

751. Valle Report ¶¶ 66-69.

752. Valle Report ¶¶ 41.

753. Second Dellepiane Report ¶¶ 20-29; Valle Report ¶¶ 21, 25-28, 52.

754. Second Dellepiane Report ¶¶ 29. Moreover, even if the Class B license to which Trigosul was entitled did not grant rights for mobile data transmission, a willing buyer of Trigosul’s license in the Spectrum would either already have an authorization to provide mobile services, or could acquire such an authorization with

to use the Spectrum, but for Uruguay's breaches, would have had an adjusted FMV as of March 1, 2015 of US\$ 38.8 million.⁷⁵⁵

E. Under The Full Reparation Standard, Italba Is Entitled To Compensation Equal To The Historical Profits It Would In All Probability Have Received But For Uruguay's Treaty Breaches.

327. Uruguay must also compensate Italba for the business opportunities lost as a result of its treaty breaches bound up in URSEC's failure to grant Trigosul a conforming license.

328. As demonstrated above and in Italba's Memorial, URSEC caused Uruguay to breach the Treaty by, inter alia, unjustifiably refusing to issue a conforming license to Trigosul.⁷⁵⁶

329. As a direct consequence, five business ventures, which reached advanced stages of development or were the subject of serious negotiations, failed to go forward due to Trigosul's lack of a conforming license: (a) the Phinder/Zupintra transaction, in which a joint venture agreement had been executed and initial construction and testing on Zupintra's Latin American network had been performed;⁷⁵⁷ (b) the Telmex transaction, in which the parties had exchanged a business plan and were engaged in advanced negotiations;⁷⁵⁸ (c) the transaction with Dr. Garcia's radiology clinics, in which a contract for services had been executed and Trigosul had

relative ease. As Mr. Dellepiane recognizes, broadband spectrum is a finite, and therefore valuable, resource, while mere authorization to engage in a particular use of spectrum is relatively readily available. Second Dellepiane Report ¶¶ 9 n.12. Therefore, even if Trigosul's license were limited to fixed data transmission, any resulting adjustment to the FMV derived from the comparator auctions in Argentina and Uruguay should be negligible. *Id.*

755. Second Dellepiane Report ¶¶ 13, 61.

756. *See supra* Section II.C.4-7, IV.C-D.

757. *See supra* Section II.A, II.C.4. It is important to note that the Phinder/Zupintra transaction represented a significant opportunity. First Alberelli Witness Stmt. ¶¶ 46-51; Second Alberelli Witness Stmt. ¶ 31; Hall Witness Stmt. ¶ 3; van Arem Witness Stmt. ¶ 3. In Mr. Dellepiane's report, historical lost profit damages are capped based on the implicit value of the Spectrum. However, this is an extremely conservative approach. In fact, Phinder's own calculation of projected profits from the project exceed USD \$1.5 million per month. Email from C. Hall to G. Alberelli with attachment (Jan. 15, 2007) (C-267).

758. *See supra* Sections II.A, II.C.4, II.C.7.

commenced test services on a trial basis;⁷⁵⁹ (d) the Canal 7 transaction, in which the parties were engaged in advanced negotiations and Trigosul was providing test services on a trial basis;⁷⁶⁰ and (e) the Grupo Afinidad Mary transaction, for which Italba had explored the serious interest for Trigosul's services that was evident in the community.⁷⁶¹

330. In its Counter-Memorial, Uruguay dismisses Compass Lexecon's calculation of profits lost to Italba as a result of Uruguay's breaches derailing these five transactions as "speculative."⁷⁶² Uruguay is wrong. Lost profits are not "speculative" merely because a business is not yet a going concern. As the tribunal in *Crystallex v. Venezuela* recognized, "once the fact of future profitability is established and is not essentially of speculative nature, the amount of such profits need not be proven with the same degree of certainty."⁷⁶³ As Compass Lexecon's Mr. Dellepiane explains, the information available on these business ventures is sufficient to estimate the extent of Italba's historical lost profits, and the amount of lost profits

