

CONFIDENTIAL INFORMATION REDACTED

INTERNATIONAL CENTRE FOR SETTLEMENT  
OF INVESTMENT DISPUTES

**ITALBA CORPORATION**

*Claimant*

v.

**ORIENTAL REPUBLIC OF URUGUAY**

*Respondent*

ICSID Case No. ARB/16/9

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**REJOINDER OF THE ORIENTAL REPUBLIC OF URUGUAY**

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11 August 2017

*The Spanish version of the Rejoinder dated 11 August 2017 is the original version. In the event of a discrepancy between the original text and the English translation, the original Spanish text prevails.*

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## I. INTRODUCTION

1. The game is over for Italba.
2. It can no longer even pretend that there is any basis for this arbitration.
3. The Reply itself, and the documents Italba reluctantly disclosed after it was

ordered by the Tribunal to do so, make perfectly clear that:

- Italba neither owns nor controls Trigosul, and therefore lacks standing to assert claims on its behalf;
- Italba is itself owned and controlled by a non-United States national and has no substantial business activities in the United States. It is thus ineligible to claim protection or benefits under the Uruguay-United States BIT;
- All of the claimed “breaches” of the BIT occurred more than three years prior to the commencement of this arbitration, and are therefore time-barred; and
- Trigosul’s permits are not protected “investments” under the BIT.

4. Each of these now-irrefutable conclusions constitutes a sufficient basis in itself to dismiss all of Italba’s claims. There is thus no need even to consider addressing their merits. But, should the Tribunal wish to delve into these claims, it would find—after all that has now been said and done—that they are false (at best) and, for the most part, fraudulent.

5. With all of the evidence now in, Italba’s case turns out to be what Uruguay said it was at the beginning: a nefarious scheme by Dr. Alberelli to extort money from Uruguay. Even his own witness, a longtime friend, described him as a man given to prevarication, whose

statements should not be assumed as true.<sup>1</sup>

6. This case is built not only on Dr. Alberelli's untruthful statements, but also on his false documents, all lacking independent support or corroboration. Put simply, there is no credible evidence that corroborates or supports a single one of Dr. Alberelli's claims.

**A. JURISDICTION**

7. Italba's Reply leaves no room for doubt: this Tribunal has no jurisdiction. Claimant has failed to override any of the four jurisdictional objections Uruguay has asserted, each of which is sufficient to require the dismissal of all claims.

**1. Italba's Claimed Ownership of Trigosl**

8. The mystery of why Italba submitted no evidence that it owns Trigosl—neither in its Request for Arbitration, nor in its Memorial, nor its various written submissions seeking provisional measures—has finally been solved. There is none!

9. Italba dodged the issue as long as it could. But after its latest submission and document production, its back was finally to the wall. In the Reply, it faced a daunting challenge: how to explain that Italba owned Trigosl when the corporate records of both entities—including the share certificates of Trigosl—demonstrate the opposite. What these records plainly show is that Trigosl's shares have been owned since 1999, and are still owned, by Dr. Alberelli and his

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<sup>1</sup> "QUESTION: What's your opinion about Alberelli? ANSWER [by Dr. Tellez]. For me he is not trustworthy. [...] He told me about telemedicine, and I told him that I was not interested, that I live on my salary, he called me 50 times but I didn't show any interest. [...] He is delirious, he said that he was going to become a millionaire, and I don't believe in riches that are made so fast. [...] His proposal was not doable." Testimony of Dr. Daniel Angel Tellez before the Criminal Court of Uruguay (14 November 2016), pp. 1-2 (C-153).



mother, individually, and not by Italba. The shares have never been owned by Italba.

10. In direct contradiction of the corporate records, Italba now argues (because it has to argue *something*) that the shares owned by Dr. Alberelli and his mother were transferred to Italba in 2002. In what should not come as a surprise, the only “support” for the alleged transfer is Dr. Alberelli’s self-serving and unsupported statement, produced exclusively for the purposes of this arbitration. A slender reed, indeed! And one that is blown entirely away by the documents that the Tribunal ordered Italba to produce. In particular:

- Trigosul’s Minutes of Shareholder Meetings, duly authenticated, establish that its shares were owned 50% by Dr. Alberelli and 50% by his mother, and were repeatedly voted accordingly by them, even *after* the date of the alleged “transfer” to Italba;
- None of Trigosul’s corporate records indicates that Italba had any ownership interest or exercised any control over the company; indeed, there is not the faintest reference to Italba in any of Trigosul’s records, or in any of its filings with the Government of Uruguay;
- All of the certificates representing stock in Trigosul were issued either to Dr. Alberelli or to his mother. None was issued to Italba. All of the certificates were kept by Dr. Alberelli in a safety deposit box in Miami, which was leased in his name and that of his wife, not in the name of Italba; and
- Italba’s corporate records make no mention of any ownership interest in Trigosul. Nor do any of its filings with the United States or Florida governments.

11. Dr. Alberelli’s assertion that he personally endorsed the share certificates to Italba in 2002 are simply more prevarication from him.<sup>2</sup> Of the 20 certificates issued in his name or that

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<sup>2</sup> Second Witness Statement of Dr. Gustavo Alberelli (12 May 2017) (“Second Statement of Dr. Alberelli”), ¶ 17.

of his mother, only one bears his putative endorsement, in his own handwriting, in favor of Italba. Apart from the fact that this was given no effect by Trigosul or its shareholders (including Dr. Alberelli) subsequently, the authenticity of the “endorsement” is dubious. Dr. Alberelli admitted that he falsified the date of issuance on the very same the certificate,<sup>3</sup> and his skills at falsifying documents, including signatures, are by now well known. But, in any event, whether considered under the lens of Uruguayan or Florida law, the purported “transfer” of this share certificate to Italba, if it occurred, was invalid. Italba owns nothing.

12. The case could and should end here. In fact, it should have ended long ago, but Italba consistently refused to present the relevant evidence, despite Uruguay’s ongoing requests and statements of concern.

## **2. Denial of Benefits**

13. Uruguay has demonstrated that it is entitled to deny Italba the benefits of the Treaty. As Claimant’s own evidence shows, Italba is controlled by Mr. Alberelli, an Italian national, and has no substantial business activities in the United States. Far from supporting Italba’s position, the evidence presented in the Reply instead confirms that Italba has two employees (Mr. Alberelli and (when convenient) his wife), no office space (beyond Mr. Alberelli’s “living room”),<sup>4</sup> marginal business activities (if any), and meager finances.

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<sup>3</sup> *Id.*, note 6 (p. 5).

<sup>4</sup> Claimant’s Reply (12 May 2017) (“Reply”), ¶ 120.

14. Italba denies none of this, but invokes the nationality of Dr. Alberelli's wife (American) to claim benefits under the Treaty. Her nationality is not disputed. But it is not sufficient to warrant the benefits of the Treaty, since Italba is entirely controlled by her husband. Mrs. Alberelli is a mere figurehead; she has no serious role in managing Italba's affairs (such as they might be). Italba tried to hide this from the Tribunal, presenting Mrs. Alberelli as Secretary/Treasurer of the company. However, through its own investigation of public records in Florida, Uruguay discovered that Mrs. Alberelli was elevated to this role in October 2015—soon after Italba notified Uruguay of its intention to institute this arbitration.<sup>5</sup> In other words, this was another artifice of Dr. Alberelli's. After the decision was made to arbitrate, he deliberately created the appearance that his wife had a meaningful role in the management of Italba in order to qualify for benefits under the Treaty. That he could do so only reinforces the fact that he alone controls Italba. As such, Uruguay is within its rights in denying Italba the benefits of the Treaty.

### **3. Limitations Period**

15. The Treaty contains a strict three-year limitations period, with which Italba failed to comply. Despite having had knowledge in 2011 of the events on which it has based its claims, Italba failed to take action under the Treaty until 2016. All of its claims were therefore already time-barred by the time it initiated this arbitration.<sup>6</sup> Italba attempts to deal with the consequences of its delay by stating, based on no evidence except Dr. Alberelli's word, that until 2015 Italba

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<sup>5</sup> State of Florida, Secretary of State, *Florida Profit Corporation Amended Annual Report (27 October 2015)* (R-121).

<sup>6</sup> Because the arbitration was initiated on 16 February 2016, pursuant to the limitations period stipulated in Article 26(1) of the Treaty, no claim can be based on actions by Uruguay before February 16, 2013. Nor can any claim be based on actions taken before the Uruguay-United States BIT entered into force on 1 November 2006.

had no knowledge of the acts and injuries it supposedly suffered. But there is nothing to suggest that this assertion is true, and in fact, the evidence proves that by 2011 Italba had the requisite knowledge to trigger the limitations period for its claims concerning the failure to issue an “updated license” and the revocation of its permits. Uruguay’s alleged breaches since then, concerning the assignment of frequencies to Dedicado in 2013 and compliance with the TCA’s 2014 Judgment, are the direct result of, and concern the same injury as, the 2011 revocation, and therefore relate back to, and are equally time-barred by, the three-year limitation period. In any event, Uruguay did not breach the Treaty in assigning frequencies to Dedicado two years after it recovered them from Trigosl, and it fully complied with the TCA’s Judgment.

#### **4. Trigosl’s “License” Was Not an “Investment”**

16. The Treaty’s definition of “investment” is the coup de grâce to Italba’s jurisdictional case. The Treaty excludes from this definition—and from its protection—any license that, like Trigosl’s, does not create rights protected under domestic law. Italba has not identified any cognizable right to overcome this express carve-out in the definition of investment, nor could it, given that its license was “provisional and revocable at any time, without a right to a claim or compensation of any kind”—conditions of which Italba has always been aware, but seeks to ignore.<sup>7</sup>

17. Any of these four reasons is, by itself, sufficient to cause the dismissal of Italba’s claims. In conjunction, they demonstrate the frivolousness of Italba’s case.

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<sup>7</sup> National Communications Directorate, Resolution No. 227/97 (4 August 1997), p. 4 (R-12).

**B. MERITS**

18. Given Italba’s failure to cross the threshold of jurisdiction, there is no need to proceed to the merits. Even so, the Claimant has equally failed to present any legal grounds for finding a violation of the Treaty concerning the four acts on which it bases its claims, whether in regard to expropriation, fair and equitable treatment, including denial of justice, or full protection and security.

**1. The “Updated License”**

19. In its Reply, Italba clings to the argument that Uruguay was obligated and failed to issue an updated license to Trigosul.<sup>8</sup> But, yet again, it does not provide any evidence that such an obligation existed. Italba did little more than repeat itself, conspicuously ignoring Uruguay’s evidence and arguments to the contrary in the Counter-Memorial.<sup>9</sup> Italba does not explain how it is that none of its competitors received an “updated license,” yet each continued to operate normally without one. Italba also fails to show that it suffered any difference in treatment in that regard, let alone that its operations were adversely affected.

20. Instead, Italba retreats to the ludicrous position that Uruguay breached its Treaty obligations because it never told Italba that it did not need an “updated license.”<sup>10</sup> On the one hand, this is an admission by Italba that no such license was required. Indeed, Italba itself cites a report by Uruguay’s Communication Services Regulatory Agency (URSEC, per its Spanish

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<sup>8</sup> Reply, ¶¶ 2, 276.

<sup>9</sup> Counter-Memorial of the Oriental Republic of Uruguay (30 January 2017) (“Counter-Memorial”), ¶¶ 157-158.

<sup>10</sup> Reply, ¶¶ 25(s), 273.

acronym) that plainly states that Trigosul never needed an updated license to carry on with its business.<sup>11</sup> Moreover, Italba's assertion reveals the desperation of its position. How else might one describe an argument to the effect that, even though URSEC allowed Trigosul to continue operating without an updated license, the Treaty was "breached" because URSEC failed to tell Trigosul it did not need one to keep operating?

21. There is thus no basis for Italba's allegations that Trigosul was treated arbitrarily, discriminatorily, or in bad faith.

## **2. The Revocation of Trigosul's Permits**

22. Italba alleges that the revocation of Trigosul's permits was based on facts that URSEC knew were false. However, the Claimant has provided no evidence that URSEC thought its information to be false. In fact, URSEC had ample justification to believe that Trigosul's permits should be revoked. Italba has absolutely no response to the evidence showing that Trigosul provided virtually no services for years leading up to the revocation, and that it had no paying customers whatsoever. It was not operating, and its debts to URSEC were mounting.<sup>12</sup> None of this is refuted in the Reply.

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<sup>11</sup> URSEC Report (30 March 2006) (R-100) ("[T]he fact that the license has not been updated to date, *by no means invalidates the project of TRIGOSUL S.A.* Furthermore, Uruguay should state for record that to date no authorization has been updated for data transmission service operators in the bands of 3.5 GHz, 10 GHz, 27 GHz, and 38 GHz to the telecommunications license system.") (emphasis added). (Note that this exhibit was presented by the Claimant in its Reply as Exhibit C-184, both in Spanish and in the unofficial English. Uruguay disagrees with the English translation submitted by Italba, and therefore submits its own translation of this document in Exhibit R-100.)

<sup>12</sup> Counter-Memorial, ¶ 212; Trigosul S.A. Statistical Table (2016) (R-54).

23. Nor does Italba refute the fact that all other companies in similar circumstances were successfully providing data transmission services to thousands of Uruguayans,<sup>13</sup> while Trigosul sat idly on its authorization and assigned frequencies for more than a decade. This alone justifies the revocation.<sup>14</sup> Uruguay had a duty, which it carried out, to ensure the effective use of the limited frequencies in its radioelectric Spectrum, a scarce public good that controls the Uruguayan public's access to the internet and other telecommunications. It did no more than exercise this duty, in good faith.

24. In any event, regardless of the justification for URSEC's decision to revoke Trigosul's permits, the *Tribunal de lo Contencioso Administrativo* (TCA) ruled on the matter, and any formal defect in the resolutions ultimately carrying out the revocation was cured and corrected by the TCA's Judgment annulling the resolutions.

25. Therefore, Italba's claim of denial of due process or discriminatory treatment is plainly unsustainable.

### **3. The Assignment of Frequencies to Dedicado**

26. Italba strains to base its claim for the 2011 revocation of Trigosul's permits on the government's subsequent assignment of Trigosul's original frequencies to Dedicado, in 2013. This is nothing more than a vain attempt at time travel, for the purpose of defeating the

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<sup>13</sup> Counter-Memorial, ¶¶ 230-231.

<sup>14</sup> Ministry of National Defense, Decree No. 114/003 (25 March 2003), Art. 26 (C-017) ("Where a portion of the assigned radio electric spectrum is not used in conformity with the terms and conditions set forth in the authorization or permit granted, such nonconformity may cause the cancellation of said authorization or permit for the use of such portion of the band.").

limitations period. Because the 2011 revocation falls outside the limitations period, Italba needs to complain about something that occurred subsequently. Hence, the attack on the 2013 assignment to Dedicado. But this artificial claim lacks justification. In 2013, when the assignment was made to Dedicado, the frequencies were unpossessed and unused—by anyone. Indeed, they had been unpossessed by Trigosul for over two years, and Trigosul failed to take any action to preserve its rights concerning them during that period (which it could easily have done in the proceeding before the TCA).<sup>15</sup> Moreover, the government had a duty to ensure the efficient use of the Spectrum. It was not until September 2012 that Dedicado applied for the unused frequencies to provide services to the people of Uruguay. Following its standard procedures, URSEC considered the application and duly approved it. There was nothing unreasonable about that action.

27. Throwing mud at the wall in hopes it will stick, Italba alleges that URSEC approved Dedicado's application in "secret," and complains that it was not notified of the assignment. This is nonsense. Like all URSEC resolutions, the one assigning frequencies to Dedicado in 2013 was duly published on the agency's website for all to see, including Trigosul. That is considered proper notice under Uruguayan law.

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<sup>15</sup> Moreover, it did not act, despite the fact that Dr. Alberelli knew, as of early 2011, that URSEC was likely to reassign the frequencies to another company. Email from R. Gorter to G. Alberelli *et al.* (14 April 2011) (C-071).



28. Since the frequencies did not belong to Trigosul in any sense after 2011, it is meaningless for Italba to call the assignment of those frequencies to Dedicado an expropriation, or an arbitrary act against it, carried out in bad faith. These claims fall of their own weight.

#### **4. Compliance with the TCA's Judgment**

29. Uruguay timely complied with the TCA Judgment when it offered equivalent frequencies in April 2016. The TCA confirmed this and closed the case. Faced with this reality, Italba now argues, for the first time, that it refused Uruguay's *second* offer to return the original frequencies because it was "impossible" for Uruguay to return them to Trigosul after assigning them to Dedicado.<sup>16</sup> This *post hoc* justification not only fails, but it also stands in direct contradiction to what Italba argued in its Memorial. There, it plainly stated that "Uruguay could have revoked the transfer of Trigosul's rights to Dedicado and restored those rights to Trigosul in accordance with the TCA Judgment, as Uruguay itself acknowledged by its recent offer to do just that."<sup>17</sup> On that occasion, Claimant was right.

30. In fact, it is indisputable that Uruguay *did* offer to return the original frequencies and would have returned them had Claimant not rejected them. There was no denial of justice nor expropriation in these actions. But, after coming to the late realization that its statement in the Memorial amounted to an admission that Uruguay complied with the TCA's Judgment, Italba reversed course in the Reply. Too late. Italba cannot now claim, counter-factually, the opposite of what it admitted in the Memorial. The evidence is clear: if it had accepted URSEC's offer, it

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<sup>16</sup> Reply, ¶ 11.

<sup>17</sup> Claimant's Memorial (16 September 2016) ("Memorial"), ¶ 108.

would have received back its original authorization and frequencies. But it wanted neither. In fact, it admitted as much in the Reply, where it states that, after March 2015, barely five months after the judgment was issued, “there would have been no point in waiting any longer for Uruguay to comply with the TCA Judgment.”<sup>18</sup> Italba saw no sense in waiting because it had no interest in recovering frequencies it had no intention of using. Instead, what made “sense” to Dr. Alberelli was commencing arbitration *before* Uruguay had a chance to comply with the TCA’s judgment, and use its alleged “noncompliance” as a vehicle for obtaining, via the arbitration process, a huge financial windfall for himself.

**C. DAMAGES**

31. Italba has entirely discarded the damages valuation it originally presented, replacing it with a brand new theory. In its Memorial, Italba calculated Trigosul’s fair market value (FMV) compared to the value of other auctioned licenses (both in Uruguay and abroad), based solely on the technical capacity of Trigosul’s assigned frequencies, while ignoring the restrictions on the services it was authorized to provide—as if a remote rural plot of land zoned for grazing livestock could be assigned the same value as a similarly sized lot in a densely populated urban area zoned for luxury high-rise construction.

32. Uruguay clarified in its Counter-Memorial that Trigosul could only be valued as a company offering point-to-point and point-to-multipoint transmissions, as established in its authorization to provide services. Italba’s desire to evaluate the frequencies in a vacuum, free of

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<sup>18</sup> Reply, ¶ 190.

the limitations of Trigosul's authorization to provide services, was a fundamentally flawed basis for comparing Trigosul's permits to much more valuable licenses.

33. In recognition of Uruguay's argument, Italba and its expert on damages abandoned their original valuation based exclusively on the Spectrum's technical capacity. In the Reply, they newly theorize that Trigosul should be valued as if it were a company with a Class B license with an authorization to offer International Mobile Telecommunication (IMT) and broadband mobile services—among the most valuable and sought-after telecommunications services available. But Trigosul never had a Class B license. And even if, *quod non*, URSEC had upgraded Trigosul's permit to a Class B license, Trigosul could not have provided IMT or broadband mobile services. As a result, neither of the valuations presented by Italba is valid or accurate.

34. At the close of the Parties' written pleadings, the unalterable fact remains that since its inception Trigosul has been a company that generated no revenue, had no paying clients, failed to perform the telecommunications services it was expected to perform, and failed to keep current with its license fees. Although it enjoyed an authorization to provide wireless data transmission services on assigned frequencies for more than ten years (between 2000 and 2011), it simply failed to engage in any significant or continuous operations during this entire period. Indeed, it gave no indication that it had any interest in operating. Its only real assets—the authorization and assignment of frequencies—were revocable at any moment, without compensation. None of this is, or can be, disputed.