759. See *supra* Section II.C.6. Uruguay's accusation that the documents Italba submitted to corroborate the transaction between Trigosul and Dr. Garcia's radiology clinics are forged is unfounded and should be disregarded. See Counter-Memorial ¶¶ 381-85. As set out above, Uruguay's charges are part of a highly-politicized effort to discredit and intimidate Italba's witnesses and interfere with the preparation of Italba's case. See *supra* Section II.C.6, ¶¶ 53(n), 61. Yet even while Italba's witnesses have not been allowed to confront the witnesses recruited against them, an independent forensic investigator, Axel Bolanos of FTI Consulting, Inc., has confirmed the authenticity of the email correspondence concerning the transaction exchanged between Dr. Alberelli, Dr. Daniel Tellez, Dr. Marcella Tellez, and individuals in Dr. Garcia's office is authentic. See FTI Report ¶ 6. If there is cause for suspicion with respect to Uruguay's accusation, it is the fact that Dr. Garcia's declarations contradict themselves, and that Dr. Garcia's narrative changed after his meeting with the Secretary of the Presidency of Uruguay, which took place after Italba submitted its Memorial in this arbitration. See *supra* Section II.C.6. In any case, Italba's claim for historical lost profits with respect to Dr. Garcia's radiology clinics represents a small fraction (approximately 6.2%) of Uruguay's total liability. See Compass Lexecon Supplemental Report, Table I. The Tribunal should not be distracted by Uruguay's contrived criminal investigation.

760. See *supra* Section II.C.5. Nonetheless, Uruguay's argument ignores the crux of Italba's claim with respect to the Canal 7 transaction: Trigosul would have been able to develop its business opportunity with Canal 7 further, but for URSEC's failure to conduct timely and proper inspections and Uruguay's wrongful revocation of Trigosul's license. See First Amaro Witness Stmt., Questions 11, 18-25; Second Amaro Witness Stmt. at 4-5.

761. See *supra* Section II.C.7.

762. See Counter-Memorial ¶ 305.

763. *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (Apr. 4, 2016) (CL-020), ¶ 875.

calculated has been confirmed to be economically reasonable.⁷⁶⁴

331. Further, Trigosul's supposed inability to provide mobile data transmission services would not have hindered any of these transactions, because Italba's joint venture partners would have contributed their own respective authorizations to the common enterprise.⁷⁶⁵ In such circumstances, Trigosul was permitted to contribute its Spectrum to the joint venture, allowing the joint venture partner to provide authorized services to customers in collaboration with Trigosul.⁷⁶⁶

332. For these reasons, and as further detailed in Mr. Dellepiane's analysis, the historical lost profits owed to Italba in full reparation for Uruguay's breaches amount to USD \$12 million, as of March 2015.⁷⁶⁷

F. Under The Full Reparation Standard, The Quantum Of Compensation Awarded Must Be Brought To A Present Value By An Award Of Interest.

333. The determination of an appropriate interest rate, and the accrual of such interest on a compounding basis, is a vital component of compensation under the "full reparation" standard. This is because an award of interest aims to restore the injured party to the position it would have occupied had the State not acted wrongfully.⁷⁶⁸

764. See Second Dellepiane Report ¶¶ 68-69.

765. Second Alberelli Witness Stmt. ¶¶ 25-27; Second Herbón Witness Stmt. ¶¶ 17, 18.

766. Uruguayan law is no obstacle to such an arrangement and Uruguay does not identify any authority to the contrary.

767. See Second Dellepiane Report ¶ 69.

768. See ILC Draft Articles on State Responsibility for Internationally Wrongful Acts (2001), (CL-072), Art. 38(1) ("Interest on any principal sum due . . . shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculations shall be set so as to achieve that result."); J. Y. Gotanda, *Awarding Interest in International Arbitration*, 90 Am. J. of Int'l Law (1996) (CL-079), at 41-42, 57; *Crystallex v. Venezuela*, Award (CL-020) at ¶ 930 ("The substantive international legal obligation to pay interest on monies due is well established. An authoritative statement of the position is to be found in Article 38(1) of the ILC Articles[.]"); *Case Concerning The Factory at Chorzów (Claim for Indemnity)*, Permanent Court of International Justice, PCIJ Series A, No 17, Judgment on the Merits (Sept. 13, 1928) (CL-070) at 47 ("[R]eparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the

334. Uruguay's reliance on the Treaty's standard of compensation for a lawful expropriation, this time to suggest that the Tribunal apply a risk-free interest rate, is again misplaced.⁷⁶⁹ As discussed above, Article 6(3) of the Treaty only provides the standard of compensation for lawful expropriations, not for circumstances of unlawful expropriation and other Treaty breaches for which "full reparation" is required.⁷⁷⁰ It is irrelevant to compensation in this case.

335. Italba is entitled to two forms of interest under the full reparation standard: (a) pre-award interest, which reflects the time value of money and actualizes the opportunity cost of Italba's losses suffered between the valuation date, *i.e.*, March 1, 2015, and the date of the Tribunal's Award;⁷⁷¹ and (b) post-award interest, which is applied to the entire sum of damages awarded to Italba to ensure that Italba is not harmed further by delay in Uruguay's payment of the Award.⁷⁷²

situation which would, in all probability, have existed if that act had not been committed.") and 49 (the Court's task was to "determin[e] what sum must be awarded. . . to place the dispossessed Companies as far as possible in the economic situation in which they would probably have been if the seizure had not taken place"); *Ioan Micula and others v. Romania*, ICSID Case No ARB/05/20, Award (Dec. 11, 2013) (CL-080), ¶ 1265 ("Having found a breach of the BIT, the Tribunal must ensure that the Claimants are restored to the position they would have been had the breach not occurred. This includes awarding interest on the sums that the Claimants would have had if the breach had not occurred in order to compensate for the cost of money until the full payment of the Award.").

769. See Counter-Memorial ¶¶ 409-16.

770. See *supra* Section V.A.

771. See *Santa Elena v. Costa Rica*, Award (CL-029), ¶ 104 (awarding an amount of interest reflecting "the additional sum that [the claimant's] money would have earned, had it, and the income generated by it, been reinvested each year at generally prevailing rates of interest"); *Sylvania Technical Systems, Inc. v. The Government of the Islamic Republic of Iran*, Award No. 180-64-1 (June 27, 1985), 8 Iran-US CTR 298 (CL-081) at 320 (interest reflects "the amount that the successful claimant would have been in a position to have earned if it had been paid in time and thus had the funds available to invest in a form of commercial investment in common use in its own country.").

772. See ILC Draft Articles on State Responsibility for Internationally Wrongful Acts (2001) (CL-072), Art. 38(2) ("Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.")

1) Interest should be awarded based on the cost of capital or, alternatively, Uruguay's borrowing rate.

336. The pre-award and post-award interest rate should both be based on the weighted average cost of capital of a telecommunications provider in Uruguay or, alternatively, Uruguay's borrowing rate.⁷⁷³

337. First, as described previously, the joint ventures and business projects that Italba sought to develop all failed because of URSEC's unjustified refusal to issue a license to Trigosl that conformed to the 2003 License Regulations.⁷⁷⁴ Uruguay's breaches of the Treaty thus deprived Trigosl of the stream of free cash flows that would have been derived from those foregone business ventures.⁷⁷⁵

338. These circumstances are analogous to those in *ConocoPhillips v. PDVSA*, where the respondent's contractual breach deprived the claimant of the cash flows expected to be received from a project, leading the tribunal to hold as follows:

Under such circumstances, the interest rate to be applied should measure the opportunity cost of capital, i.e. the cash flows [the claimant] was deprived of as a result of Respondent's contractual breach which, had they been timely received by [the claimant], it would have had the opportunity to apply them to the Project or some alternative productive use.⁷⁷⁶

339. Here, the cash flows that Trigosl's thwarted business ventures would have generated would have earned returns, had they been reinvested, at the rate at least equal to the weighted average cost of capital of a telecommunications provider in Uruguay (*i.e.*, Trigosl's

773. See Memorial ¶¶ 200-09.

774. See *supra* Section II.C.4-7.

775. See *id.*

776. *Phillips Petroleum Company Venezuela Limited & ConocoPhillips Petrozuata B.V. v. Petroleos de Venezuela, S.A.*, ICC Case No. 16848/JRF/CA (C-16849/JRF), Award (Sept. 17, 2012) (CL-083), ¶ 295(ii).

opportunity cost). Consequently, pre-award and post-award interest at the cost of capital is necessary to provide Italba with “full reparation” for Uruguay’s Treaty breaches.