35. Had Trigosul been allowed to retain its authorization after January 2011, there is no reason to believe it would have shown any more interest in operating, or would have operated more successfully, than was the case in the ten years leading up to the revocation. It had no legitimate business prospects. The “evidence” of its supposed business dealings are equal parts fraudulent, inchoate, and unsupported assertions of Dr. Alberelli. In such circumstances, the only possible conclusion is that had no fair market value. There is no evidence to support any claim of damages.

\* \* \*

36. In sum, this case continues to be a flagrant abuse of the investment arbitration system in order to secure a windfall that Claimant does not deserve, at the expense of the Uruguayan people, whose government offered to comply with the TCA Judgment, twice, only to be refused both times. Far from trying to resolve this dispute, Claimant has pursued arbitration despite its own lack of standing, lack of evidence, and lack of real claims. For all the reasons outlined above and explained in greater detail to follow, Italba’s claims should not only be dismissed, but Claimant should also be held responsible for its abusive actions by being ordered to pay all of Uruguay’s legal fees and costs, its expert and witness expenses and costs, and the administrative costs associated with this arbitration.

## II. THERE IS NO JURISDICTION TO DECIDE THIS DISPUTE

37. Italba has the burden to prove that all of the conditions for the Tribunal's jurisdiction have been met.<sup>19</sup> But it has not satisfied this burden. There are at least four fatal jurisdictional flaws in its claim, which, after the Reply, continue to be apparent.

38. *First*, Italba has not shown that it owns or controls Trigosul, its alleged investment in Uruguay. From the outset of this arbitration, Uruguay has called attention to the lack of evidence for this essential element of the case. In its briefs and correspondence in opposition to Italba's application for provisional measures, Uruguay insisted that Italba had to provide evidence that it is the owner of Trigosul, to show *prima facie* that it had the right to invoke the Treaty. It did not do so. In the Counter-Memorial, Uruguay again stressed that not even Italba's Memorial offered any evidence to show that Trigosul is or was an investment of Italba, except for the self-serving statements of Dr. Alberelli and Mr. Herbón.

39. The Reply offered Italba a final opportunity to prove the existence of its supposed investment in Trigosul, but it squandered it. Worse still, the documentation accompanying the Reply shows that the true and sole shareholders of Trigosul are Dr. Alberelli and his mother Carmela Caravetta, both Italian citizens. Given that the shareholders are Italian citizens, they cannot invoke the Treaty against Uruguay. Italba does not qualify as an "investor" in Trigosul,

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<sup>19</sup> See, e.g., *Abaclat et al. (case previously named Giovanna a Beccara et al.) v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011) (Tercier, Abi-Saab, van den Berg), ¶ 678 (RL-87). As Uruguay explained in its Counter-Memorial, this burden of proof is not affected by jurisdictional objections raised by the respondent. Counter-Memorial, note 62 (citing cases).

and therefore its complaint is illegitimate.

40. These conclusions are reinforced by Trigosul's and Italba's records. Trigosul's records, including the shareholder minutes book, never mention the acquisition or transfer of its shares to Italba, its supposed owner. In fact, there is no mention whatsoever of Italba in Trigosul's records, or in the reports or other documents Trigosul sent to the government authorities. On the contrary, those records show that the owner of Trigosul, who exercised complete control, was Dr. Alberelli.

41. Just as Italba does not appear in Trigosul's records, Trigosul is entirely absent from Italba's. There is no internal corporate document of Italba, or any document submitted to the government of the United States or the state of Florida, that indicates that Italba owns Trigosul. If Italba owned or controlled Trigosul, there would have been some mention of Italba in Trigosul's records, and some mention of Trigosul in Italba's records. The inevitable conclusion is that such a link does not exist.

42. **Second**, it is clear from the documents submitted by the Claimant that Dr. Alberelli, personally, controls not only Trigosul, but also Italba. His wife Beatriz Alberelli, who is a United States citizen, has just a minor role at Italba, only "on paper"—and was not even part of Italba for several years, rejoining it only *after* the notice of arbitration. Therefore, the Claimant is controlled by an Italian citizen, not by a United States citizen. Moreover, Italba does not have substantial business activities in the United States, as shown by the absence of actual income, employees, or commercial office space, among other indicators. Taken together, these

factors give Uruguay the right to deny Italba the protections of the Treaty, pursuant to its Article 17(2).

43. **Third**, Italba's claims were already time-barred when it submitted its Request for Arbitration to ICSID on February 16, 2016. In order to revive these expired claims, Italba attempts to transport events that occurred between 2003 and 2011 to the future, tying them to actions that took place after the critical date of February 16, 2013, that is, within the limitations period. But these weak connections are artificial and do not hide the fact that more than three years before the Request for Arbitration, Italba already knew of the actions and the supposed damages it is claiming. Specifically, the revocation of the permits granted to Trigosul, which constitute the heart of the claim, took place in 2011, more than two years before the critical date. The false claim that, after February 16, 2013, Uruguay failed to comply with a judgment of the *Tribunal de lo Contencioso Administrativo* (TCA) with respect to that revocation has also expired, given that it is directly related to the alleged unlawful act (the revocation) which occurred before the critical date.

44. **Fourth**, the permits that Italba considers to be part of its investment in Uruguay, and which were revoked, are not a protected investment according to the definition of "investment" in Article 1 of the Treaty. In its Reply, Italba failed to identify rights protected under Uruguayan law arising from Trigosul's authorization to provide services and frequency allocation. Nor could it have—both permits were provisional and revocable, and could be cancelled without any right to compensation. Therefore, the authorization and the frequency allocation are excluded from the definition of "investment" contained in the Treaty.

45. As a result of each of these serious defects, Italba's claim must be denied in its entirety due to lack of jurisdiction.

**A. ITALBA HAS NOT PROVEN THAT IT OWNS OR CONTROLS TRIGOSUL**

46. Although Uruguay invites the Tribunal to read all of this Rejoinder, it is only necessary to read this section to decide the case and reject all of Claimant's claims.

47. In order for jurisdiction to exist under this Treaty, it is essential to show that Italba owns or controls Trigosul. This is stipulated by Article 1 of the Treaty, which defines "investment" as "every asset that an investor *owns or controls*, directly or indirectly, that has the characteristics of an investment," and "investor of a Party" as "a national or an enterprise of a Party, that attempts to make, is making or has made an investment in the territory of the other Party[.]"<sup>20</sup>

48. It is only in the Reply that Italba attempts for the first time to explain its assertion that it owns and/or controls Trigosul. And it is clear why Italba preferred to avoid this key issue until now. After multiple opportunities to show that it is the owner of Trigosul or that it controls it, Italba has yet to provide reliable evidence of this alleged relationship between the two companies. In fact, the evidence it recently submitted, for the first time, confirms the exact

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<sup>20</sup> Treaty between the Oriental Republic of Uruguay and the United States of America concerning the Encouragement and Reciprocal Protection of Investment, signed on 4 November 2005, entered into force on 1 November 2006 ("Uruguay-U.S. BIT"), Art. 1 (C-001) (emphasis added).



opposite: that Trigosul’s true owners are Dr. Alberelli and his mother—not Italba. Thus, there is still no basis to support this essential requirement for jurisdiction.

**1. The Corporate Records Explicitly Establish that Trigosul’s Sole Shareholders Are Dr. Alberelli and His Mother**

49. Italba has spun a tale in which Trigosul’s shares were transferred by Dr. Alberelli to Italba in *August 2002*.<sup>21</sup> Before dissecting the inconsistencies and discrepancies in that story, it is important to examine the facts shown in Trigosul’s corporate records. The minutes of the shareholder and board of directors meetings tell a very different story than Italba’s. According to those minutes, on *October 10, 2002*, two months after the date of the alleged transfer of shares to Italba, the shareholders present at the special meeting of Trigosul’s shareholders were Dr. Alberelli and Carmela Caravetta, his mother, who, according to the official records, were holders of equal parts of the totality of the shares.<sup>22</sup> As shown in the following image, the minutes leave no room for doubt:

*With nothing further to discuss and having approved [illegible], the meeting is adjourned.* [signature]

<i>Shareholders in Attendance</i>	<i>PRESENT</i>	<i>VOTES</i>
<i>1. Carmela Caravetta</i>	<i>\$ 27375</i>	<i>27375</i>
<i>2. Gustavo Alberelli</i>	<i>\$ 27.375</i>	<i>27375</i>
	<i>\$54.750</i>	<i>54.750</i>

*Source: Trigosul S.A., Minutes of the Shareholder and Board of Directors Meetings (1996-2011), p. 7 (C-164).*

<sup>21</sup> Reply, ¶ 72; Second Statement of Dr. Alberelli, ¶ 17. Note that this alleged acquisition of Trigosul by Italba in 2002 contradicts the Memorial, in which Italba alleged that Italba was the owner of Trigosul since the 1990s. Memorial, ¶ 94 (“Italba began investing in Uruguay twenty years ago.”).

<sup>22</sup> Trigosul S.A., *Minutes of the Shareholders and Board of Directors Meetings* (1996-2011), p. 7 (C-164).

50. These Minutes of the Shareholders' Meeting were not an isolated event. The following month, on *November 1, 2002*, the official record again confirms that Trigosul's shareholders are Dr. Alberelli and his mother:

<i>Shareholders in Attendance</i>	<i>PRESENT</i>	<i>VOTES</i>
<i>1. Carmela Caravetta</i>	$\$ 27.375$	$27.375$
<i>2. Gustavo Alberelli</i>	$\$ 27.375$	$27.375$
<i>Total</i>	$\$ 54.750$	$54.750$

*Source: Trigosul S.A., Minutes of the Shareholders and Board of Directors Meetings (1996-2011), p. 9 (C-164).*

51. These documents state that they were prepared in the presence of the shareholders, “represent[ing] the totality of the integrated capital,” and the Chairman of the Board of Directors.<sup>23</sup> Both records are very important for Trigosul: they record the election of the new Director of the company. The minutes confirm in detail—with first and last names, amount of capital and number of votes, as well as the endorsement signed by Mr. Luis Herbón—the presence of Dr. Alberelli and his mother as the only two shareholders. This level of detail makes it clear that this record is not a mere oversight, or a typographical error, but a reflection of the reality of the company at that time, just as it was understood to be by its shareholders and the Board of Directors.

52. There is *no* mention of Italba as a shareholder. Not in these records or in any others. The silence says it all. Therefore, the evidence submitted by Italba contradicts its story

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<sup>23</sup> *Id.*, pp. 7, 9.

about the alleged transfer of shares to Trigosul, and confirms that Dr. Alberelli and his mother are the true owners of the company.

53. Faced with this conclusive evidence, Italba argues that Trigosul's records are not reliable. Incredibly, the Claimant takes the position that the company's official and contemporaneous documents, prepared in the presence of its shareholders (including Dr. Alberelli) and with the participation of its Board of Directors, are not reliable. At the same time, the Claimant asks us to rely on the self-serving statement of Dr. Alberelli, prepared for this arbitration, as evidence that Italba is the owner of Trigosul. But as discussed below, it is not the corporate records of Trigosul that are not reliable, but rather the implausible story invented by Italba.

## **2. There Was No Transfer of Shares to Italba**

54. Despite Trigosul's official records establishing that Dr. Alberelli and his mother were the only shareholders of this Uruguayan company, the Claimant argues, first, that all of the shares were validly transferred to Italba in August 2002, in accordance with Florida state law,<sup>24</sup> where the transfer allegedly occurred.<sup>25</sup> However, as shown in Subsection (a), even accepting, *quod non*, the highly questionable story presented by Italba, in no way, was there a valid transfer of those shares under Florida law. The invalidity of the alleged transfer is confirmed by Uruguay's Florida law expert on corporate matters and securities, Mr. Louis Conti.<sup>26</sup> Mr. Conti

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<sup>24</sup> Reply, ¶¶ 75-79.

<sup>25</sup> *Id.*, ¶ 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.").

<sup>26</sup> Expert Report of Mr. Louis T.M. Conti (9 August 2017) ("Expert Report of Mr. Conti").

has 35 years of experience in this field and has been recognized as one of the top corporate law attorneys.<sup>27</sup>

55. Given that Florida law is not on its side, Italba invokes a second and third alternative theory, both based on Uruguayan law. The second theory is that, even without being a shareholder, Italba always acted as Italba's owner and therefore it must be understood to be such.<sup>28</sup> The third is that Italba acquired Trigosul upon contributing capital, even without receiving the corresponding shares.<sup>29</sup> As explained below in Sections (3) and (4), none of these theories is based on facts or supported by Uruguayan law.

**a. Trigosul's Shares Were Not Validly Transferred to Italba**

56. Italba cannot provide a consistent story about Trigosul's shares. Originally, Trigosul told the Uruguayan government that 95% of the shares initially belonged to Dr. Alberelli and 5% to his mother.<sup>30</sup> In its Reply, Italba presents another distribution of these shares: that Trigosul was initially owned by Dr. Alberelli and his mother, at 50% each.<sup>31</sup> And according to the certificates themselves, 85% were issued in favor of Dr. Alberelli and 15% in favor of his mother.<sup>32</sup>

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<sup>27</sup> See Expert Report of Mr. Conti, *curriculum vitae*, p. 3 ("Honors & Awards").

<sup>28</sup> Reply, ¶¶ 80-85.

<sup>29</sup> *Id.*, ¶¶ 89-92.

<sup>30</sup> Letter from L. Herbón (Trigosul S.A.) to National Telecommunications Directorate (4 November 1999) (R-19) ("We have also prepared a notarial certificate showing the ownership of the registered shares, 95% of which are owned by Mr. Gustavo Alberelli and the remaining 5% by his mother.").

<sup>31</sup> Second Statement of Dr. Alberelli, ¶ 10 (explaining that when Trigosul issued its first stock certificates, it issued three in favor of Dr. Alberelli and three in favor of his mother).

<sup>32</sup> See Trigosul S.A., *Share Certificates* (1996-1999) (C-161).

57. The situation was clarified, according to Claimant, in May 2002, when Dr. Alberelli's mother endorsed each of her three certificates to her son.<sup>33</sup> In turn, Claimant represents that Dr. Alberelli endorsed all of his shares, that is, the certificates endorsed by his mother plus those issued in his name, to Italba in August of the same year.<sup>34</sup> The Reply argues that as of that moment, Trigosl was wholly owned by Italba. But that is not in fact the case: Dr. Alberelli did not endorse more than one of the certificates to Italba, and this alleged transfer of shares was not valid, as evidenced in the facts presented by Italba itself.

58. When evaluating the credibility of the "transfer" of this certificate, it must be taken into account that Dr. Alberelli has confessed to falsifying the date of the initial issue of the certificate (replacing the true year of issuance, 1999, with 1996), thus casting doubt on all elements of the alleged endorsement.<sup>35</sup>

*(i) There was no valid transfer of the shares under Florida law*

59. According to Italba, the validity of the transfer of Trigosl shares by Dr. Alberelli to Italba is governed by Florida law, as that was the place where the transfer occurred.<sup>36</sup> Even accepting, *quod non*, that this is the applicable law, the transfer was not valid.

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<sup>33</sup> Reply, ¶ 72; Second Statement of Dr. Alberelli, ¶¶ 10, 17.

<sup>34</sup> Reply, ¶ 72; Second Statement of Dr. Alberelli, ¶ 17.

<sup>35</sup> Second Statement of Dr. Alberelli, note 6; *see also* Second Witness Statement of Mr. Luis Herbón (12 May 2017) ("Mr. Herbón's Second Witness Statement"), note 5.

<sup>36</sup> According to Italba, Florida law and Uruguayan law both stipulate that the place where the transfer is made is decisive, and therefore under both systems, the validity of the transfer must be evaluated in accordance with Florida law. Reply, ¶ 75-77.

60. Of the 20 Trigosul stock certificates that existed in 2002 (whether valid or invalid), 17 belonged to Dr. Alberelli and three to his mother.<sup>37</sup> According to Dr. Alberelli, on May 24, 2002, his mother transferred her Trigosul shares to Dr. Alberelli.<sup>38</sup> Oddly, Italba, through Dr. Alberelli, at no time indicates where this alleged transfer took place, despite the fact that Italba itself alleges that the place where the transfer occurred is essential to determining the applicable law. Italba has not satisfied its burden of proof with respect to this point.

61. However, based on the immigration records of Dr. Alberelli and his mother, it can be determined that both were in Uruguay on May 24, 2002, the day of the alleged transfer, and thus Uruguayan law would be applicable to that transfer.<sup>39</sup> Italba admits that Uruguayan law requires that the transfer of shares must be recorded in the company books in order for it to be valid.<sup>40</sup> Trigosul's corporate records do not contain a record of this alleged transfer, and therefore the transfer was necessarily invalid.<sup>41</sup> Thus, Dr. Alberelli's mother has always been and still is a Trigosul shareholder, as established in the official records of the company—even after the alleged transfer to Dr. Alberelli.

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<sup>37</sup> See Trigosul S.A., *Share Certificates* (C-161).

<sup>38</sup> Second Statement of Dr. Alberelli, ¶ 17.

<sup>39</sup> See Immigration Movements of Carmela Caravetta (May 2002) (R-89) (showing Mrs. Caravetta entering Uruguay on 15 May 2002); Immigration Movements of Carmela Caravetta (July 2002) (R-91) (showing Mrs. Caravetta leaving Uruguay on 11 July 2002); Immigration Movements of Gustavo Alberelli (May 2002) (R-88) (showing Dr. Alberelli entering Uruguay on 23 May 2002 and departing in the evening of May 24, 2002).

<sup>40</sup> Reply, note 285 (citing Law 16,060 (1 November 1989), Art. 305 (C-222), which provides that “[t]he endorsable shares shall be transferred by an uninterrupted chain of endorsements and *for the exercise of their rights the endorser will consult the registry.*”) (emphasis added).

<sup>41</sup> See Expert Report of Dr. Luis Lapique (12 May 2017) (“Expert Report of Dr. Lapique”), p. 15 (“On May 24, 2002, Caravetta endorsed certificates 1, 2 and 3 to Alberelli. That transfer was not recorded in the Stock Ledger Book.”).

62. This was not the only invalid transfer. In August—Italba alleges—Dr. Alberelli transferred all of the Trigosul shares to Italba.<sup>42</sup> According to Italba’s account, the transfer was a gift, that is, a transfer without a payment in return.<sup>43</sup> In this case, Florida law requires three facts to be demonstrated: (1) donative intent, (2) delivery of possession, and (3) acceptance by the recipient.<sup>44</sup> None of these three facts is present here.

63. First, Dr. Alberelli never validly expressed an intent to gift all of the shares to Italba. Only one certificate (number 4 of the series of 20) is endorsed by Dr. Alberelli. The inscription reads “[o]n the date of August 15, 2002, this is transferred [*nota bene* the use of the singular] to Italba Corp. (Miami FL 33183, 8540 SW 132 Court).”<sup>45</sup> Even if a specific intent to transfer were expressed in this endorsement, such intention is only applicable to one of the stock certificates. According to the Florida law expert, Mr. Conti, the endorsement of only one stock certificate cannot serve as an endorsement of the others; on the contrary, no valid transfer of a stock certificate can be made without an individual endorsement:

Alberelli’s indorsement on the back of Trigosul stock certificate 4 uses the Spanish language word for the singular pronoun “it”. *There are no words expressing donative intent to gift any of the other Trigosul stock certificates because the other Trigosul stock certificates are blank.*<sup>46</sup>

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<sup>42</sup> Reply, ¶ 72; Second Statement of Dr. Alberelli, ¶ 17.

<sup>43</sup> See Reply, Section III.A.1 (with no mention of any payment in return), and note 283 (citing *Tanner v. Robinson*, 411 So. 2d 240, 242 (1982) (C-221) (regarding gift of shares)).

<sup>44</sup> Expert Report of Mr. Conti, pp. 11-12; M. Waldman, *FLORIDA JURISPRUDENCE 2D* (2017), p. 1 (RL-153).

<sup>45</sup> Trigosul S.A., *Share Certificates*, p. 8 (C-161).

<sup>46</sup> Expert Report of Mr. Conti, p. 11 (citation omitted; emphasis added).

64. Second, there was no effective delivery of the only certificate that was endorsed. According to Florida law, “delivery” is understood to mean that the donor has demonstrated its immediate, complete and irrevocable relinquishment of its control over the asset.<sup>47</sup> That did not occur in this case. The shares, including the endorsed certificate, were deposited in a safety deposit box at Wells Fargo Bank in the name of Dr. Alberelli and his wife—not in the name of Italba—and, therefore, Dr. Alberelli maintained his access to the shares without restriction.

65. Dr. Alberelli speaks of “Italba’s safety deposit box,” but this statement is false.<sup>48</sup> According to the contract with Wells Fargo Bank, the only owners of the safety deposit box are Dr. Alberelli and his wife, in an individual capacity.<sup>49</sup> There is no mention whatsoever of Italba. As a result, Dr. Alberelli retained possession of the shares at all times, without transferring his dominion and control, as required by Florida law.

66. According to Mr. Conti, in Florida delivery can also be considered complete if the recipient exercises dominion and control of the gift, and in the case of a gift of stock, “[t]he key determination is whether the donee exercised dominion and control over the stock by exercising the rights associated with the stock.”<sup>50</sup> Mr. Conti concludes that Italba never exercised such dominion:

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<sup>47</sup> Expert Report of Mr. Conti, p. 12 (“For delivery to be complete the donor must surrender dominion and control over the property subject to the gift.”); M. Waldman, p. 3 (RL-153) (“[Delivery] represents an immediate, complete, and irrevocable surrender of dominion and control of the property.”); *Green v. Green*, 314 So. 2d 801 (Fla. Dist. Ct. App., 1975) (RL-121).

<sup>48</sup> Second Statement of Dr. Alberelli, ¶ 17.

<sup>49</sup> Addendum to Safety Deposit Box Lease Agreement for Self-Service Boxes (25 August 1999) (C-162).

<sup>50</sup> Expert Report of Mr. Conti, p. 12.



*There is no evidence in the record that Italba actually participated in any shareholders meetings or exercised any control over Trigosul after the purported transfer in 2002. Nor does it appear that any dividends issued by Trigosul were ever reported by Italba as having come from Trigosul.*<sup>51</sup>

67. Finally, for the same reasons, there was not a valid acceptance of the shares.<sup>52</sup> As described above, the shares were deposited in a safety deposit box in the name of Dr. Alberelli and his wife, not in the name of Italba. Italba and Dr. Alberelli make it clear that the delivery was not made to Italba as a legal entity, but to Dr. Alberelli and his wife, as individuals.<sup>53</sup> Moreover, and of particular importance, *Italba's records from 2002 to the present date do not in any way show the receipt, possession, or recognition of such shares, or of any other Trigosul shares.*

Mr. Conti commented on this noteworthy fact:

I have not seen any record [...] that Italba reported any profits or loss from Trigosul, nor any indication that it had expended capital contributions to Trigosul, nor that shares of stock in Trigosul were reflected as an asset of Italba Corporation. [...] *[T]here is no evidence on the books and records of Trigosul that Italba Corporation ever became a shareholder, including after the purported gift transfers in 2002.*<sup>54</sup>

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<sup>51</sup> *Id.* (emphasis added).

<sup>52</sup> The delivery of a gift must be proven through “clear and convincing” evidence or “clear and satisfactory” evidence. M. Waldman, p. 4 (RL-153). Even accepting the facts as presented by Italba, the evidence submitted by Italba does not satisfy this evidentiary standard. At the time of the transfer, Dr. Alberelli was, according to Italba: (1) the sole shareholder of Trigosul, (2) Chairman and CEO of Italba, and (3) together with his wife Beatriz Alberelli, the lessee of the safety deposit box where the shares were placed. Placing the shares in the safety deposit box could be interpreted as an action carried out for the purpose of both keeping the shares in his personal possession and delivering them to the directors of Italba (although not to Italba itself). The evidence, therefore, is neither clear, convincing nor satisfactory, but rather vague.

<sup>53</sup> Reply, ¶ 79; Second Statement of Dr. Alberelli, ¶ 17.

<sup>54</sup> Expert Report of Mr. Conti, p. 13 (emphasis added).

68. As a result, it is impossible to argue that Italba accepted Dr. Alberelli's gift.

Under Florida law, Italba never received it.

69. Italba itself states that Florida law is the applicable law for determining the validity of the transfer of the Trigosul shares.<sup>55</sup> Florida law is clear: if the three requirements are not met, there has not been a valid gift.<sup>56</sup> In this case, not even one of the three requirements was met.<sup>57</sup> The Trigosul shares were never validly transferred to Italba, and therefore, it never came to own Trigosul. As Mr. Conti concluded:

Alberelli has failed to provide clear and convincing evidence to support a conclusion that the purported gift of the Trigosul stock certificates was completed on August 15, 2002. *The purported gift of 'all' stock certificates of Trigosul held in the name of Alberelli to Italba Corporation, on August 15, 2002, should not be deemed to be a completed gift of those stock certificates.*<sup>58</sup>

70. It is revealing that the Claimant, who contends that the alleged transfer of shares to Italba is dependent on Florida law, has decided not to submit with its Reply an expert opinion on Florida law and its application to this case. The Tribunal can reach its own conclusions on Italba's omission. The omission is even more apparent when taking into account the fact that the

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<sup>55</sup> Reply, ¶ 75.

<sup>56</sup> See, e.g., M. Waldman (RL-153).

<sup>57</sup> As if this were not enough, Trigosul's corporate records directly contradict Italba's version. Trigosul's Minute Book of the Shareholder and Board of Directors Meetings of Trigosul establishes that in October and November 2002, that is, *after* the date on which the shares had allegedly been transferred to Italba, the shareholders were, in equal parts, Dr. Alberelli and his mother. Trigosul S.A., *Minutes of the Shareholders and Board of Directors Meetings*, pp. 7, 9 (C-164).

<sup>58</sup> Expert Report of Mr. Conti, p. 16 (emphasis added).

Claimant did submit an expert opinion on Uruguayan law, which the Claimant insists does not apply.

**3. Even if Uruguayan Law Were Applicable, Italba Does Not Own Trigosl according to the Theory of “Economic Reality”**

71. According to Italba, there are three ways to demonstrate ownership under Uruguayan law:

(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.<sup>59</sup>

72. When it invokes Uruguayan law, Italba does not allege that that it made a transfer through endorsement and delivery, the first of the three methods described and the method that would appear to be most appropriate given its narrative of, precisely, endorsement and delivery.<sup>60</sup> It does not allege this because it recognizes that Trigosl’s stock ledger book does not mention this alleged transfer,<sup>61</sup> and, as its own expert explains, without registration in the ledger, “the holder of the share could not exercise his rights [...]”<sup>62</sup> Thus, Italba recognizes that it does

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<sup>59</sup> Reply, ¶ 80.

<sup>60</sup> *Id.* It is also important to note that some of the requirements for transferring shares under this first method , (endorsement and delivery) are similar to the requirements under Florida law. For the same reasons that the requirements under Florida law were not met, the requirements under Uruguayan law were not either: in the note whereby he attempted to endorse the shares, Dr. Alberelli never expressed any intent to donate the totality of the shares to Italba, the note only applied to one of the certificates, and he also never delivered the shares to Italba, but rather kept them in his personal safety deposit box.

<sup>61</sup> Trigosl S.A., *Minutes of the Shareholders and Board of Directors Meetings*, p. 2 (C-164).

<sup>62</sup> Expert Report of Dr. Lapique, p. 16; *see also id.*, p.15 (“The transfer takes effect with respect to the company and third parties from the time it is recorded in the Stock Ledger Book, which means that the transfer will be valid and take effect between the parties, but not vis-a-vis the company and third parties, until it is recorded.”) (emphasis

not have ownership through this first method under Uruguayan law.

73. Instead, Italba argues in the Reply that it is the owner of Trigosl according to the theory of “economic reality.”<sup>63</sup> The fundamental problem with this theory is that it is inapplicable here, as Italba’s own expert admits. According to Dr. Lapique, the “economic reality” theory is based on “the theory of disregard” contained in Article 189 of the Commercial Companies Act.<sup>64</sup> But Dr. Lapique himself admits that “[said] theory is for piercing the corporate veil to reach the shareholders behind it *in cases of fraudulent evasion of the law, violation of public order, etc. [...]*.”<sup>65</sup> That is, the theory is designed to contend with situations different from those in the present case, such that, in the words of Dr. Lapique, the theory “*would not be applicable in this case [...]*.”<sup>66</sup> It appears that the Claimant did not read (or did not like) this part of its own expert’s report.

74. The Uruguayan law expert consulted by Uruguay, Dr. Eugenio Xavier de Mello, agrees that the “economic reality” theory does not apply to the present case. As Dr. Xavier de Mello explains: “said reality is not appropriate for determining the owner of the shares of a corporation, especially when the shares are registered shares.”<sup>67</sup> Dr. Xavier de Mello explains

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omitted); Law 16,060, Art. 305 (C-222) (requiring that the endorsee (Italba) request registration of the transfer in order to exercise its rights).

<sup>63</sup> Reply, ¶ 80.

<sup>64</sup> Expert Report of Dr. Lapique, p. 18.

<sup>65</sup> *Id.* (emphasis added).

<sup>66</sup> *Id.* (emphasis added).

<sup>67</sup> Expert Report of Dr. Eugenio Xavier de Mello Ferrand [(31 July 2017)] (“Expert Report of Dr. Xavier de Mello”), ¶ 55.

that Dr. Lapique erroneously relies on the Companies Act to demonstrate that the principle of economic reality is applicable in commercial law.<sup>68</sup> But Dr. Lapique does not take into account that this is a “principle of exception” that “is applied only to reject the legal personality of corporations (*not to recognize the status of shareholder*), in the event of fraud.”<sup>69</sup> The principle is particularly inapplicable to securities such as the Trigosul shares, given that, as Dr. Xavier de Mello explains, the laws on this subject matter “attribute fundamental importance to formal aspects.”<sup>70</sup>

75. But even assuming that this theory were applicable, which it is not, Italba has not submitted documents to support its assertion that Italba acted at all times as a shareholder of Trigosul.

76. Italba believes that the following factors must be analyzed in order to determine whether it acted as Trigosul’s owner: business decisions, financing of operations, and representations to third parties.<sup>71</sup> Even assuming that these are the relevant factors, the evidence in the record does not support Italba’s argument.

77. *First*, the documents submitted by Italba to support the statement that Italba was in charge of Trigosul’s business decisions do not fulfill this purpose. Specifically:

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<sup>68</sup> *Id.*, ¶ 48.

<sup>69</sup> *Id.* (emphasis added).

<sup>70</sup> *Id.*, ¶ 49.

<sup>71</sup> Reply, ¶¶ 81-85. Italba also considers “share capital,” to be important in this context, as discussed in *infra* Part II.A.4.

- The exhibits “Proposal for a Banking Communication Network” and “Site Survey Report: Uruguay” do not mention Trigosul.<sup>72</sup> What is more, the latter does not mention Italba either.<sup>73</sup>
- The documents “Joint Venture Agreement for Telecommunications Project in Uruguay” and “Shareholders’ Agreement” of Italba, Worldstar, and Villaclara S.A. which according to Italba provided for the use of the Trigosul “license,” are dated July 1999 and October 1998, respectively.<sup>74</sup> That is, a date on which Trigosul did not have an authorization to operate in the Spectrum.<sup>75</sup> It is unrealistic to argue that these documents prove that Italba was seeking business plans that involved the Trigosul license.<sup>76</sup> Furthermore, these plans were never carried out.
- The documents “Co-Investment Agreement Among Eastern Pacific Trust, A Business Trust, and ITALBA Corporation, A Florida Corporation” and “Joint Venture Agreement Terms Sheet between Phinder Technologies Inc. and Italba Corporation” do not contain anything to indicate that Italba was acting on behalf of Trigosul, as Italba claims.<sup>77</sup> In the first, Trigosul is only mentioned as a strategic partner. In the second, Trigosul is not mentioned, and, worse still, it is a draft document, not a final version.

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<sup>72</sup> See Italba and ETS, *Proposal for a Banking Communication Network* (6 January 1999) (C-006); Prime Wave Communication, *Site Survey Report: Uruguay* (15 October 2001) (C-165).

<sup>73</sup> *Site Survey Report: Uruguay* (C-165).

<sup>74</sup> See Italba and Worldstar Communications Corp., *Joint Venture Agreement for Telecommunications Project in Uruguay* (July 1999) (C-007); Italba and Worldstar Communications Corp., *Shareholders’ Agreement* (October 1998) (C-008).

<sup>75</sup> See Ministry of National Defense, Resolution No. 142/000 (8 February 2000), p. 1 (C-005) (transferring the authorization of Dr. Alberelli to Trigosul, in February 2000).

<sup>76</sup> Reply, ¶ 82.

<sup>77</sup> *Id.*; See Italba and Eastern Pacific Trust, *Co-Investment Agreement* (14 June 2002) (C-015); Italba and Phinder Technologies Inc., *Joint Venture Terms Sheet* (February 2007) (C-030).

78. Not one of these documents indicates that Italba was making business plans on behalf of Trigosul.

79. *Second*, the evidence submitted by Italba does not show that Italba financed Trigosul's operations. The documents regarding supposed equipment purchases for Trigosul are drafts or preliminary documents,<sup>78</sup> require payment from Trigosul (not Italba),<sup>79</sup> specify shipment of equipment to Italba (not to Trigosul),<sup>80</sup> or simply do not mention Trigosul.<sup>81</sup>

80. The statement that "a September 2002 resolution by the President of Uruguay explicitly recognized that Italba paid for Trigosul's equipment" is also untrue.<sup>82</sup> That resolution only mentions that Trigosul presented a claim for "ITALBA invoice for the purchase of radios: US \$25,964."<sup>83</sup> This language suggests that Trigosul purchased radios from Italba, and sought to be reimbursed for them. That is, the resolution refutes, rather than affirms, the theory that Italba was paying for the Trigosul equipment. Moreover, the resolution did not evaluate the veracity of the claim that Italba paid for that equipment, but it did order that "TRIGOSUL S.A. shall be

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<sup>78</sup> Italba and Prime Wave Communications, *Memorandum of Understanding* (8 May 2001) (C-168); Letters from D. Los Santos (L-3 Communications Group) to G. Alberelli (26 September and 23 October 2000), Fax from R. Sancristobal (Ericsson) to L. Herbón (2 November 2000), and email from L. Herbón (Trigosul S.A.) to F. Pérez (National Communications Directorate) (30 October 2000) (C-135).

<sup>79</sup> Wavelynx International Inc., *Invoice No. 5925 to Trigosul S.A.* (18 February 2000) (C-009).

<sup>80</sup> Starmesh Technologies, *Invoice No. 107 to Italba Corporation* (12 June 2007) (C-169).

<sup>81</sup> Wavelynx International Inc., *Quotation No. 2501 to Italba Corporation* (11 January 2000) (C-159); Italba Corporation and Wavelynx International Inc., *Seller's Agreement* (20 February 2000) (C-160).

<sup>82</sup> Reply, ¶ 84.

<sup>83</sup> UMDN-URSEC, *Approval of Settlement between M.D.N.-URSEC and Trigosul S.A.* (10 September 2002), p. 2 (C-171).

directly paid an amount of US 985.20 [...]”—less than 4% of the supposed cost of the radios.<sup>84</sup>

The rest would be used to pay debts that Jorter, Villaclara, and Trigosl had with URSEC.<sup>85</sup>

81. In sum, to demonstrate that Italba financed more than 15 years of Trigosl’s operations, Italba has only submitted two checks, which combined, total only US\$ 3,750,<sup>86</sup> and documents related to a single purchase of US\$ 25,000 in bonds<sup>87</sup>—hardly compelling proof that “the overwhelming majority of Trigosl’s share capital”<sup>88</sup> came from Italba over the course of a decade and a half.<sup>89</sup>

82. *Third*, Italba contends that it consistently represented to third parties that it was the owner of Trigosl, but many of the documents cited to support this assertion do not show what Italba alleges.<sup>90</sup> Only two of the cited documents are dated after the alleged transfer of

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<sup>84</sup> *Id.*, p. 3.

<sup>85</sup> *Id.*

<sup>86</sup> Italba Corp., *Check from Italba Corp. to Gustavo Alberelli* (13 May 2006) (C-174); Italba Corp., *Check from Italba Corp. to Cash* (7 June 2005) (C-173).

<sup>87</sup> See Italba Corp., *Check from Italba Corp. to Indumex S.A.* (27 April 2004) (C-177); Indumex, *Check from Indumex to Gerardo Rivero* (27 April 2004) (C-178); Gaston Bengochea y Cia., *Receipt for purchase of bonds from Luis Herbón* (29 April 2004) (C-179); Gaston Bengochea y Cia., *Receipt for sale of bonds* (8 August 2006 to November 30, 2006) (C-180).

<sup>88</sup> Reply, ¶ 83.

<sup>89</sup> Italba has also submitted Exhibits: Trigosl S.A., *Details of Operations* (1 December 2001 – 30 November 2006) (C-175) and Trigosl S.A., *Journal of Accounting Contributions* (1 December 2007 – 30 November 2015) (C-176). However, it has not specified which entries in these documents correspond to contributions from Italba, if in fact there are any. Italba is not mentioned in either of the two documents.

<sup>90</sup> For example, the letter from Luis Herbón to URSEC dated October 31, 2000, at no time states that the L3 company understood that Italba had rights to operate on Spectrum through Trigosl. Letters from D. Los Santos (L-3 Communications Group) to G. Alberelli (26 September and 23 October 2000), Fax from R. Sancristobal (Ericsson) to L. Herbón (2 November 2000), and email from L. Herbón (Trigosl S.A.) to F. Pérez (National Communications Directorate) (30 October 2000) (C-135); see also Reply, note 304 (noting that Exhibit C-135 states “L3’s understanding that Italba, through Trigosl, had acquired rights to the Spectrum”). The documents regarding the alleged business with EPIC mention Trigosl only as a “strategic partner,” not as an Italba affiliate. Italba and Eastern Pacific Trust, *Co-Investment Agreement*, p. 4 (C-015) (mentioning Trigosl as a strategic partner); Letter from S. Rossi (Eastern Pacific Trust) to A. Jansenson and G. Alberelli (Italba Communications Group) (3 February



shares to Italba, and *neither* of the two mention the relationship between Trigosul and Italba.<sup>91</sup>

83. Italba also relies on its claim that Uruguay “received notice in July 2001—in a letter from Luis Herbón to the Secretary of the Presidency—that Italba owned Trigosul.”<sup>92</sup> The letter is dated more than one year prior to the alleged transfer of Trigosul shares to Italba, which alone refutes Italba’s narrative. Moreover, the letter contains errors that make it impossible to identify which companies are involved. For example, the company that sent the letter is “Italba Telecomunicaciones [*sic*] Group,” and not “Italba Corporation.”<sup>93</sup> The address of that company is in Coral Gables, while Italba’s address has always been in Miami.<sup>94</sup> The letter is signed by Albert Jansenson, who Italba has never mentioned as a director or shareholder of Italba.<sup>95</sup> And the letter mentions that said company is comprised of “majority shareholders” of Trigosul, not a sole shareholder, as Italba alleges it has always been, according to its “economic reality.”<sup>96</sup>

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2002) (C-014) (no mention of Trigosul); Letter from A. Cherp (Eastern Communications Group) to A. Jansenson, G. Alberelli, and L. Herbón (Italba Communications Group and Trigosul S.A.) (8 January 2003) (C-016) (no mention of the type of relationship between Trigosul and Italba). The documents regarding the alleged business with Phinder do not even mention Trigosul. *Joint Venture Terms Sheet* (C-030).

<sup>91</sup> Letter from S. Rossi (Eastern Pacific Trust) to A. Jansenson and G. Alberelli (Italba Communications Group) (3 February 2002) (C-014) (no mention of Trigosul); Letter from A. Cherp (Eastern Communications Group) to A. Jansenson, G. Alberelli and L. Herbón (Italba Communications Group and Trigosul S.A.) (8 January 2003) (C-016) (no mention of the nature of the of relationship between Trigosul and Italba).

<sup>92</sup> Reply, ¶ 86.

<sup>93</sup> *See* Letter from A. Jansenson (Italba Telecomunicaciones [*sic*] Group) to Secretary to the President of the Oriental Republic of Uruguay (9 July 2001) (C-182).

<sup>94</sup> Reply, ¶ 86; State of Florida, Department of State, *Articles of Incorporation of ITALBA CORPORATION* (10 May 1982) (R-81).

<sup>95</sup> Reply, ¶ 86.