340. An award of pre- and post-award interest is also necessary to prevent unjust enrichment to Uruguay, which would otherwise effectively receive a free loan from Italba: failing to pay timely compensation for its expropriation of Italba’s investment without compensating Italba for the return that Italba would in all probability have earned on the amount of that compensation over the period it was unlawfully withheld.⁷⁷⁷ Full reparation must, in other words, reflect the time value of money. Italba must therefore be awarded interest reflecting at the very least the reasonable cost Uruguay would have incurred in borrowing the amount in question.⁷⁷⁸ This interest rate corresponds to the rate at which *willing* investors lend to Uruguay, *i.e.*, the interest rate Uruguay pays on short-term sovereign bonds.⁷⁷⁹

2) Compounded interest is necessary to achieve “full reparation.”

341. Uruguay’s argument that a “general rule of international law establishes that the

777. See T. J. Sénéchal & J. Y. Gotanda, *Interest as Damages*, 47 Colum. J. Transnat’l L. 491 2008-2009 (CL-085) at 496 (“The second reason for awarding interest is to prevent unjust enrichment of the respondent. Respondents that retain and use the money owed to the claimants during the resolution of the dispute enjoy an unfair benefit. They are receiving the earning capacity of the borrowed money without compensating the claimants for the loss of its use. Pursuant to this rationale, the respondents should be liable for at least ‘the reasonable cost the [respondent] would have incurred in borrowing the amount in question for the relevant period.’”); F. A. Mann, *Compound Interest as an Item of Damage in International Law*, 21 *University Of California Davis Law Review* 577 (1988) (CL-152) at 585 (“during that period [between breach and payment] the wrongdoer has enjoyed the fruits of the money withheld”); Mark Beeley and Richard E. Walck, *Approaches to the Award of Interest by Arbitration Tribunals*, 1 *Journal Of Damages In International Arbitration* 51 (2014) (CL-153) at 18 (“Tribunals should consider a variety of indicators of the appropriate rate, rather than simply defaulting to a risk-free or nearly risk-free rate. The alternative uses the claimant has for the monies (whether to reinvest or to pay down debt) are relevant, as are the investment returns and/or borrowing costs of the respondent who has enjoyed the use of the money. Public policy grounds should allow tribunals to reverse the unjust enrichment that a respondent has enjoyed.”).

778. See *Tenaris S.A. and Talta-Trading E Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award (Jan. 29, 2016) (CL-078), ¶¶ 584-86 (holding that the appropriate rate of interest was the rate that the State would have had to pay to borrow money from the claimants at the time of expropriation).

779. See Aaron Dolgoff and Tiago Duarte-Silva, *Prejudgment Interest: An Economic Review of Alternative Approaches*, J. Int’l Arb. (Kluwer Law Int’l 2016) (CL-084) at 102 (“the rate on the respondent’s traded debt securities or other measures of the respondent’s cost to borrow”).

victim of an unlawful act does not have any entitlement to compound interest, in the absence of special circumstances” fails to accept the overwhelming *jurisprudence constante* establishing a presumption in favor of compound interest.⁷⁸⁰ Arbitral tribunals have consistently affirmed that compound interest best achieves the customary international law rule of “full reparation.”⁷⁸¹ As the tribunal in *Gemplus v. Mexico* observed:

[I]t is clear . . . that the current practice of international tribunals (including ICSID) is to award compound and not simple interest. In the Tribunal’s opinion, there is now a form of “*jurisprudence constante*” where the presumption has shifted from the position a decade or so ago with the result it would now be more appropriate to order compound interest, unless shown to be inappropriate in favour of simple interest, rather than vice-versa.⁷⁸²

342. Compound interest is also necessary to avoid under-compensation, which would unjustly enrich Uruguay.⁷⁸³ Further, semi-annual compounding is recognized as an appropriate

780. Counter-Memorial ¶ 418.

781. *See, e.g., Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Award (Nov. 27, 2013), (CL-154), ¶ 261 (“[T]he standard of full reparation would not be met if an award were to deprive a Claimant of compound interest which would have been available on the sums awarded had they been paid in a timely manner.”); *Ioan Micula v. Romania*, Award (CL-080), ¶ 1266 (“The overwhelming trend among investment tribunals is to award compound rather than simple interest. The reason is that an award of damages (including interest) must place the claimant in the position it would have been in had it never been injured.”); *Gold Reserve v. Venezuela*, Award (CL-071), ¶ 854 (“Compound interest better reflects current business and economic realities and therefore the actual damage suffered by a party.”); J.Y. Gotanda, *Awarding Interest in International Arbitration*, 90 Am. J. of Int’l Law 1996 (CL-079) at 61 (“In the modern world of international commerce, almost all financing and investment vehicles involve compound, as opposed to simple, interest. If the claimant could have received compound interest merely by placing its money in a readily available and commonly used investment vehicle, it is neither logical nor equitable to award the claimant only simple interest.”).