<sup>96</sup> *Id.*; *See* Letter from A. Jansenson (Italba Telecomunicaciones [*sic*] Group) to Secretary to the President of the Oriental Republic of Uruguay (9 July 2001) (C-182).

84. Therefore, even if Uruguayan law and its theory of “economic reality” were applicable (which it is not, according to the admission of Italba’s own expert), and one were to accept that the factors cited by Italba are relevant for the analysis according to that theory, it has still not been evidenced that Italba acted as Trigosul’s owner. Italba’s own evidence contradicts its position with respect to these factors.

**4. Italba Is Also Not Trigosul’s Owner According to the Theory of “Capital Contributions”**

85. The other alternative theory presented by Italba is that it must be recognized as the owner of 93.36% of Trigosul, given that, allegedly, it contributed 92.04% of its capital and it was endorsed 1.33% of the shares.<sup>97</sup> However, once again, it does not provide documentation to support the veracity of its position, even accepting, *quod non*, the validity of its theory.

86. Italba bases its argument that Italba contributed “the overwhelming majority of Trigosul’s share capital”<sup>98</sup> on the analysis of Dr. Lapique who, in turn, relies on the information contained in Trigosul’s corporate records, specifically the “Shareholder and Meeting Attendance Ledger Book of Trigosul” and the “Trigosul Diary.”<sup>99</sup> These are the same documents that Italba seeks to disregard for being unreliable and filled with “errors.”<sup>100</sup> Italba’s cynicism is clear: when Trigosul’s official and contemporaneous records establish that the shareholders are

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<sup>97</sup> Reply, ¶ 89.

<sup>98</sup> *Id.*, ¶ 83.

<sup>99</sup> See Expert Report of Dr. Lapique, p. 2 (list of documents reviewed, including “Trigosul S.A. Shareholder and Meeting Attendance Ledger Book,” “Trigosul S.A. Stock Ledger Book,” “Trigosul S.A. Book of Shareholders and Directors Meetings,” and “Trigosul S.A. Diary”).

<sup>100</sup> Reply, ¶ 81.

Dr. Alberelli and his mother in an individual capacity, the records are unreliable; but, when they supposedly show that Italba has contributed the “majority of the share capital” and that because of this it should be considered the majority shareholder, the records are suddenly reliable.

87. The short response is that the records are indeed reliable, and are indeed conclusive in establishing that the shareholders of Trigosul are Dr. Alberelli and his mother, and not Italba. The analysis can end here.

88. With respect to the capital contributions, Trigosul’s records contradict what Italba claims. Italba alleges that in “February 2001, [it] wired \$ 35,000 to Trigosul 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.”<sup>101</sup> However, the records do not support this assertion. The transfer allegedly occurred in February 2001, but Trigosul did not record it until October 2001—more than eight months later.<sup>102</sup> And to add to this contradiction, the meeting minutes establish that the transfer was received “on December 2000”—two months prior to the date on which Italba allegedly transferred this amount.<sup>103</sup> Not only is it impossible to know when this contribution occurred, but it is also impossible to know if it ever actually occurred at all, regardless of the date.

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<sup>101</sup> *Id.*, ¶ 35; *see also id.*, ¶ 90.

<sup>102</sup> Trigosul S.A., *Minutes of the Shareholders and Board of Directors Meetings*, pp. 5-6 (C-164); Trigosul S.A., *Diary Book (various dates)*, p. 13 (C-167).

<sup>103</sup> Trigosul S.A., *Minutes of the Shareholders and Board of Directors Meetings*, pp. 5-6 (C-164).

89. It is also noteworthy that Italba's expert, Dr. Lapique, qualifies his opinion regarding the contributions with the following phrase: "*According to the instructions received, the Contributions for future paid-in capital were made by Italba Corp.*"<sup>104</sup> In other words, *per Dr. Alberelli's instructions*, the contributions came from Italba. Aside from the word of Dr. Alberelli, which the expert was kindly willing to accept at face value, there is nothing in Trigosul's corporate records to support this statement.

90. Based on his analysis of the same corporate records, Mr. Conti concludes that Dr. Lapique's opinion on this point is "demonstrably not accurate."<sup>105</sup> Mr. Conti notes that Dr. Alberelli acknowledges that a portion of the funds for the acquisition of Trigosul in 1999 came from his mother, and based on this contribution, 50% of the shares were issued to Mrs. Caravetta, and the other 50% to Dr. Alberelli.<sup>106</sup> For Mr. Conti, the fact that the shares were issued to Dr. Alberelli and his mother is inconsistent with the idea that Italba financed the acquisition of Trigosul.<sup>107</sup> Similarly, the fact that shares were never issued in favor of Italba is inconsistent with Dr. Alberelli's argument that Italba contributed capital in the subsequent years.<sup>108</sup>

91. Dr. Xavier de Mello also did not find clear evidence in Trigosul's records that Italba contributed to Trigosul's share capital. Dr. Xavier de Mello explains that "the accounting

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<sup>104</sup> Expert Report of Dr. Lapique, p. 7 (emphasis added).

<sup>105</sup> Expert Report of Mr. Conti, p. 7.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*, p. 8.

entries in Trigosul’s journal, invoked by Italba to prove its alleged contributions to future paid-in capital [...] are not clear nor unequivocal, either regarding the nature and scope of these ‘contributions,’ or regarding who made them.”<sup>109</sup> Worse still, this lack of clarity is “exacerbated by the fact that there is no evidence that those who made said entries have any documentary support for such transactions.”<sup>110</sup>

92. To support Italba’s argument, its expert, Dr. Lapique, has adopted a position that completely contradicts the position he took in his book published in 2011. As Dr. Xavier de Mello states:

[I]t is only fitting to share what Dr. Lapique stated when he severely criticized, in a doctrinal work that he authored, the practice of some corporations of delivering, against receiving contributions to an account, a receipt (there is no evidence that one was issued in this case) and “not agreeing in a detailed manner on the conditions of the transaction, given that this situation is what later generates *disputes about the nature of the money delivered*, regarding what was delivered and what the parties’ rights and obligations are. Also, *the lack of definition can allow a contributor to adopt the position that best serves its interests...*” Such expressions appropriately describe the situation invoked by Italba.<sup>111</sup>

93. Dr. Xavier de Mello provides a detailed explanation of the reasons why Italba cannot be considered a shareholder of Trigosul, under Uruguayan law, based on the alleged capital contributions.<sup>112</sup> His analysis leads to the following conclusion:

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<sup>109</sup> Expert Report of Dr. Xavier de Mello, ¶ 59 (emphasis added).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*, ¶ 60 (emphasis in original).

<sup>112</sup> *Id.*, ¶¶ 65-72.

For the reasons expressed, I believe that *Italba has not made capital contributions to Trigosul in a legal manner*. In addition, even if it had done so, it is evident that the subsequent steps that were essential for it to acquire the status of shareholder were not completed. Therefore, *it has never been in a position to exercise the rights arising from the shares*, and, therefore, it has not had the opportunity to exercise any shareholder control over Trigosul.<sup>113</sup>

94. Finally, Italba itself admits that “Trigosul 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.”<sup>114</sup> That is, Italba’s alleged capital contribution equivalent to 92.04% of Trigosul did not lead to the issuance of the corresponding shares. This defect is fatal to its claim, according to its own expert. As Dr. Lapique explains: “[o]nce the respective shares are issued and with the transfer of certificate 4 to Italba, the share in Trigosul’s paid-in capital *would be*” the 93.36% indicated by Italba.<sup>115</sup> The conjugation in the conditional tense clearly indicates that Italba’s participation, up to now, is not as described. Dr. Lapique is unequivocal in stating that Italba cannot submit claims on behalf of Trigosul: “[the] recording in the book has to do with taking effect vis-à-vis the company and third parties. Without the recording in the book, the holder of the share *could not exercise his rights*.”<sup>116</sup>

95. Given that it is not the owner of Trigosul, the shareholder “rights” that Italba “could not exercise” include the right to invoke the Bilateral Treaty between Uruguay and the United States.

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<sup>113</sup> *Id.*, ¶ 73 (emphasis added).

<sup>114</sup> Reply, ¶ 90 (emphasis added).

<sup>115</sup> Expert Report of Dr. Lapique, p. 16 (emphasis added).

<sup>116</sup> *Id.* (emphasis added).

**5. Italba Has Not Proven That It Controls Trigosl**

96. As mentioned previously, the Treaty defines investment as “every asset that an investor *owns or controls* [...]”<sup>117</sup> If it is unable to prove it owns Trigosl, then Italba has the burden of proving it controls Trigosl in order to keep its claim alive. But just as it has not proven that it owns Trigosl, Italba has not shown that it controls it.

97. The purpose of the Treaty is to protect the investments from the other State Party, not third party investments.<sup>118</sup> In this case, the alleged investment is actually owned and controlled by Dr. Alberelli: an Italian citizen.<sup>119</sup> Italba is not the owner, nor does it exercise control.

98. This fact is evident after considering indicators of control such as (1) who are the shareholders, (2) who exercises the right to vote based on their shares, (3) who authorizes changes to the capital of the company, (4) who elects the company’s directors, (5) who acts as directors of the company, and in general, (6) who makes the business decisions. As we will see, Italba has not exercised any control over Trigosl; all of the elements point to Dr. Alberelli as the true controller.

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<sup>117</sup> Uruguay-U.S. BIT, Art. 1 (C-001) (definition of investment) (emphasis added).

<sup>118</sup> It is for this reason, for example, that the Treaty also includes a denial of benefits clause.

<sup>119</sup> To arrive at the conclusion that Dr. Alberelli, and not Italba, controls Trigosl it is not necessary to pierce Italba’s corporate veil, as this would only be necessary if Italba were the owner of Trigosl (which it is not) and if it were necessary to determine who, aside from the owner, controls the company. As shown, Dr. Alberelli and his mother are the shareholders of Trigosl, and they control this company directly.

99. *First*, as shown in the previous analysis regarding the corporate records and the invalid transfer of shares, Dr. Alberelli and his mother are the true shareholders of Italba.<sup>120</sup> Italba is *never* mentioned, not even once, as a shareholder. Even Italba recognizes that ownership of the shares is a relevant factor for determining who controls the company.<sup>121</sup>

100. *Second*, Dr. Alberelli and his mother are not merely passive shareholders with no interest in the active control of Trigosul. The documents show the exact opposite: Dr. Alberelli and his mother consistently exercised their voting rights. For example:

- At the shareholders' meeting on October 10, 1996, Dr. Alberelli and his mother voted with 27,375 shares each to elect Luis Herbón as President.<sup>122</sup>
- In September 2001, Dr. Alberelli and his mother again voted with all of their 27,375 shares to hold a meeting to discuss a possible increase to Trigosul's authorized capital.<sup>123</sup>
- On October 31, 2001, a meeting was held and Dr. Alberelli and his mother voted with their shares to increase the authorized capital and to accept a "received" contribution.<sup>124</sup>

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<sup>120</sup> See *supra* Sections II.A.1 and II.A.2.

<sup>121</sup> See Reply, ¶ 138 and note 400 (citing *Aguas del Tunari v. Bolivia*, in which the Tribunal concluded that "the phrase 'controlled directly or indirectly' means that one entity may be said to control another entity (either directly, that is without an intermediary entity, or indirectly) if that entity possesses the legal capacity to control the other entity. Subject 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. In the case of a minority shareholder, the legal capacity to control an entity may exist by reason of the percentage of shares held [...]." *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction (21 October 2005) (Caron, Alberro-Semerena, Álvarez), ¶ 264 (CL-104)).

<sup>122</sup> Trigosul S.A., *Minutes of the Shareholders and Board of Directors Meetings*, p. 3 (C-164).

<sup>123</sup> *Id.*, p. 5.

<sup>124</sup> *Id.*, pp. 5-6. It is odd that the minutes do not specify who made this contribution—and there is certainly nothing in the minutes to suggest that the contribution was made by Italba.



- On October 10, 2002, Dr. Alberelli and his mother voted to elect Mr. Daniel Turcatti as President of Trigosl.<sup>125</sup>
- Less than one month later, on November 1, 2002, Dr. Alberelli and his mother again exercised their votes, this time to remove Mr. Turcatti and reinstate Mr. Herbón as President.<sup>126</sup>

101. It is clear that Dr. Alberelli and his mother exercised their voting rights to control Trigosl's essential functions, such as the appointment of the Chairman of the Board of Directors, the scheduling of shareholders' meetings, and authorization of changes to the company's capital. More than mere shareholders, Dr. Alberelli and his mother used their shares to participate actively in Trigosl's management. Italba had neither a right to comment nor a right to vote on these decisions—nor could it have, given its lack of shareholding interest.

102. Italba admits that, beyond merely holding shares, exercising the voting rights granted by such shareholding is a determinant factor.<sup>127</sup> Its admission is devastating to its claim. In the words of Mr. Conti: “there is no evidence in the record that Italba actually participated in any shareholders meetings or exercised any control over Trigosl after the purported transfer in 2002.”<sup>128</sup>

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<sup>125</sup> *Id.*, p. 7.

<sup>126</sup> *Id.*, p. 9.

<sup>127</sup> See Reply, note 400 (quoting the Tribunal in *AIG Capital Partners v. Kazakhstan*, which noted that “voting control of stock held is generally determinative of control.” *AIG Capital Partners Inc. & CJSC Tema Real Estate Co. v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award (7 October 2003) (Nariman, Bernardini, Vukmir), ¶ 10.2.2 (CL-120)).

<sup>128</sup> Expert Report of Mr. Conti, p. 12.

103. *Third*, it is clear from the meeting minutes that Dr. Alberelli and his mother controlled the company's capital. The minutes show that the two shareholders exercised their right to vote to schedule a shareholders' meeting to discuss the matter of authorized capital, to authorize a capital increase, and to accept an alleged contribution.<sup>129</sup> Italba's absence from this process is clear. As Mr. Conti remarks, it is noteworthy that "Trigosul's corporate records [...] were under the control of Alberelli and his appointee Herbón" and, therefore, "they could easily have taken steps to address the necessary issuance and recording of Trigosul shares to Italba Corporation, yet they did not do so."<sup>130</sup> Dr. Alberelli could have taken the necessary measures for Italba to obtain and exercise shareholder rights, but chose not to do so.

104. *Fourth*, Dr. Alberelli and his mother also elected the company's board of directors and made changes to it. As is clear from the minutes, Dr. Alberelli and his mother exercised their voting rights to appoint the President of Trigosul on at least three occasions between 1996 and 2002.<sup>131</sup> The events of October and November 2002 are interesting in this regard: Mr. Turcatti held the position for less than a month, and only weeks after being appointed, Dr. Alberelli and his mother voted to replace him with Mr. Herbón.<sup>132</sup> The minutes do not explain the reason for this sudden change, but it can be assumed that the two shareholders were evaluating Mr. Turcatti's performance and took measures to safeguard the proper management of the company

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<sup>129</sup> Trigosul S.A., *Minutes of the Shareholders and Board of Directors Meetings*, pp. 5-6 (C-164).

<sup>130</sup> Expert Report of Mr. Conti, p. 8.

<sup>131</sup> Trigosul S.A., *Minutes of the Shareholders and Board of Directors Meetings*, pp. 3, 7, 9 (C-164).

<sup>132</sup> *Id.*, pp. 7, 9.

when they determined it was proper to do so. Italba had no role in the composition of the Trigosul Board of Directors, which once again shows its absence of control over the company.

105. *Fifth*, Dr. Alberelli exercised control over Trigosul not only through his right to vote as a shareholder, but also as President of the company and sole member of the Board of Directors. The minutes of the shareholders' meeting of February 4, 2011 contain a record of the appointment of Dr. Alberelli as Chairman of the Board of Directors.<sup>133</sup> That same day, in the minutes of a Board of Directors' meeting, Dr. Alberelli, in his official role, resolved to "accept the appointment made by the special shareholders' meeting, assuming as of that moment full possession of the position of Chairman" and "to accept the resignation as director submitted by Mr. Luis Herbón."<sup>134</sup> The act of serving as President of Trigosul is further evidence that Dr. Alberelli, in an individual capacity, and not Italba, is who actually controls the company.

106. *Sixth*, according to Italba itself, Dr. Alberelli is the one who decided Trigosul's business plan. Dr. Alberelli is the one who, according to Claimant, participated in the actions to obtain business opportunities for Trigosul.<sup>135</sup> It was, then, Dr. Alberelli, and not Italba, who decided what opportunities Trigosul would pursue. Dr. Alberelli also had control over the financing of Trigosul's operations: one of the only two checks that Italba has submitted as

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<sup>133</sup> *Id.*, p. 12.

<sup>134</sup> *Id.*, p. 13. Note that there are no minutes of meetings of shareholders or the board of directors after this one. Thus, Uruguay does not know whether Dr. Alberelli continues to hold this position or how long he served in that role.

<sup>135</sup> See, e.g., *Site Survey Report: Uruguay*, p. 13 (C-165) (mentioning Dr. Gustavo Alberelli in the list of contacts as the only representative of Italba, although Trigosul is not mentioned at any time in this alleged study on the "feasibility of the Trigosul business plan."). Reply, ¶ 82; *Joint Venture Agreement for Telecommunications Project in Uruguay*, p. 29 (C-007) (showing Dr. Alberelli as the signatory); *Italba y Eastern Pacific Trust, Co-Investment Agreement*, p. 14 (C-015) (showing Dr. Alberelli as the signatory).

evidence to show that Italba was financing Trigosul was in fact made out in the name of Dr. Alberelli, who, presumably, was ultimately the person who transferred the funds to Trigosul.<sup>136</sup> Based on the evidence, Mr. Conti concludes that:

In actuality, it was always Alberelli, not Italba, who directed the affairs of Trigosul (since he acquired ownership in June 1999). The fact that Alberelli also served as the CEO and President of Italba, does not establish, in and of itself, that Alberelli's actions or statements were taken on behalf of Italba.<sup>137</sup>

107. Based on the foregoing, only one conclusion is possible: Italba did not exercise any control whatsoever over Trigosul. Trigosul's corporate records consistently show that decision-making regarding essential aspects of the company—the composition of the Board of Directors, changes to company capital, management of operations—were in the hands of the only two shareholders: Dr. Alberelli and his mother, and furthermore, that Dr. Alberelli exercised full control over the company's activities. Italba has the burden to prove that it controls Trigosul, but it has not met this burden. On the contrary, the documents that Italba itself has presented completely destroy its argument.

108. In sum, Italba's claim is invalid. There is no jurisdiction pursuant to the Treaty between Uruguay and the United States. Therefore, the arbitration must end here, with no need to

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<sup>136</sup> *Check from Italba Corp. to Gustavo Alberelli* (C-174). The second check was made out to "Cash." *Check from Italba Corp. to Cash* (C-173).

<sup>137</sup> Expert Report of Mr. Conti, p. 15. Mr. Conti's conclusion is particularly relevant in light of the position that "In giving effect to the ordinary meaning of the word 'control' [...], reference must be had to general principles of property law and company law. [...] [I]nternational law in general does not purport to regulate the relationship between an individual or legal entity and its assets." Z. Douglas, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* (2009), p. 300 (¶ 556) (CL-102).

consider the other jurisdictional defects, equally devastating for Italba, or the absolute baselessness of its claims on the merits.

**B. ITALBA DOES NOT HAVE THE RIGHT TO BENEFIT FROM THE TREATY BETWEEN URUGUAY AND THE UNITED STATES**

109. Italba's second serious jurisdictional defect gives rise to Uruguay's invocation of Article 17(2) of the Treaty, which contains a denial of benefits clause. This clause grants Uruguay the authority to deny Italba the benefits of the Treaty if the applicable requirements are met. There is no dispute between the Parties that the two requirements to trigger the clause in this case are (1) ownership or control of Italba by persons who are not United States citizens, and (2) the absence of substantial business activities by Italba in the United States.<sup>138</sup> Both requirements are met here.

110. The Reply attempts to create the appearance that the requirements to deny the benefits of the Treaty have not been met, arguing that Italba has been actively involved in business operations in the United States, and that the equity interest of Mrs. Alberelli is sufficient to counterbalance the control exercised by Dr. Alberelli.<sup>139</sup> But as discussed below, the facts show that Italba's argument is incorrect and that Uruguay can indeed deny it the benefits of the Treaty.

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<sup>138</sup> See Reply, ¶ 123.

<sup>139</sup> *Id.*, ¶¶ 134, 136.

**1. Italba Is Controlled by an Italian Citizen: Dr. Alberelli**

111. Italba admits that its owners are, in equal parts, Dr. Alberelli and his wife, Beatriz Alberelli.<sup>140</sup> Dr. Alberelli is not a United States citizen; he is Italian.<sup>141</sup> Only Mrs. Alberelli is a citizen of the United States.<sup>142</sup> Italba’s ownership is therefore mixed, making it necessary to examine the control of the company to determine whether the first requirement for the denial of benefits has been met.

112. Italba first argues that “control,” for purposes of the denial of benefits clause, is generally understood as a majority shareholding.<sup>143</sup> Italba’s reasoning is that if it were understood differently, then “even a small amount of non-controlling foreign ownership could contaminate a U.S. or Uruguayan company’s status as a protected investor.”<sup>144</sup> But this is not a case of “a small amount of non-controlling foreign ownership.” First, Mrs. Alberelli does not

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<sup>140</sup> Second Statement of Dr. Alberelli, ¶ 7; State of Florida, Department of State, *Articles of Incorporation of ITALBA CORPORATION* (May 10, 1982), Art. VIII (R-81) (Note that Claimant had submitted an incomplete version of this document in Exhibits C-002 and CLEX-005. In the production of documents stage, in response to Uruguay’s request for a complete version of the Articles of Incorporation of Italba, Claimant submitted this document, which Uruguay presents as Exhibit R-81).

<sup>141</sup> Reply, ¶ 136.

<sup>142</sup> United States Secretary of State, *Passport of Beatriz Alberelli* (30 December 2016) (C-252).

<sup>143</sup> Reply, ¶¶ 137, 138 and note 400. In contrast to the cases cited by Italba, this is not a situation where a person owns the majority of a company’s shares, and thus equity interest does not resolve the question of who controls Italba. See *Aguas del Tunari v. Bolivia*, ¶ 264 (CL-104) (determining that one entity had control of another given that it owned the majority of the shares and the majority of the voting rights); *AIG v. Kazakhstan*, ¶¶ 2.1, 3.2 (CL-120).

It is also important to highlight the contradiction between the positions Italba has taken in this case. In the context of denial of benefits, it has argued that in order to control a company, more than a 50% ownership stake is required. But in the context of determining who is the owner of Trigosul, it argued for a “flexible” standard whereby even if the shareholders were other individuals (Dr. Alberelli and his mother), it should be understood that Italba controlled Trigosul, even though it did not own the majority of the shares. Italba adopted contradictory positions at its convenience.

<sup>144</sup> Reply, ¶ 137.

have a majority shareholding, and thus, by Italba's own logic, Mrs. Alberelli does not have control of the company. Second, Dr. Alberelli holds the other 50% of the ownership, as well as effective and undeniable control of the management of the company, as discussed below.

113. Contrary to Italba's assertion, the fact that Dr. Alberelli owns half of the shares does not mean he does not control the company.<sup>145</sup> As its own source indicates, in many cases, the control requirement can be met with 50% ownership or less.<sup>146</sup> And as Italba itself recognizes, control is not only dependent on a majority of shares, but rather is a concept that take a number of factors into account, including shares, voting rights, and management role.<sup>147</sup>

114. The management role is decisive in the case of Italba. Italba's corporate structure, with two equal shareholders and two directors, does not include in its design a way to resolve an impasse in decision-making. But the Alberellis' roles as corporate officers are different, in terms of both function and decision-making authority.

115. Dr. Alberelli is the President of Italba, while Mrs. Alberelli has acted as secretary and treasurer.<sup>148</sup> The decision-making authority and functions of these positions are radically

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<sup>145</sup> *Id.* On this point, Italba cites *The ICSID Convention: A Commentary*, as well as a variety of arbitral awards which hold that control of a company can be determined based on factors such as management roles, control of the decision-making structure and exercise of power. *See id.*, note 327.

<sup>146</sup> L. Caplan and J. Sharpe, *United States* in COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES (C. Brown ed., 2013), p. 767 (CL-116) ("Ownership of over 50 percent of the voting stock of a company would normally convey control but in many cases the requirement may be satisfied by less than that proportion.").

<sup>147</sup> Reply, ¶ 94 (mentioning several factors that impact the capacity to control a company, including, *inter alia*, shares, voting rights, and management role).

<sup>148</sup> *Articles of Incorporation of ITALBA CORPORATION*, Art. VIII (R-81).

different.

116. The functions of the secretary are generally limited to the management of corporate formalities and record keeping.<sup>149</sup> As explained in a Florida law treatise, the jurisdiction where Italba is incorporated, “[t]here is little implied power in the office; the duties of a secretary are usually ministerial. [...] The secretary is a ministerial officer without authority to transact business [such as sign a lease agreement on behalf of the company].”<sup>150</sup> The role of the treasurer is also ministerial. The treasurer, by virtue of its position, does not have the authority to make contract-related decisions or to approve expenses on behalf of the corporation.<sup>151</sup>

117. The president, on the other hand, has the express authority to supervise and control the business.<sup>152</sup> The president also performs implicit functions, which are “very broad” and cover “nearly all matters which relate to the ordinary conduct of the business.”<sup>153</sup>

118. In accordance with their positions, Dr. Alberelli figures prominently in the documents that Italba presents to illustrate Italba’s alleged business activities. All of the documents submitted by Italba as evidence of its business in the United States are signed by Dr. Alberelli.<sup>154</sup> By contrast, none of the documents presented by Italba have Mrs. Alberelli as a

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<sup>149</sup> M. Gordon, *Officers, Employees, and Agents* in FLORIDA CORPORATIONS MANUAL (2017), § 23.39 (RL-155).

<sup>150</sup> *Id.* (emphasis added).

<sup>151</sup> *Id.*, § 23.40.

<sup>152</sup> *Id.*, § 23.32.

<sup>153</sup> *Id.*, § 23.33.

<sup>154</sup> See, e.g., Harris Stratex and Italba, *Mutual Non-Disclosure Agreement* (10 October 2009), p. 3 (R-110); Letter from L. Herbón (Villaclara S.A.) to G. Alberelli (Italba) (24 June 2003), p. 7 (R-94); Letter from G. Alberelli



signatory. And none of them state that Mrs. Alberelli has lead the decision-making process for any business-related matter or exercised control over the company's operations. It could not be otherwise—her role does not authorize her to make decisions on behalf of the company, but limits her to strictly ministerial functions.

119. Italba also fails to mention the important fact that Mrs. Alberelli resigned as secretary and treasurer for four and a half years. Mrs. Alberelli reported her resignation to the State of Florida on April 29, 2011.<sup>155</sup> It was not until October 27, 2015—apparently in an effort to present a certain appearance in this arbitration—that Mrs. Alberelli resumed her role as secretary of Italba.<sup>156</sup> No mention is made of her resuming her role as treasurer.<sup>157</sup> During Mrs. Alberelli's absence, Dr. Alberelli managed the company alone, once again confirming his majority control of and decision-making authority at Italba.

120. The recent case of *Capital Financial Holdings Luxembourg v. Cameroon* dealt with a situation similar to Mrs. Alberelli's resignation. Just like Italba, the claimant Capital Financial Holdings Luxembourg (CFHL) was a company that existed years before the dispute with the State arose, but that fact alone was not enough to show that an abuse of rights did not

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(Italba) to D. Santos (L-3 Communications) (31 March 2003), p. 2 (R-92); Letter from G. Hernandez (PanAmSat) to G. Alberelli (Italba) (8 March 2000), p. 2 (R-85).

<sup>155</sup> State of Florida, Department of State, *Officer/Director Resignation for a Corporation* (29 April 2011) (R-115).

<sup>156</sup> *Florida Profit Corporation Amended Annual Report* (R-121).

<sup>157</sup> *Id.*

occur.<sup>158</sup> CFHL was inactive for at least four years,<sup>159</sup> and the tribunal determined that CFHL acted improperly by reviving itself only to “create the appearance of an active Luxembourg company.”<sup>160</sup> In other words, the Claimant attempted to take measures to create the appearance that the nationality requirements had been met.

121. Something similar has occurred here: Italba spent four and a half years without the participation of Mrs. Alberelli, a United States citizen, in a management role. It was not until October 27, 2015, *after* the notice of arbitration dated August 5, 2015, that Mrs. Alberelli reassumed her position at Italba.<sup>161</sup> Mrs. Alberelli declared herself secretary of Italba right before the Request for Arbitration was submitted on February 16, 2016. The synchronization of these events is curious: right at the moment that the participation of a United States citizen would benefit Italba in its claim, Mrs. Alberelli appears (although as described, her role is ministerial, and the control has remained with Dr. Alberelli).

122. All of the evidence points in the same direction: Dr. Alberelli, and not Mrs. Alberelli, is the person who effectively controls Italba. Italba is controlled by an Italian citizen, thereby satisfying the first requirement for a denial of benefits.

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<sup>158</sup> *Capital Financial Holdings Luxembourg SA v. Republic of Cameroon*, ICSID Case No. ARB/15/18, Award (22 June 2017) (Tercier, Mourre, Pellet), ¶¶ 362, 366 (RL-154); *cf.* Reply, ¶ 121.

<sup>159</sup> *Capital Financial v. Cameroon*, Award, ¶ 363 (RL-154).

<sup>160</sup> *Id.*, ¶ 362 (translation of Uruguay; original text in French: “créer l’apparence d’une société luxembourgeoise en activité.”).

<sup>161</sup> See Letter from Italba Corporation to Directorate of International Economic Affairs, Ministry of Foreign Affairs (5 August 2015) (C-090); *Florida Profit Corporation Amended Annual Report* (R-121).

## 2. Italba Does Not Have Substantial Business Activities in the United States

123. As Uruguay mentioned in its Counter-Memorial, in order to determine whether “substantial business activities” exist, tribunals consider factors such as materiality and the relationship to the investment in question, the use of employees, leasing of office space, and the existence of bank accounts.<sup>162</sup>

124. In its Reply, Italba, rather than stating its position with respect to the factors to be considered in the “substantial business activities” analysis and attempting to demonstrate that it has complied with those factors, instead falsely accuses Uruguay of misrepresenting the cases it cites.<sup>163</sup> Then, in an attempt to show that it does have substantial business activities, Italba dedicates two short paragraphs to assert that it meets this requirement because “Italba is not a ‘mailbox’ or ‘shell’ company”<sup>164</sup>—a lackluster description of its business activities, supported by exactly zero documents showing any business activity since the Treaty entered into force.

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<sup>162</sup> Counter-Memorial, ¶ 65 (citing *Limited Liability Co. AMTO v. Ukraine*, SCC Case No. 080/2005, Final Award (26 March 2008) (Cremades, Soderlund, Runeland), ¶ 69 (RL-70); *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Objections to Jurisdiction (1 June 2012) (Tawil, Stern, Veeder), ¶¶ 4.66-4.69, 4.74 (RL-91)).

<sup>163</sup> Reply, ¶¶ 124-132. The Claimant dedicates the bulk of its discussion regarding Italba’s level of business activities to disputing the interpretation of the *AMTO* and *PacRim* cases. *See id.* However, Italba attempts to make distinctions where no difference exists. It argues that, for purposes of the denial of benefits, *AMTO* does not require that business activities be connected to a specific business sector, but at the same time it admits that what Uruguay argued in the Counter-Memorial, *i.e.*, that the existence of “investment-related activities” are a relevant factor in the analysis, is correct. *See id.*, ¶¶ 127-129. It also contends that Uruguay incorrectly argued that the *Pac Rim* and *AMTO* cases require the existence of permanent staff in order for it to be determined that substantial business activities exist. *Id.*, ¶ 130. This is false. Uruguay did not argue that permanent staff is a “prerequisite for BIT protection” (*id.*, ¶ 131), but simply stated that it is a relevant factor. Counter-Memorial, ¶ 65. Italba does not dispute this. Italba admits that permanent staff may be a factor that is taken into account when determining whether substantial business activities exist. *See Reply*, ¶¶ 130-131 (admitting that in *AMTO* and *Pac Rim* the existence of permanent staff was evidence of substantial business activities).

<sup>164</sup> Reply, ¶¶ 133-134.

125. It is understandable that Italba has had to set the bar at such a low level; its hands are tied in light of the evidence. Specifically, the documents furnished by Italba in the document production stage of this arbitration confirm that Italba does not have substantial business activities in the United States.

126. Italba confirmed that, from 1999 to 2016, Gustavo Alberelli and Beatriz Alberelli were the company's only employees.<sup>165</sup> Neither has an employment contract.<sup>166</sup> The Alberellis are also the only corporate officers and directors that the company has had since 1999.<sup>167</sup> And, in fact, Dr. Alberelli was the only employee, officer, or director between 2011 and 2015, when Mrs. Alberelli resigned from her position.<sup>168</sup>

127. Italba has also failed to produce a single lease agreement for office space for the entire 1999-2016 period.<sup>169</sup> This confirms that Italba's only space is the residential property of the Alberellis, which is not located in a commercial district.<sup>170</sup>

128. Crucially, the documentation submitted by Italba has confirmed that its business activities were essentially non-existent throughout its entire operating history. Of the 17 purported business documents and contracts Italba was a party to, cited by the Claimant to

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<sup>165</sup> Procedural Order No. 4 (31 May 2017), Exhibit B, request 2 (“Italba states that Italba’s employees between 1999 and 2016 are Gustavo Alberelli and Beatriz Alberelli.”).

<sup>166</sup> *Id.* (“Italba does not have any written contracts with these employees.”).

<sup>167</sup> Procedural Order No. 4, Exhibit B, request 7.

<sup>168</sup> See *Officer/Director Resignation for a Corporation* (R-115); *Florida Profit Corporation Amended Annual Report* (R-121).

<sup>169</sup> Procedural Order No. 4, Exhibit B, request 3.

<sup>170</sup> See Counter-Memorial, ¶¶ 76-78.

illustrate its alleged lines of business, all are dated before 2006—that is, not a single one of them corresponds to the period after the Treaty entered into force.<sup>171</sup> Moreover, of the 16 documents provided to Uruguay as part of document production in response to its request for Italba’s telecommunications contracts between 1999 and 2016, only two are dated after the date the Treaty entered into force.<sup>172</sup> One of them is a “contract” that is not signed by the other party, and the other is a letter addressed “to whom it may concern,” indicating only that Italba is authorized to sell products from the Redline Communications company, but does not indicate whether any sales took place.<sup>173</sup>

129. Italba’s meager bank accounts are also proof of its negligible business activities. In the bank account statements received, the balances are low, ranging from a maximum of [[REDACTED]] to a minimum of [[REDACTED]].<sup>174</sup> In the nearly 200 monthly account

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<sup>171</sup> See IDS Long Distance Inc. and Italba, *Bilateral Confidential & Non Circumvention Agreement* (26 January 1999) (C-235); IDS Long Distance, Inc. and Italba, *Reciprocal Carrier Services Agreement* (3 May 1999) (C-236); AT&T Latin America and Italba, *Bilateral Confidentiality & Non Circumvention and Non-Disclosure Agreement* (3 October 2000) (C-237); FPL FiberNet, LLC Corporation and Italba, *Confidentiality Agreement* (13 February 2002) (C-238); Atlas Telecom Network Inc. and Italba, *Non-Disclosure Agreement* (10 April 2002) (C-239); Go2Tel.com Inc. and Italba, *Agreement* (4 June 2002) (C-240); Floe Networks and Italba, *Reciprocal Telecommunications Agreement* (27 January 2003) (C-241); More Time SL and Italba, *Joint Venture Agreement* (27 March 2003) (C-242); Global Communication Networks, Inc. and Italba, *Agency Agreement* (1 August 2003) (C-243); Carrier House Inc. and Italba, *Lease Agreement* (1 August 2003) (C-244); InterAmerica Telco Systems Inc. and Italba, *Equipment Purchase Agreement and Joint Venture Agreement* (11 August 2003) (C-245); InTel Communications LLC and Italba, *Joint Venture Articles* (5 April 2004) (C-246); TeleNova Corporation and Italba, *Reciprocal Non-Disclosure Agreement* (11 April 2004) (C-247); Mercury Telecom Inc. and Italba, *Mutual Non-Disclosure Agreement* (14 June 2004) (C-248); Opextel, LLC and Italba, *Non-Disclosure Agreement (undated)* (C-249); Email from D. Los Santos (RULA Holdings, Inc.) to G. Alberelli (3 June 2005) (C-250); Protel Enterprises Inc. and Italba, *Bilateral Confidentiality & Non Circumvention Agreement* (22 July 2005) (C-251).

<sup>172</sup> *Mutual Non-Disclosure Agreement* (R-110); Letter from O. Gnass (Redline Communications) to G. Alberelli (Italba) (24 January 2007) (R-102).

<sup>173</sup> *Id.*

<sup>174</sup> See First Union, *Commercial Checking account of Italba Corp.* (2000-2001), p. 11 (R-86); First Union, *Commercial Checking account of Italba Corp.* (April 1999), p. 1 (R-84).

statements for the 17 years from 1999–2016, the balances exceed [[REDACTED]] only 31 times—approximately 15% of the time.<sup>175</sup> In other words, 85% of the time, the accounts had balances of less than [[REDACTED]]. These amounts hardly reflect the income of a serious, active and successful company.

130. It is also not surprising that Italba has not had a single financial statement, either audited or unaudited, throughout practically its entire existence, from 1999 to 2016.<sup>176</sup>

131. Based on the absence of service contracts and its meager bank accounts, Italba has no income. The income reported by Italba to the United States federal government from 1999 to 2015 is insignificant, as shown in the following table.<sup>177</sup> In the worst years, its total income did not exceed [[REDACTED]].<sup>178</sup> From the time the Treaty entered into force in November 2006, Italba’s total annual income only exceeded [[REDACTED]] twice, and since 2009, it has not exceeded [[REDACTED]] a year.

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<sup>175</sup> See First Union, *Commercial Checking account of Italba Corp.* (April 1999) (R-84); First Union, *Commercial Checking account of Italba Corp.* (2000-2001) (R-86); Wachovia Bank, *Commercial Checking account of Italba Corp.* (2010-2011) (R-112); Wachovia Bank, *Commercial Checking account of Italba Corp.* (June 2011) (R-116); Wells Fargo, *Commercial Checking account of Italba Corp.* (2012-2013) (R-117); Wells Fargo, *Commercial Checking account of Italba Corp.* (2013-2014) (R-119); Wells Fargo, *Commercial Checking account of Italba Corp.* (2014-2016) (R-120); First Union, *Commercial Checking account of Italba Corp.* (1999) (R-83); First Union, *Commercial Checking account of Italba Corp.* (2001-2002) (R-87); First Union, *Commercial Checking account of Italba Corp.* (2002-2003) (R-90); Wachovia Bank, *Commercial Checking account of Italba Corp.* (2003-2004) (R-93); Wachovia Bank, *Commercial Checking account of Italba Corp.* (2004-2005) (R-95), Wachovia Bank, *Commercial Checking account of Italba Corp.* (2005-2006) (R-97), Wachovia Bank, *Commercial Checking account of Italba Corp.* (2006-2007) (R-101), Wachovia Bank, *Commercial Checking account of Italba Corp.* (2007-2008) (R-103), Wachovia Bank, *Commercial Checking account of Italba Corp.* (2008-2009) (R-107); Wachovia Bank, *Commercial Checking account of Italba Corp.* (2009-2010) (R-108).

<sup>176</sup> Procedural Order No. 4, Exhibit B, request 21.

<sup>177</sup> Internal Revenue Service, *Corporation Income Tax Return* (1999-2015) (R-82).

<sup>178</sup> *Id.*

Tax Return Year	Total Income (US\$)
1999	[[REDACTED]]
2000	[[REDACTED]]
2001	[[REDACTED]]
2002	[[REDACTED]]
2003	[[REDACTED]]
2004	[[REDACTED]]
2005	[[REDACTED]]
2006	[[REDACTED]]
2007	[[REDACTED]]
2008	[[REDACTED]]
2009	[[REDACTED]]
2010	[[REDACTED]]
2011	[[REDACTED]]
2012	[[REDACTED]]
2013	[[REDACTED]]
2014	[[REDACTED]]
2015	[[REDACTED]]

132. The documents submitted to the United States never mention Trigosl.

Mrs. Alberelli justifies this omission with the reasoning that Italba received very little income as a result of the alleged business carried out through its alleged subsidiaries. According to Mrs. Alberelli, “[i]n Italba’s tax filings, the company *did not claim any foreign subsidiaries—* though Italba has many subsidiaries outside of the U.S.—*because we were advised that it was not necessary to do so where there was no substantial taxable revenue generated by those subsidiaries.*”<sup>179</sup> Again, Trigosl does not appear in Italba’s essential records.