782. *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award (June 16, 2010) (CL-026), ¶¶ 16-26.

783. *See* Sénéchal and Gotanda, *Interest as Damages*, Colum. J. Transnat’l L., Vol 47 (2009) (CL-085) at 505; (explaining that an award of compound interest “reflects the majority of commercial realities in that a loss of value by a company, active in normal trading operations, implies the loss of use of that value. Not recognizing these ‘realities’ would also lead to awarding a windfall to the Respondent.”).

periodicity for compound interest.⁷⁸⁴

343. Italba should therefore be awarded: (a) pre-award interest at an annual rate of 8.77% compounded semi-annually from the date of the expropriation until the date of the Tribunal's award, or, in the alternative, an annual rate of 4.39% compounded semi-annually from the date of the expropriation until the date of the Tribunal's award; and (b) post-award interest at the rate of 8.77% from the date in which an award is issued by the Tribunal until the date of payment, or, in the alternative, an annual rate of 4.39% compounded semi-annually from the date in which an award is issued by the Tribunal until the date of payment.⁷⁸⁵

VI. CONCLUSION AND PRAYER FOR RELIEF

344. On the basis of the foregoing, without limitation and reserving Italba's rights to supplement these prayers for relief, including without limitation in the light of further action by Uruguay, Italba respectfully requests that the Tribunal:

- a. DECLARE that Uruguay has breached:
 - i. Article 6 of the Treaty by unlawfully expropriating Italba's investments in Uruguay and/or taking measures equivalent to unlawful expropriation with respect to Italba's investments in Uruguay;
 - ii. Article 5 of the Treaty by failing to accord Italba's investments in Uruguay fair and equitable treatment;
 - iii. Articles 3 and 4 of the Treaty by failing to accord Italba treatment no less favorable than it accorded to other investors in like circumstances; and
 - iv. Article 5 of the Treaty by failing to afford Italba's investments in Uruguay

784. See, e.g., *Siag v. Egypt*, Award (CL-016), ¶ 598 (compounding interest rate semi-annually); *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award (Mar. 2 2015) (CL-155), ¶ 519 (same).

785. See Second Dellepiane Report ¶¶ 73-79; see also Memorial ¶¶ 210-11.

full protection and security.

- b. ORDER Uruguay to pay damages to Italba for its breaches of the Treaty in the amount of USD \$61.1 million, together with payment of compound interest accruing semi-annually from April 30, 2017 at the rate of 8.77%, until full payment of the Award has been made in accordance with Article 34 of the Treaty;
- c. AWARD such other relief as the Tribunal deems appropriate; and
- d. ORDER Uruguay to pay all of the costs, attorneys' fees, and expenses of this arbitration, including Claimant's legal and expert fees, the fees and expenses of any experts appointed by the Tribunal, the fees and expenses of the Tribunal, and ICSID's other costs, in accordance with Article 34(1) of the Treaty.

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Respectfully submitted,

By: 

Alexander A. Yanos
Carlos Ramos-Mrosovsky
Fara Tabatabai
Pavlos Petrovas
Andreas Baum
Rebeca Mosquera
Leticia Goni
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, NY 10004
Telephone: (212) 837-6000
Facsimile: (212) 422-4726

alex.yanos@hugheshubbard.com
carlos.ramos-mrosovsky@hugheshubbard.com
fara.tabatabai@hugheshubbard.com
pavlos.petrovas@hugheshubbard.com
andreas.baum@hugheshubbard.com
rebeca.mosquera@hugheshubbard.com
leticia.goni@hugheshubbard.com

Sandra Gonzalez
FERRERE ABOGADOS
Juncal 1392
Montevideo, C.P. 11000
Uruguay
sgonzalez@ferrere.com