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<sup>179</sup> Witness Statement of Mrs. Beatriz Alberelli (May 12, 2017), note 5 (emphasis added).

133. These documents have confirmed that Italba is a company without substantial business activities.

134. Having demonstrated that Italba does not have substantial business activities in the United States and that it is controlled by a citizen of a country that is not a party to the Treaty, Uruguay has the right to deny Italba the protections of the Treaty. Therefore, the Tribunal does not have jurisdiction over Italba's claims.

**C. ITALBA'S CLAIMS WERE ALREADY TIME-BARRED WHEN ITALBA FILED ITS NOTICE OF ARBITRATION ON FEBRUARY 16, 2016**

135. The third reason to reject this claim due to lack of jurisdiction is that all the claims were already time-barred before the Request for Arbitration was filed.

136. Article 26(1) of the Treaty establishes that

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 (for claims brought under Article 24(1)(a)) or the enterprise (for claims brought under Article 24(1)(b)) has incurred loss or damage.<sup>180</sup>

137. As explained in the Counter-Memorial, the critical date for purposes of the three-year limitations period is February 16, 2013, three years before the date on which the Claimant filed its Request for Arbitration.<sup>181</sup> Thus, the focus of the analysis is now to determine whether,

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<sup>180</sup> Uruguay-U.S. BIT, Art. 26(1) (C-001).

<sup>181</sup> Counter-Memorial, ¶ 88. Note that Italba does not object to the use of this critical date. According to Italba, using the Request for Arbitration or the Notice of Arbitration as the critical date does not affect the analysis of the limitations period. Reply, note 410.



on the critical date, Italba had or ought to have had knowledge of (1) the violations it is claiming and (2) the damage suffered.

138. Uruguay presented evidence in its Counter-Memorial that showed that on the critical date, Italba had knowledge of the violations it is claiming and the damage that allegedly resulted from them.<sup>182</sup> In its Reply, Italba has not presented any arguments proving the contrary, but instead has merely argued, without any proof, that all of its claims—from the alleged failure to adjust its authorization in 2003, to the alleged failure to comply with the TCA’s judgment after 2014—arose in March 2015, when, according to Italba, it discovered for the first time that all the measures it complains of were motivated by Uruguay’s bad faith. As discussed below, this unfounded story cannot refute the evidence presented by Uruguay.

139. Before going any further into Italba’s knowledge of the acts it complains of, one important point requires attention. Italba places great emphasis on the date of March 2015, when it allegedly discovered that the frequencies that previously belonged to Trigossul had been assigned to Dedicado, which it interpreted as “bad faith.” But it has failed to supply any proof showing that it neither knew nor ought to have known of the allocation to Dedicado prior to that date.<sup>183</sup> On the contrary, the fact is that the resolution that made the allocation had been available

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<sup>182</sup> Counter-Memorial, Section II.C.

<sup>183</sup> This lack of evidence is fatal to Italba's jurisdiction case. As the Claimant, the burden is on Italba to establish jurisdiction and prove whatever facts are necessary and relevant to show that its claims are within the three-year limitations period. See *Pac Rim v. El Salvador*, ¶¶ 2.8, 2.9, 2.11, 2.15 (RL-91); *Apotex Holdings Inc. and Apotex Inc. v. United States*, ICSID Case No. ARB(AF)/12/1, Counter-Memorial on the Merits and Jurisdiction (14 December 2012), ¶ 150 (RL-95).

to the public since 2013.<sup>184</sup> And Italba has presented evidence that by 2011 it was already aware that the frequencies could potentially be assigned to another service provider.<sup>185</sup> It is simply not credible that Italba, had it really been concerned that the frequencies might be assigned to another company, would not have acted with due diligence to become informed about the transfer the moment it occurred, or soon thereafter. Its story, that it was not until 2015 that it found out or could have found out about the allocation, is not credible.

### 1. Acts before February 2013

140. Italba has claimed violations of the fair and equitable treatment, full protection and security and national treatment clauses, based on Uruguay's actions prior to the critical date of February 16, 2013. First, it argues that URSEC unjustifiably refused to issue Trigosul a new operating license in accordance with the 2003 Regulations, and as evidence of this, offers alleged conversations and correspondence that took place between 2003 and 2006, before the Treaty entered into force and its protections became effective.<sup>186</sup> And secondly, it argues that in 2011, URSEC revoked Trigosul's authorization to operate in the Spectrum.<sup>187</sup>

141. Italba concedes that prior to the critical date it already had knowledge of the

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<sup>184</sup> See Second Witness Statement by Dr. Nicolás Cendoya (10 August 2017) (“Dr. Cendoya’s Second Statement”), ¶ 19; *infra* ¶ 222 (“Resolution 220/13 of September 2013 was published, like any other government action—in a public resolution, accessible to everyone.”).

<sup>185</sup> See Email from R. Gorter to G. Alberelli *et al.* (14 April 2011) (C-071).

<sup>186</sup> See, e.g., Reply, ¶¶ 271-272, 275, 279 and note 452 (showing that all the correspondence submitted in support of this claim of failure to adjust the authorization predates the date the Treaty entered into force). It must be recalled that any actions taken prior to the Treaty entering into force on November 1, 2006 were not protected by it.

<sup>187</sup> See, e.g., *id.*, ¶¶ 271, 275. Italba concedes that the revocation is not grounds for any claim of expropriation. *Id.*, ¶ 153 (“Any claim that Italba might have had in respect of the January 2011 revocation of Trigosul’s frequencies would have been extinguished by the TCA Judgment.”).

damage it claims to have suffered as a result of the alleged failure to adjust the license and the revocation.<sup>188</sup> For example, in its Reply, it states that “there is no question that Italba was *injured* by URSEC’s failure to act” and that it “lost its business opportunity with Canal 7 because of URSEC’s illegal revocation of its license in January 2011.”<sup>189</sup> With this, one of the requirements for the limitations period is met.

142. Italba, however, argues that its claims are not time-barred because “there is no basis for finding that Italba ‘should have known’ of Uruguay’s breach any sooner than March 2015,” the date on which it maintains it found out that the frequencies were assigned to Dedicado and concluded that Uruguay acted in bad faith.<sup>190</sup>

143. This argument is unconvincing. The alleged breach that resulted from the failure to adjust the authorization culminated in 2011, at the latest, when the authorization was revoked, thereby extinguishing any right to any adjustment that might have existed. Moreover, the revocation occurred in 2011, two years before the critical date. Italba does not dispute the fact that it had knowledge of these events soon after they occurred, and that it thought at the time that they had caused it harm.<sup>191</sup>

144. Instead, Italba’s argument is that it was not until the allocation was made to

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<sup>188</sup> As Uruguay explained earlier, Italba, in its Memorial, went into detail regarding the damage it was already aware of prior to the critical date. Counter-Memorial, ¶¶ 96-97, 104-105.

<sup>189</sup> Reply, ¶¶ 48, 162 (emphasis in the original).

<sup>190</sup> *Id.*, ¶ 163.

<sup>191</sup> Italba’s narrative in its Memorial makes it clear that it was aware of the failure to adjust the license as of 2003, and of the revocation as of January 26, 2011. *See* Counter-Memorial, ¶¶ 96-97, 103-104 (summarizing the instances in which Italba acknowledged being aware of the failure to adjust and the revocation).

Dedicado in March 2015 that it “became aware of the true character of Uruguay’s conduct as being in breach of the Treaty.”<sup>192</sup> According to Italba, prior to that date it had no knowledge of Uruguay’s alleged “discriminatory animus.”<sup>193</sup>

145. This desperate argument cannot withstand the slightest scrutiny. The limitations period clause in the Treaty does not require knowledge of the existence of any discriminatory animus; it merely requires knowledge of the violation and the resulting damages.<sup>194</sup> Italba does not dispute the fact that in 2011 it was aware of both, in regards to the license adjustment and the revocation. Nor could it dispute it. Italba has argued that for years, since 2003, it complained of the failure to adjust the license.<sup>195</sup> What is more, at the time Trigosul filed the appeal with the TCA, Italba was already of the opinion that the revocation was arbitrary—after all, that was the basis of its claim.

146. Moreover, should any doubt remain, Dr. Alberelli explicitly stated in 2011 that he believed that the revocation constituted a violation of the Treaty.<sup>196</sup> In April 2011, Dr. Alberelli wrote that he was already aware that the frequencies that were revoked from Trigosul would be assigned to another service provider, stating that “[t]hrough personal contacts I have learned that

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<sup>192</sup> Reply, ¶ 164.

<sup>193</sup> *Id.*, ¶ 162.

<sup>194</sup> Uruguay-U.S. BIT, Art. 26(1) (C-001).

<sup>195</sup> First Witness Statement by Mr. Luis Herbón (16 September 2016), ¶ 15; First Statement by Dr. Gustavo Alberelli (16 September 2016), ¶¶ 28-31.

<sup>196</sup> Email from R. Gorter to G. Alberelli *et al.* (14 April 2011) p. 2 (C-071) (inquiring whether he should “implement [*sic*] the investment treaty” in relation to the protest Trigosul filed with URSEC for the revocation of the frequencies, URSEC’s lack of response, and the information it had received that URSEC was planning to auction the frequencies it revoked from Trigosul).

URSEC intends to place the frequencies up for public auction,” for which reason he consulted with the United States Embassy in Uruguay to find out whether “we should implement [*sic*] the investment treaty.”<sup>197</sup> With this admission, both of the requirements for the limitations period are met. Italba was aware in 2011 of the act that it believed constituted a breach and the resulting effects.

147. Knowing that its claims based on the alleged failure to adjust the license and the revocation are time-barred, Italba attempts to revive them by arguing that they both constitute “continuing treatment.”<sup>198</sup> According to Italba, “URSEC’s unresponsiveness, the unlawful 2011 revocation of Trigosul’s license, and the unannounced 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.”<sup>199</sup>

148. Italba’s reasoning is flawed. In April 2011, nearly two years before the critical date, Dr. Alberelli learned that the frequencies that were revoked from Trigosul would be assigned to another provider. In this context, Article 26(1) of the Treaty provides that claims must be filed within “three years [...] from the date on which the claimant first acquired, or should have first acquired, knowledge” of the breach and the alleged damage.<sup>200</sup> As the United States stated in its submission as a non-disputing party in the *Corona Materials* case, “[s]uch

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<sup>197</sup> *Id.*

<sup>198</sup> Reply, ¶ 170.

<sup>199</sup> *Id.*

<sup>200</sup> Uruguay-U.S. BIT, Art. 26(1) (C-001).

knowledge cannot be acquired at multiple points in time or on a recurring basis. Accordingly, a continuing course of conduct cannot renew the limitations period [...].”<sup>201</sup>

149. Italba’s attempt to tenuously link the alleged failure to adjust the license and the revocation to the subsequent allocation to another provider merely serves to highlight Italba’s desperate efforts to rescue claims dating from years before the critical date. Italba’s evidence and admissions, however, speak for themselves: these claims are time-barred.

## **2. Acts after February 2013**

150. Italba has also filed claims based on proceedings that took place after February 2013. Specifically, it has filed fair and equitable treatment, full protection and security and national treatment claims based on the allocation of frequencies to Dedicado, which took place on September 5, 2013,<sup>202</sup> and expropriation and denial of justice claims based on the allocation of frequencies to Dedicado and the alleged failure to comply with the Judgment of the TCA. These claims also lack merit.

151. At the time the frequencies previously used by Trigosul were assigned to Dedicado, Trigosul no longer had any legal interest in them. The frequencies had been revoked from Trigosul in 2011. The allocation of the frequencies to Dedicado two years later could not have caused any harm to Trigosul. Even accepting the facts as Italba relates them, there is no violation here that has caused any damage, under the limitations period clause in Article 26(1) of

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<sup>201</sup> *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Submission by the United States (11 March 2016), p. 1 (RL-152).

<sup>202</sup> URSEC, Resolution No. 220/013 (5 September 2013) (C-084).

the Treaty. The act that affected Trigosul's alleged rights occurred when the frequencies assigned to it were revoked in 2011. That was when it lost its permit, not at a later date.

152. Faced with this reality, Italba states that its expropriation claim is not based on the revocation of its authorization and its frequencies.<sup>203</sup> Its admission is welcome. But the fact that its claim is not based on this specific act does not mean that the revocation is irrelevant. On the contrary, the revocation is the fundamental act that released those blocks of frequencies and allowed them to be assigned to a service provider as required to safeguard the public interest.

153. As Uruguay has explained on prior occasions, the allocation to Dedicado arose out of the revocation, and together they constitute a “series of similar and related actions”<sup>204</sup>—in the words of the United States, the other State Party to this Treaty. Italba cannot rely on the allocation in order to “evade the limitations period by basing its claim on ‘the most recent transgression of that series.’”<sup>205</sup> The allocation to Dedicado was the direct and expected result of the revocation of the frequencies previously assigned to Trigosul—an act that in and of itself put an end to any claim Trigosul might have had in relation to these frequencies, until the TCA's Judgment annulled the revocation.

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<sup>203</sup> Reply, ¶¶ 147, 153.

<sup>204</sup> *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award (31 May 2016) (Dupuy, Mantilla-Serrano, Thomas), ¶ 173(ii) (RL-114) (*citing* the submission by the United States under Article 10.20.2 of the CAFTA-DR).

<sup>205</sup> *Id.* (*citing* the submission by the United States under Article 10.20.2 of the CAFTA-DR).

154. Italba has also claimed that Uruguay violated the Treaty after February 16, 2013 when it refused to comply with the TCA Judgment of October 23, 2014.<sup>206</sup> The claim based on this alleged violation is also time-barred.

155. According to Italba, the failure to comply with the TCA Judgment should be seen as an act unrelated to the revocation that occurred three years earlier. Italba takes this position to get around the tribunal's reasoning in *Corona Materials*, which dealt with a situation similar to the one in this case.<sup>207</sup> In *Corona Materials*, the investor had filed a motion for reconsideration in relation to the denial of an environmental permit.<sup>208</sup> The Dominican Republic did not rule on that motion, for which reason the investor filed a claim under the bilateral investment treaty.<sup>209</sup> The tribunal took up the question of whether the absence of any response to the motion for reconsideration could constitute a violation separate from the violation resulting from the denial of the permit.<sup>210</sup> The denial occurred outside the three-year limitations period, while the motion for reconsideration was filed within that period.

156. The tribunal ruled that the motion for reconsideration, and the denial of the permit, were time-barred. The absence of a response to the motion for reconsideration could not be seen as a State measure (or a violation of the treaty) separate from the denial.<sup>211</sup> The tribunal

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<sup>206</sup> *Tribunal de lo Contencioso Administrativo*, Judgment No. 579 (23 October 2014) (C-076).

<sup>207</sup> *Corona Materials v. Dominican Republic*, Award, ¶ 173 (RL-114).

<sup>208</sup> *Id.*, ¶ 204.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*, ¶ 202.

<sup>211</sup> *Id.*, ¶ 210.



agreed with the analysis of the Dominican Republic, which held that the claim involving the lack of a response to the motion for reconsideration was “relat[ed] to [the same] theory of liability” as the other claims.<sup>212</sup>

157. The tribunal also favorably cited the position of the United States in that case, which held that: “Where a ‘series of similar and related actions by a respondent State’ is at issue, an investor cannot evade the limitations period by basing its claim on ‘the most recent transgression in that series.’”<sup>213</sup>

158. The court’s reasoning in *Corona Materials* is applicable here. The claim based on the alleged failure to comply with the TCA Judgment is based on the same theory of liability as the claims regarding the revocation of Trigosul’s permits. In fact, the claim Trigosul filed with the TCA was precisely that the revocation was illegal, and the prayer for relief asked the tribunal to declare it null and void, and restore the *status quo ante*. The TCA Judgment did just that. Thus, Uruguay’s alleged noncompliance with the Judgment is precisely that Uruguay allegedly failed to reverse the revocation, and did not restore Trigosul’s rights that had been revoked. Just like in *Corona Materials*, failure to comply with the Judgment “cannot be considered a stand-

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<sup>212</sup> *Id.* According to that theory of liability, the State “refused to permit Corona Materials to proceed with its mining project for reasons that are not legitimate and which are unrelated to the merits of that project” and “[d]ue to the refusal of the Environmental License by the Respondent, the Claimant cannot enjoy any meaningful benefit from the Exploitation Concession.” *Id.* (emphasis omitted).

<sup>213</sup> *Id.*, ¶ 215. In *Vieira v. Chile*, the tribunal similarly concluded that “in most cases allowing a claimant to get around *ratione temporis* restrictions established in any Agreement for the Encouragement and Reciprocal Protection of Investment, by filing a new claim at any time after such agreement took effect, to later contend that a negative response to the first claim constitutes an unlawful act that gives rise to a new dispute [...] [would be] contrary to the parties’ intent as set forth in Article 2 of the Agreement.” *Sociedad Anónima Eduardo Vieira v. Republic of Chile*, ICSID Case No. ARB/04/7, Award (21 August 2007) (von Wobeser, Czar de Zaldueñ, Reisman), ¶ 274 (RL-136).

alone ‘measure’, or a separate breach of the Treaty” because it “rest[ed] on [the same] theory of liability.”<sup>214</sup>

159. Italba attempts to deflect attention from the fact that it has filed claims based on the same theory of liability, distinguishing *Corona Materials* based on the argument that, in that case, the lack of response to the motion for reconsideration constituted a confirmation, and not a reversal, of the denial of the environmental permit.<sup>215</sup> This argument is without merit. In *Corona Materials*, the tribunal did not base its decision on whether the lack of response to the motion for reconsideration confirmed or reversed the underlying government decision. The tribunal was clear that the decisive factor is the existence of a theory of liability linking the two claims that were filed. Italba cannot deny that its entire claim is based on a single theory of liability—that the revocation and the alleged reluctance to remedy it violated Trigosul’s right to keep the frequencies and the authorization it had enjoyed for years.

160. In light of the foregoing, all of Italba’s claims must be rejected due to lack of jurisdiction, as they were already time-barred on the date the Request for Arbitration was filed.

**D. TRIGOSUL’S AUTHORIZATION TO PROVIDE SERVICES AND FREQUENCY ALLOCATION DO NOT QUALIFY AS AN “INVESTMENT” UNDER THE TREATY**

161. As Uruguay explained in its Counter-Memorial, Trigosul’s authorization to provide services and the frequency allocation do not constitute an “investment” as defined by the

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<sup>214</sup> *Corona Materials v. Dominican Republic*, Award, ¶ 210 (RL-114).

<sup>215</sup> Reply, ¶ 149.

Treaty.<sup>216</sup> Although the definition of investment in the Treaty does include “licenses, authorizations, permits, and similar rights conferred pursuant to domestic law,” certain permits, such as those held by Trigosl, do not constitute an investment.<sup>217</sup> In note 3 to the Treaty, the parties expressly agreed that permits “that do not create any rights protected under domestic law” “do not have the characteristics of an investment.”<sup>218</sup>

162. Italba argues that Uruguayan law “protects the rights vested by an URSEC authorization or allocation of frequencies.”<sup>219</sup> But its analysis is incorrect. The three protections Italba identifies are: (1) restrictions on the basis on which such rights may be revoked, (2) due process and the duty to provide a reasoned decision, and (3) compensation for revocations not instituted “for cause.”<sup>220</sup> None of these rights arises from the authorization or the frequency allocation. According to the language of the Treaty, it is not the permits themselves that “create rights” and therefore “do not have the characteristics of an investment.” As one of the commentators quoted by Italba explains, note 3 seeks to “focus the determination on the nature and extent of the putative investor’s property rights *in the license*.”<sup>221</sup>

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<sup>216</sup> Counter-Memorial, Section II.D.

<sup>217</sup> Uruguay-U.S. BIT, Art. 1 (C-001) (definition of investment).

<sup>218</sup> The relevant portion of the note states that: “[w]hether a particular type of license, authorization, permit, or similar instrument [...] has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law” Uruguay-U.S. BIT, note 3 (C-001) (emphasis added).

<sup>219</sup> Reply, ¶ 109.

<sup>220</sup> *Id.*

<sup>221</sup> K. Vandeveld, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009), p. 124 (CL-117) (“The footnote is intended both to make the point that not every license, authorization, permit, or similar instrument is an investment, and to focus the determination on the nature and extent of the putative investor’s property rights in the license. A

163. The “rights” that Italba has identified are not rights arising from the permits themselves, but from the rules governing government actions in general. As explained by Prof. Pereira, “Trigosul *did not have a private right protected by local laws.*”<sup>222</sup> Permits such as the one Trigosul held, which have no set term, characteristically “*do not confer any private rights to the citizen.*”<sup>223</sup> Although permit holders do enjoy the procedural protections Trigosul has identified, such protections are based on “the general legal framework for administrative matters (but *never derived from the permit itself or the provisional authorization.*)”<sup>224</sup>

164. International law confirms that mere procedural protections do not constitute “assets,” much less assets that can be designated as “investments.” For example, in the *Accession Mezzanine* case, the tribunal explained that “procedural rule[s] governing a tender process cannot constitute an ‘asset’ for the purposes of the definition of an investment” under the applicable bilateral investment treaty.<sup>225</sup> Conscious of this fact, the claimants in *Accession Mezzanine* argued that certain procedural protections<sup>226</sup> were incorporated contractually in a broadcasting

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license revocable at will by the state would exemplify the kind of license that is unlikely to constitute an investment.”).

<sup>222</sup> Second Expert Opinion of Dr. Santiago Pereira Campos (7 August 2017) (“Second Expert Opinion of Dr. Pereira”), ¶ 25 (certain emphasis added; certain emphasis omitted).

<sup>223</sup> *Id.* (certain emphasis added; certain emphasis omitted).

<sup>224</sup> *Id.*

<sup>225</sup> *Accession Mezzanine Capital L.P. and Danubius Kereskedohaz Vagyonkezele v. Hungary*, ICSID Case No. ARB/12/3, Award (17 April 2015) (Rovine, Lalonde, Douglas), ¶ 115 (RL-150). Note that the Treaty between Uruguay and the United States also contains a definition of “investment” based on the concept of “assets.” Uruguay-U.S. BIT, Art. 1 (C-001) (defining investment as “every *asset* that an investor owns or controls, directly or indirectly, that has the characteristics of an investment [...]”) (emphasis added).

<sup>226</sup> The procedural protections in this case were the obligation to handle the tender processes in good faith, in accordance with the law, in a just and transparent manner; the obligation to publish the call for bids 12 months prior to the expiration of the existing license; and the requirement to disqualify bidders who failed to adhere to certain restrictions and requirements. *Accession Mezzanine Capital v. Hungary*, ¶ 112 (RL-150).

agreement, in order to bridge the gap between procedural rules (which constitute neither assets nor investments) and substantive rights (which can indeed constitute an investment.)<sup>227</sup> But the tribunal determined that generally applicable procedural rules, in this case applicable to all bidders, are not specific enough to constitute an investment.<sup>228</sup> In the words of the tribunal, “it is manifestly clear that procedural rules that apply in equal measure to all participants in an administrative process cannot satisfy these requirements [to constitute an investment].”<sup>229</sup> Here, as in *Accession Mezzanine*, there is no investment, but merely generally applicable procedural rules that the Treaty excludes from the scope of its protections.

165. The TCA Judgment confirms that what Italba identifies as rights enjoyed by Trigosul do not arise from the permits, but rather from the exercise of administrative power. The TCA evaluated the action taken by the Executive Branch to determine whether it was consistent with the procedural obligations with which all administrative decisions must comply. It specifically examined the revocation to determine whether the “motive[s] for the administrative act, do not exist or are different from what the Agency claims,” since otherwise “the act will be defective because of inexistent motives.”<sup>230</sup> The grounds for administrative decisions “must be correct. The legal grounds must be in accordance with the texts cited, the facts must be true. It is not enough for there to be facts; they must also be correctly evaluated.”<sup>231</sup> At no time did the

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<sup>227</sup> *Id.*

<sup>228</sup> *Id.*, ¶ 116.

<sup>229</sup> *Id.*

<sup>230</sup> TCA Judgment No. 579, p. 16 (C-076).

<sup>231</sup> *Id.*, pp. 18, 19.

TCA indicate that the authorization or the frequency allocation was the source of the protections in question.

166. According to the terms of the Treaty, in order for an authorization or frequency allocation to constitute an investment, they must give rise to rights of such “nature and [...] extent” that they warrant protection under international law.<sup>232</sup> Note 3 to the Treaty does not mean that only those authorizations that do not enjoy *any* procedural or substantive rights fall outside the protection of the Treaty. A license may create protected rights and even so not reach the level of an investment. Determining whether an authorization constitutes an investment is not a simple question of whether or not it creates any right, but rather a determination of “the nature and extent of the rights.”

167. There can be no doubt that Trigosul’s rights are not sufficient to reach the level of “investment.” The fundamental nature of Trigosul’s permits was that they were “provisional and revocable without any right to compensation.” This designation was clearly stated in the frequency allocation:

5.- It is hereby established that this authorization is provisional and revocable at any time, without any right to any claim and/or compensation of any kind, and the holder of this authorization shall be solely responsible to this National Directorate for the payments set forth in Art. 8 of Decree No. 599/989, including its subscribers’ stations, and shall keep the joint and several guarantee up to date.

*Source:* National Communications Directorate, Resolution No. 227/97 (4 August 1997), p. 5 (R-12).

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<sup>232</sup> Uruguay-U.S. BIT, note 3 (C-001).

168. And the authorization to operate in the Spectrum was also provisional and revocable. As explained by Prof. Pereira: “the authorization for the provision of services granted by the Administration to Trigosl under Executive Resolution No. 142/2000 was granted without any term, constituting a concession with no fixed term or a permit, which could be revoked by the Administration, at any moment, for reasons of general interest.”<sup>233</sup>

169. Italba acknowledges that Trigosl’s authorization and frequency allocation were provisional and revocable, without any right to compensation.<sup>234</sup> As such, Trigosl’s permits were “weakened rights’ because they have a provisional nature and are essentially revocable at any time.”<sup>235</sup> Prof. Pereira explains that holding a weakened right in telecommunications, such as Trigosl did, has three consequences: (1) the use of radio waves is possible solely by virtue of an authorization granted “in the exercise of *discretionary authority*”; (2) “[o]nce the authorization has been granted or the frequency has been allocated, the citizen *does not have any right to keep them for a specific time period*”; and (3) “[t]he citizen does not have any right to receive compensation when the authorization or allocation of frequencies is revoked because of reasons of general interest.”<sup>236</sup> These three characteristics are what distinguish weakened rights from perfect private rights.

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<sup>233</sup> First Expert Opinion of Dr. Santiago Pereira Campos (20 January 2017) (“First Expert Opinion of Dr. Pereira”), ¶ 90 (emphasis omitted).

<sup>234</sup> See Reply, ¶¶ 101-102 (arguing that the Treaty does indeed protect its permits since, according to Italba, the Treaty does not distinguish between rights that are provisional and revocable and rights of any other nature).

<sup>235</sup> Second Expert Opinion of Dr. Pereira, ¶ 16.

<sup>236</sup> *Id.*, ¶ 17 (certain emphasis added; certain emphasis omitted).

170. As if this were not enough, in a recent judgment, the TCA analyzed provisional and revocable permits, holding that “the permit does not imply obligations of the State toward the permit holder, who *lacks rights with respect to the former*.”<sup>237</sup> It could not be any clearer that Trigosul’s provisional and revocable permits, under Uruguayan law, do not create the “rights protected under domestic law” that would be required for such permits to qualify as an “investment.”

171. Investment status (and consequently, protection under the Treaty) cannot be accorded to a provisional and revocable interest, subject to a multitude of conditions and monitoring, and obtained without paying a cent.<sup>238</sup> To do so would expand the Treaty’s definition of investment beyond the intent of the contracting parties.

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<sup>237</sup> *Id.*, ¶ 18 (citing Judgment No. 218 (30 March 2017) (SPC-080)) (certain emphasis added; certain emphasis omitted).

<sup>238</sup> The cases cited by Italba are not analogous to Trigosul’s situation, since in addition to dealing with different definitions of investment, they involved licenses that enjoyed more extensive protections under domestic law than Trigosul’s did. The *Amco* case, for example, dealt with the revocation of a license that, under a state decree, required the license holder to be notified in advance of any intent to revoke the license. *AMCO v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction in Resubmitted Case (25 September 1983), 3(1) ICSID REV.—FILJ 166 (1988), ¶ 8 (RL-123). The *Rumeli Telekom* case involved a contract that could only be terminated due to breach of contract if the contract was first suspended and the investor given the opportunity to cure the breach. *Rumeli Telekom AS et al. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award (29 July 2008) (Hanotiau, Boyd, Lalonde), ¶ 614-615 (CL-027). The exploration and mining licenses in *Khan Resources* enjoyed the protections offered by the Foreign Investment Act, among others, not just the procedural protections related to the administrative decision to revoke. *Khan Resources Inc. et al. v. Government of Mongolia*, PCA Case No. 2011-09 (UNCITRAL), Award (2 March 2015) (Dervaird, Greenberg, Belman), ¶ 99 (CL-008). The license in *Tecmed* was a renewable license to operate for a period of one year. *Técnicas Medioambientales TECMED S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003) (Grigera Naón, Fernández Rozas, Bernal Vereza), ¶ 38 (CL-009). The interests described in the above cases are not comparable to Trigosul’s authorization and assignment of frequencies, which were expressly provisional and revocable without right of compensation.



172. Consequently, Trigosul's permits do not constitute a protected investment under this Treaty, and Italba's claim must be rejected in its entirety.<sup>239</sup>

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173. For each of the above four reasons, Italba's claims must be rejected in their entirety due to lack of jurisdiction.

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<sup>239</sup> Italba accuses Uruguay of "ignor[ing] Italba's investments in equipment, leases, and other tangible property in Uruguay." Reply, note 338. This is incorrect. Italba is claiming damages exclusively for the value of Trigosul's authorization and frequencies, without including a single cent in its claim for the value of any tangible asset that might have existed. *See, generally*, Second Expert Report of Santiago Dellepiane Avellaneda, Compass Lexecon (12 May 2017) ("Second Compass Lexecon Report") (assessing only the value of Trigosul's authorization and frequencies); Reply, ¶ 344(b) (only requesting the value of the authorization and frequencies calculated by Mr. Dellepiane). Thus, if the authorization and frequencies are not a protected investment, there is no other asset for which Italba could be compensated.

**III. EVEN IF THE TRIBUNAL WERE TO EXAMINE THE MERITS OF THE DISPUTE, IT WOULD NOT FIND THAT URUGUAY BREACHED ANY OF ITS TREATY OBLIGATIONS**

174. After filing two pleadings, Italba has been unable to show that Uruguay has violated any of its obligations under the Treaty. In its Reply, Italba fails to present any argument or evidence that could refute what Uruguay has established. Italba has not shown the Tribunal any basis for Uruguay's alleged obligation to grant a new license to Trigosul. Uruguay, on the other hand, has established that it was not necessary to do so. Nor has Italba been able to prove that the revocation of Trigosul's permits violated the provisions of the Treaty; Uruguay has shown that the reason for the revocation was clearly that Trigosul was not providing services, and ultimately the TCA restored its rights, thereby remedying any defect in the preceding decisions. Moreover, despite the errors it claims with regard to the allocation of the frequencies to Dedicado in 2013, Italba fails to submit in its Reply any evidence or arguments to the effect that this decision was taken unlawfully. Lastly, Italba has also failed to put forward any arguments that contradict the fact that Uruguay complied with the TCA's Judgment not once, but twice.

175. The arguments and evidence put forward by Uruguay in its Counter-Memorial remain unscathed. Instead, in its Reply, Italba has resorted to fallacious and outlandish arguments primarily based solely on the outrageous testimony of its witnesses. In response, Uruguay will explain in the following sections why these arguments have no merit and therefore cannot serve as the basis for claiming violations of the right not to have its property expropriated, the right to receive fair and equitable treatment, the right to receive national treatment and

treatment no less favorable than that granted to other countries, and the right to the full protection and security of its investment under Articles 3, 4, 5 and 6 of the Treaty.

**A. ITALBA HAS FAILED TO SHOW THAT TRIGOSUL NEEDED AN “UPDATED LICENSE” TO PROVIDE SERVICES OR THAT URUGUAY WAS OBLIGATED TO GRANT ONE**

176. In its Reply, Italba repeats the arguments it put forward in its Memorial, most of which are supported by nothing more than the statements of Messrs. Alberelli and Herbón, ignoring evidence to the contrary presented by Uruguay in its Counter-Memorial.

177. None of these arguments undermine the simple fact that Uruguay has clearly established: Trigosul did not require an “updated license” to provide services it had been authorized to provide since 2000. Meanwhile, Italba’s insistence that URSEC was *obligated* to issue Trigosul an updated license still lacks any basis.<sup>240</sup> Above all, it ignores Uruguay’s arguments about the fact that these events either occurred prior to the date the Treaty entered into force,<sup>241</sup> or more than three years after Italba initiated the arbitration proceedings, and as such fall outside the Tribunal’s temporal jurisdiction or are time barred under Article 26.1 of the Treaty.<sup>242</sup>

**1. Trigosul Did Not Need an “Updated License”**

178. The Reply repeats the same arguments put forth in the Memorial, that several

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<sup>240</sup> Counter-Memorial, ¶¶ 157-159.

<sup>241</sup> Uruguay-U.S. BIT (C-001).

<sup>242</sup> Counter-Memorial, ¶¶ 95-102; Uruguay-U.S. BIT, Art. 26(1) (C-001).

URSEC officials between 2003 and 2006 provided verbal assurances to Messrs. Alberelli and Herbón that they would receive a license that was “updated” pursuant to decrees 114/003 and 115/003.<sup>243</sup>

179. All of these arguments were refuted by Uruguay in its Counter-Memorial, in which it submitted proof that none of them have any merit.<sup>244</sup> This is undoubtedly why Italba, in its Reply, is putting forward even more outlandish arguments, including (i) that no one at URSEC informed them that they did not need an upgraded license<sup>245</sup> and (ii) that an “internal” URSEC memorandum reveals that the agency itself “believed that conforming licenses were necessary under the 2003 License Regulations.”<sup>246</sup> These arguments lack any credible support.

180. To summarize the status of the evidence after the first exchange of pleadings, Trigosul had an authorization to perform “for business purposes, wireless digital leased lines, not connected to the public telephone network, for point-to-point and point-to-multipoint data transmission.”<sup>247</sup> This authorization allowed it to provide data transmission services over the radio Spectrum and was not in any way affected by the enactment of decrees 114/003 and 115/003.<sup>248</sup> As demonstrated by the evidence submitted in the Counter-Memorial, the obtainment of an updated license did not prevent Trigosul from engaging in commercial activity.<sup>249</sup> Uruguay

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<sup>243</sup> Reply, ¶ 38.

<sup>244</sup> Counter-Memorial, Section III.A.

<sup>245</sup> Reply, ¶ 38.

<sup>246</sup> *Id.*, ¶¶ 39, 272.

<sup>247</sup> Ministry of National Defense, Resolution No. 75/997 (17 January 1997) (R-11).

<sup>248</sup> Counter-Memorial, ¶¶ 144, 149.

<sup>249</sup> *See Id.*, ¶¶ 212, 213; Trigosul S.A. Statistical Table (R-54).

submitted evidence that the other companies competing with Trigosul, which had similar authorizations, reported having customers, providing services and earning income.<sup>250</sup> In contrast, in the statistics reported by Trigosul itself, no evidence can be found that it derived any economic benefit whatsoever from the alleged customers who purchased the services it allegedly provided.<sup>251</sup> Naturally, Italba completely ignores these facts in its Reply.

181. It is stated categorically in the Reply that Trigosul’s competitors were “indisputably issued licenses post-2003.”<sup>252</sup> Uruguay has already established that this is false.<sup>253</sup> The documents on which Italba is once again attempting to base its claims, are the same ones that Uruguay already explained in the Counter-Memorial are not licenses.<sup>254</sup> By insisting that its competitors received licenses after 2003,<sup>255</sup> Italba fails to provide any evidence or respond to Uruguay’s arguments showing that this is false.<sup>256</sup>

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<sup>250</sup> Counter-Memorial, ¶¶ 230, 231; Dedicado S.A. Statistical Table (2016) (R-52); Enalur S.A. Statistical Table (2016) (R-53); Trigosul S.A. Statistical Table (R-54); Telefónica Móviles del Uruguay Statistical Table (2016) (R-55); Telstar S.A. Statistical Table (2016) (R-56).

<sup>251</sup> Trigosul S.A. Statistical Table (R-54).

<sup>252</sup> Reply, note 181.

<sup>253</sup> First Witness Statement of Dr. Nicolás Cendoya (15 January 2017) (“Dr. Cendoya’s First Witness Statement”), ¶ 61; URSEC Report, p. 3 (R-100).

<sup>254</sup> See Reply, note 181 (referencing URSEC Resolution No. 611/007 (27 December 2007) (C-041), URSEC Resolution No. 157/010 (25 March 2010) (C-053), URSEC Resolution No. 544/010 (29 October 2010) (C-054), and URSEC Resolution No. 053/011 (16 March 2011) (C-055)). These documents are the same ones that Uruguay already explained in the Counter-Memorial were not licenses. They have to do with the frequency allocations to the applicant companies and in no way alter their respective authorizations to provide services. Counter-Memorial, ¶¶ 172, 173; see also, Dr. Cendoya’s First Witness Statement, ¶ 62.

<sup>255</sup> Reply, note 181.

<sup>256</sup> Counter-Memorial, ¶ 151. However, Italba appears to be challenging ingenuity by complaining that Uruguay failed to produce documents in relation to the applications Trigosul’s competitors allegedly filed to obtain a class B license or evidence that they were granted, knowing that they do not exist. See Reply, note 181. Once again, Uruguay must make clear that no such applications were filed and that no such licenses were granted to Trigosul’s

182. Moreover, the evidence Italba itself presented shows that an updated license was not necessary for Trigosul to provide the data transmission services it was already authorized to provide. Mr. Luis Valle, the expert presented by Italba, acknowledges that Dedicado, S.A. “is offering a broad range of data transmission and Internet access services to businesses and homes. [...] These are the services that Trigosul could be providing with the license it originally held in 2000.”<sup>257</sup> Moreover, Italba does not refute the fact that Dedicado is currently providing those services based on an authorization that was granted prior to 2003, in other words without any “update” of the authorization it already had.<sup>258</sup>

183. As such, the alleged applications filed by Trigosul in relation to updating its authorization are irrelevant given that it never needed a new license. In any event, Italba also ignores Uruguay’s argument that the communications it submitted in relation to updating its authorization do not comply with the requirements for applying for a license under the 2003 regulations<sup>259</sup> and that under Uruguayan law they were denied.<sup>260</sup>

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competitors. See Counter-Memorial, ¶¶ 171, 173. Italba’s disgruntlement is solely due to the fact that it was unable to obtain *a posteriori* documentary evidence to support its unfounded claims.

<sup>257</sup> Expert Report of Eng. Luis Valle (12 May 2017) (“Expert Report of Eng. Valle”), ¶ 58.

<sup>258</sup> Counter-Memorial, ¶ 230, note 412; National Communications Directorate, Resolution No. 768/999 (15 September 1999) (R-18).

<sup>259</sup> First Expert Opinion of Dr. Pereira, ¶ 144.

<sup>260</sup> *Id.*, ¶ 156 (citing Oriental Republic of Uruguay, National Constitution (2004), Art. 318 (C-108)). As Dr. Pereira has explained, in the event no express response to an application is received from the government after 150 days, under Uruguayan law the application is considered to have been denied. Trigosul was never in legal limbo. As Dr. Pereira explains, “[t]here is no uncertainty whatsoever about [the] effects [of the presumptive denial] and, if they harm the citizen, Uruguayan law provides effective appeals to challenge them. Trigosul did not fall into legal limbo. On the contrary, the presumptive denial exists precisely to prevent that circumstance from happening. Any uncertainty that Trigosul perceived in its situation simply occurred because of its inexplicable conduct of failing to use the appeals within its reach to express its grievances.” See Second Expert Opinion of Dr. Pereira, ¶ 79 (citations omitted).

184. The only new document Italba submits in relation to its claim for the lack of an update is a report issued by URSEC’s Radio Frequencies Department, allegedly showing that “URSEC itself believed that conforming licenses were necessary under the 2003 License Regulations [...].”<sup>261</sup> Italba’s interpretation of this report is misguided, since it ignores the content of the report that does not help it.

185. The sentence following the one quoted by the Claimant<sup>262</sup> explicitly states that based on URSEC’s understanding, “the fact that the license has not been updated to date, *by no means invalidates the project of TRIGOSUL S.A.*”<sup>263</sup> Moreover, the document itself confirms, removing all possible doubt, that no update had been issued for any data transmission service providers.<sup>264</sup> This sentence makes is clear that URSEC did not believe that Trigosul needed a new license to move ahead with its project.<sup>265</sup>

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<sup>261</sup> Reply, ¶ 39 (*quoting* URSEC Report (R-100)).

<sup>262</sup> Italba quoted only the following extract of the 2006 report “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 does, it should obtain authorization from the Regulatory Unit.” Reply, ¶ 39 (*quoting* the URSEC Report (R-100)) (emphasis omitted).

<sup>263</sup> URSEC Report, p. 3 (R-100) (emphasis added).

<sup>264</sup> *Id.* (“In addition, we must note that to date no data transmission service operator authorizations in bands 3.5 GHz, 10 GHz., 27 Ghz. or 38 GHz. have been upgraded to the telecommunications license system.”).

<sup>265</sup> Note that this file has always been available to Trigosul and its agents for consultation. In fact, in 2007, years before filing this claim, Trigosul authorized an attorney to consult the file containing this document, *see* Letter from Mr. L. Herbón (Trigosul) to URSEC (24 October 2007) (R-105). In Dr. Pereira’s opinion, in the framework of Uruguayan administrative practice “it is reasonable to think that if Trigosul authorized a professional that it trusted to examine the file it is because it wanted to know about the records it contained” and that “it is sufficient that a person is authorized to allow that person to analyze the file.” *See* Second Expert Opinion of Dr. Pereira, ¶¶ 5(o), 65. In this regard, the expert in Uruguayan law explains that “it is known that the citizen’s attorney has the responsibility to control and examine the administrative or judicial file in which he or she participates for the purpose of providing effective advice to his or her client[.]” and moreover “Article 12 of Decree 500/91 establishes the principle that the Administration may not deny interested parties and their representatives or attorneys access to administrative records [...] the principle of generality, and therefore it encompasses the entire file, as well as the

186. Italba insists that under Uruguayan law, it had the right to obtain an updated license in compliance with the 2003 regulations.<sup>266</sup> However, it does not cite or refer to any legal authority that provided for such a thing. It has simply ignored the arguments explained by Uruguay in its Counter-Memorial.<sup>267</sup>

187. In the Memorial, Italba referred only to Article 38 of Decree 114/003.<sup>268</sup> However, Dr. Pereira and Dr. Cendoya have explained that the authorization update to which this article refers only applies to frequency allocations.<sup>269</sup> On the contrary, the relevant decree, Decree 115/003, which deals with authorizations to provide services, has no transitional arrangement for licenses similar to Article 38 of decree 114/003.<sup>270</sup> Dr. Pereira also analyzed the

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items attached thereto. This right encompasses not only the possibility of its analysis and examination, but also the option for the interested party to copy or reproduce, by any means, all the administrative records.” *See id.*, ¶¶ 66-69 (emphasis and citations omitted). Moreover, Dr. Cendoya confirms that “this document has been accessible to Trigosul since its issuance in 2006, and the file in which it is found has been classified as being publicly accessible.” *See* Second Witness Statement of Dr. Nicolás Cendoya (10 August 2017), ¶ 16.

<sup>266</sup> Reply, ¶¶ 2, 276.

<sup>267</sup> Counter-Memorial, ¶¶ 152, 157-159.

<sup>268</sup> Memorial, note 41. In its pleadings, Italba refers to Decrees 114/003 and 115/003 as “the 2003 License Regulations” in a transparent attempt to mix up and confuse the two separate regulations that each have a distinct sphere of application. *See, e.g.*, Memorial, Part II.B.2; Reply, ¶¶ 27(b), 43, 271. However, as explained in the Counter-Memorial, the 2003 regulations, specifically Decrees 114/003 and 115/003, deal with different matters: Decree 114/003 is the “Regulation on the Administration and Control of the Radio Spectrum” and deals with the allocation of radio frequencies, as its name indicates. *See* Counter-Memorial, ¶¶ 145-147; First Expert Opinion of Dr. Pereira, Part VI.A. For its part, Decree 115/003 is the “Regulation on Telecommunications Licenses” which prescribes the conditions and characteristics for the granting of licenses, which under the previous system were known as authorizations to provide services. *See id.*, ¶ 118

<sup>269</sup> First Expert Opinion of Dr. Pereira, ¶¶ 117, 125; Dr. Cendoya’s First Witness Statement, ¶23. Even if one were to assume that Article 38 was applicable to Trigosul’s circumstances, the regulations needed to implement it had not yet been issued.

<sup>270</sup> First Expert Opinion of Dr. Pereira, ¶¶ 124, 138.



requirements for applying for a license under decree 115/003 and concluded that Trigosl never met them.<sup>271</sup>

**2. Italba Has Failed to Provide Any Evidence Showing that URSEC Officials Assured It that a New License or “Updated License” Would Be Granted to Trigosl**

188. Italba also repeats the arguments it formulated in its Memorial alleging that URSEC officials assured Trigosl representatives that they would obtain an “updated license” pursuant to the 2003 regulations.<sup>272</sup> However, all the URSEC officials to whom Italba refers have already refuted these statements.<sup>273</sup> The outcome of Trigosl’s requests was never assured; Trigosl was always advised by the government officials with all due prudence that any request it might have made had to be processed in accordance with regulatory requirements and would be analyzed by URSEC before a decision would be issued, without providing any advanced opinion as to the outcome of such an analysis.<sup>274</sup> Any argument to the contrary remains unproven.

189. In response to this extremely ordinary situation, Italba has recently attempted to

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<sup>271</sup> *Id.*, ¶¶ 144-152.

<sup>272</sup> Reply, ¶¶ 41-42, 156 and note 452.

<sup>273</sup> Messrs. Gabriel Lombide, León Lev, Juan Piaggio, Fernando Pérez Tabó and Mrs. Elena Grauert, during the time they worked at URSEC, dealt with Luis Herbón and Gustavo Alberelli in relation to Trigosl, in the same way as they deal with any other subject. *See* Counter-Memorial, ¶ 162; Witness Statement of Mr. Juan Piaggio (23 December 2016) (“Mr. Piaggio’s Witness Statement”), ¶ 4; Witness Statement of Mrs. Elena Grauert (30 December 2016) (“Mrs. Grauert’s Witness Statement”), ¶¶ 5-6; Witness Statement of Mr. Fernando Pérez Tabó (30 December 2016) (“Mr. Pérez’s Witness Statement”), ¶¶ 3-4; Witness Statement of Mr. León Lev (28 December 2016) (“Mr. Lev’s Witness Statement”), ¶ 4.

<sup>274</sup> Mr. Piaggio’s Witness Statement, ¶ 4; Mrs. Grauert’s Witness Statement, ¶ 6, Mr. Pérez’s Witness Statement, ¶ 4; Mr. Lev’s Witness Statement, ¶ 4.

argue that URSEC acted in bad faith because it never advised Trigosl that the updated license *was not necessary*.<sup>275</sup> Italba goes so far as to state that this fact is not even disputed by Uruguay (which defies all logic since it is only recently in its Reply that it brought up these arguments).<sup>276</sup> On the contrary, Uruguay does indeed take issue with these statements.

190. The only thing that is not in dispute, and has been already established, is that Uruguay never told Trigosl that it could not operate without a new or different license other than the authorization it already had. Even so, Trigosl continued to behave as though it did not need one,<sup>277</sup> and Uruguay never prevented it from providing the services it was authorized to provide. In fact, in 2011, Uruguay had to intervene solely because Trigosl was not operating, not because Trigosl needed a license other than the one it had in order to do so.

191. In any case, the arguments to the effect that Trigosl never received a response to its requests are false. URSEC responded to its request to update its license<sup>278</sup> with a notice requesting information<sup>279</sup> which was communicated to Trigosl.<sup>280</sup> Luis Herbón responded to this notice with a letter dated August 26, 2005.<sup>281</sup> The process then came to a halt because

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<sup>275</sup> Reply, ¶ 273.

<sup>276</sup> *Id.*, ¶ 25.

<sup>277</sup> Email from G. Alberelli (Trigosl) to E. Bornio (21 January 2011) (R-114) (“Alejandro and I have identified several business opportunities using the Ghz. 3.4 and Ghz. 3.5 frequency”); Emails between G. Alberelli (Italba) and M. Tellez (10 February 2011) (C-196) (“MARCELLA, TRIGOSUL HAS A LICENSE GRANTED BY URSEC INSIDE THE NATIONAL TERRITORY WITH A FREQUENCY OF 3.4 Ghz FOR DATA TRANSMISSION. I GIVE THEM FREE SERVICE FOR THE FIRST 90 DAYS.”).

<sup>278</sup> Letter from L. Herbón (Trigosl S.A.) to J. Piaggio (URSEC) (6 July 2005) (C-020).

<sup>279</sup> URSEC, Memorandum (17 August 2005) (R-98).

<sup>280</sup> URSEC, Fax Notification to Trigosl S.A. (26 August 2005) (R-99).

<sup>281</sup> Letter from L. Herbón (Trigosl) to URSEC (6 September 2005) (R-33).

Trigosul owed a considerable debt to URSEC due to its failure to pay the frequency usage fee,<sup>282</sup> a situation of which Mr. Herbón was obviously aware and has conveniently decided not to mention.

**3. Italba Accuses Uruguay of Bad Faith, Arbitrariness and Discriminatory Animus without any Proof Whatsoever**

192. Italba bases its accusations regarding the existence of bad faith and other undesirable conduct on two things, an alleged bribe requested by Ms. Fernandez, and URSEC's alleged intent to favor ANTEL.<sup>283</sup> Neither of these two alleged motives is based on any evidence; they arise solely out of the allegations of Dr. Alberelli and Mr. Herbón.

193. In the case of Ms. Fernandez, Italba once again shamelessly and falsely accuses her of having solicited money in exchange for expediting the process of granting a license to Trigosul. These malicious accusations are not supported by any evidence other than the irresponsible statements of Dr. Alberelli, who is clearly not a disinterested witness in these arbitration proceedings.

194. Ms. Fernandez has testified that she never solicited any bribe from Trigosul and that the meeting in July to which Dr. Alberelli refers never took place.<sup>284</sup> Moreover, the records of Dr. Alberelli's movements in and out of the country show that in July he was not even in

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<sup>282</sup> URSEC, Report of the Accounting Division, Accounts Receivable (19 September 2005) (R-35).

<sup>283</sup> Reply, ¶ 242.

<sup>284</sup> First Witness Statement of Eng. Alicia Fernández (28 December 2016), ¶ 4; Second Witness Statement of Eng. Alicia Fernández (26 July 2017) ("Eng. Fernández's Second Witness Statement"), ¶ 5.

Uruguay, with the exception of a single day.<sup>285</sup> Thus, the categorical certainty with which Italba stated in its Memorial that the events surrounding the alleged bribe took place in July has faded to the point that now it “possibly” took place in July, but Dr. Alberelli cannot be expected to recall any details in this regard.<sup>286</sup>

195. What Dr. Alberelli has been able to recall, recently in this final phase of a dispute that has gone on for more than five years now, is an alleged comment made by Héctor Budé, an URSEC official, at a meeting in 2011, to the effect that he had received instructions from Ms. Fernández not to take any action with regard to updating Trigosl’s license. This statement on the part of Dr. Alberelli is also not credible. *First*, Ms. Fernández ceased working at URSEC in 2010,<sup>287</sup> more than a year prior to the alleged comment made by Mr. Budé, who would have had no reason whatsoever to continue following the alleged instruction given by Ms. Fernández after she left URSEC. *Secondly*, Ms. Fernández was not even Mr. Budé’s supervisor, as he reported directly to URSEC’s Division Management and General Management.<sup>288</sup> And *lastly*, in her second witness statement, Ms. Fernández flatly denies having given any such instruction to Mr. Budé.<sup>289</sup>

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<sup>285</sup> Counter-Memorial, ¶ 166.

<sup>286</sup> Reply, ¶ 41 (“It is, however, possible that the meeting took place on July 31.”).

<sup>287</sup> Eng. Fernández’s Second Witness Statement, ¶ 4.

<sup>288</sup> *Id.*, ¶ 3 (“Furthermore, I was not Mr. Budé’s boss, but rather he reported to the managerial line of command (Division Manager and General Manager). Therefore, I did not give him instructions in relation to licensees’ requests.”).

<sup>289</sup> Eng. Fernández’s Second Witness Statement, ¶ 3 (“That assertion is absolutely false. At no time did I ask Mr. Budé to put any request by Trigosl or any other licensee “in the freezer.”).

196. The second grounds for Italba’s claim of alleged bad faith on the part of URSEC is the government’s alleged determination “to protect Antel’s domination of the Uruguayan telecommunications sector from foreign competition.”<sup>290</sup> However, Italba cannot provide even the minutest trace of evidence to support its theories of conspiracy and discrimination against Trigosul in favor of ANTEL.

197. Uruguay responded to Italba’s request for documents related to ANTEL by turning over all the requested documents it had in its possession.<sup>291</sup> None of the documents show the existence of any collusion or discrimination against Trigosul. Italba itself acknowledges that URSEC did not grant ANTEL’s request to have the frequencies that were allocated to Trigosul and other operators allocated to it instead.<sup>292</sup>

198. In its Reply, Italba has merely repeated the unfounded arguments from its Memorial, ignored Uruguay’s evidence refuting them, and put forth some new untenable arguments that Uruguay has refuted.<sup>293</sup> In conclusion, in view of these facts, Uruguay’s arguments remain firm: the update was not necessary.

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<sup>290</sup> Reply, ¶¶ 17, 242.

<sup>291</sup> Uruguay produced the documents requested by Italba in relation to ANTEL at the document production stage, specifically document numbers RP-414 through RP-431 consisting of 800 pages, which contain no evidence in support of Italba’s accusations, *see* Index of Documents Responsive to Claimant’s Document Requests (14 April 2017), p. 8 (R-123).

<sup>292</sup> Reply, ¶ 18. Once again, lacking any concrete evidence, Italba resorts to quoting out of context articles that are extremely general and have nothing to do with Trigosul. The truth is that ANTEL never stood in the way of any of the activities that Trigosul could have engaged in during the time its authorization and frequency allocation were in effect. Unable to base its claims on the evidence they hoped to find, Italba has no argument other than to vilify ANTEL, in hopes of distracting the Tribunal from the fact that it had nothing to do with Trigosul’s business.

<sup>293</sup> First Expert Opinion of Dr. Pereira, ¶¶ 117, 125; Dr. Cendoya’s First Witness Statement, ¶ 23.

**B. THE REVOCATION OF TRIGOSUL'S AUTHORIZATION TO PROVIDE SERVICES AND FREQUENCY ALLOCATION WAS NOT ARBITRARY OR IN BAD FAITH**

199. As established in the Counter-Memorial, Uruguay revoked Trigosul's permits because it breached its obligation to provide the services it was authorized to provide. Trigosul was not providing effective or continuous services in any area of the country and had no traffic whatsoever to demonstrate the efficient use of the frequencies allocated to it as required by applicable regulations.<sup>294</sup>

200. In this regard, Italba does not contradict the evidence presented showing that at the time the decision was made to revoke its allocation, it did not report having any customers or income,<sup>295</sup> in addition to its long history of delinquent payments of the frequency usage fee and failure to meet deadlines for starting its operations. In its Reply, Italba claims that it was no longer providing services because it lacked an updated license.<sup>296</sup> This is a spurious argument, as already explained: all the companies that Italba named as Trigosul's competitors had authorizations that predated 2003, and all of them served thousands of customers with these authorizations.<sup>297</sup>

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<sup>294</sup> See Decree No. 114/003, Art. 12 (C-017) ("A person who has been assigned a radio frequency shall be deemed to be making an efficient use thereof if such use takes place in an effective and continuous manner in the geographical areas for which such frequencies have been reserved, with adequate traffic volume. In the case of systems used for the commercial provision of telecommunication services, the spectrum reservation necessary for any foreseeable growth for the effective period of the relevant license may be included as such.").

<sup>295</sup> Counter-Memorial, ¶¶ 19, 29, 174-176, 314-316; Trigosul S.A. Statistical Table (R-54).

<sup>296</sup> Reply, ¶ 279.

<sup>297</sup> Counter-Memorial, ¶¶ 230-231, 104-105 and Section III.A.1.

201. Before going any further, Uruguay must reiterate that these claims are now time-barred, under Article 26(1) of the Treaty. The revocation of the frequencies allocated to Trigosul on January 20, 2011<sup>298</sup> and the revocation of its authorization to provide services took place on July 8, 2011.<sup>299</sup> Both events and the alleged damage they caused were known to Italba more than three years prior to the start of these arbitration proceedings.<sup>300</sup> However, even if one assumed, *quod non*, that the Tribunal has jurisdiction over these claims, Uruguay will explain the reasons why the revocation of Trigosul's permits was not in bad faith or arbitrary, and that ultimately the TCA corrected any procedural error that may have been committed in these decisions.

**1. The Revocation of Trigosul's Authorization to Provide Services and Frequency Allocation Was Not Arbitrary; It Was Done for Legitimate Reasons**

202. Italba argues that the revocation of its permits was baseless; however it cannot deny that the failure to provide services constitutes grounds for revocation,<sup>301</sup> nor can it show that it was providing services,<sup>302</sup> or in any case, services that were consistent with the efficient use of the frequencies it was allocated. This is an untenable position.

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<sup>298</sup> URSEC, Resolution No. 001/011 (20 January 2011) (C-068).

<sup>299</sup> Ministry of Industry, Energy and Mining, Resolution No. 335/011 (8 July 2011) (C-072).

<sup>300</sup> Reply, ¶ 25(kkk).

<sup>301</sup> Decree No. 114/003, Art. 26 (C-017).

<sup>302</sup> Trigosul S.A. Statistical Table (R-54). Trigosul did not report having any customers or income when its permits were revoked; *see* Counter-Memorial, Sections IV.A.1.a and V.A.1.b.

203. Uruguay has already objectively established that Trigosul was not meeting any of the requirements for the efficient use of the Spectrum.<sup>303</sup> Trigosul was not providing continuous or effective service, as its own reports to URSEC show,<sup>304</sup> in 2009 and 2010 it did not report having a single customer.<sup>305</sup> Obviously, during its periods of inactivity it had no traffic whatsoever, but even during the periods in which it reported having customers, it never reported having more than eight. Such a volume of traffic was clearly unacceptable in comparison to its competitors, who each served thousands of customers.<sup>306</sup> Italba does not refute these facts; in its entire Reply it does not even make any reference to the statistics submitted by Uruguay.

204. In an attempt to ignore these facts, Italba even maintains that it is not in dispute that the basis for determining that Trigosul did not comply with its obligation to provide services was merely “a failed inspection that URSEC conducted at Trigosul’s former address in Montevideo, rather than its new address in Punta del Este.”<sup>307</sup> But the inspection conducted at the domicile URSEC had on file for Trigosul in Montevideo<sup>308</sup> was only one of the elements that led to the conclusion that the required services were not being provided.

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<sup>303</sup> Decree No. 114/003, Art. 12 (C-017). The applicable rule at the time the decision was made to revoke the frequency allocation specifically provides that: “[R]adio frequency shall be deemed to be making an efficient use thereof if such use takes place in an effective and continuous manner in the geographical areas for which such frequencies have been reserved, with adequate traffic volume.”

<sup>304</sup> Trigosul S.A. Statistical Table (R-54).

<sup>305</sup> *Id.*

<sup>306</sup> Counter-Memorial, ¶ 230.

<sup>307</sup> Reply, ¶ 25(rr).

<sup>308</sup> As such, it should be noted that in its report dated December 21, 2010, it clarified that no applications for moving the ECT were on file at URSEC. *See* URSEC, Memorandum, Status of Trigosul S.A. (21 December 2010), p. 1 (NC-016). Moreover, it is clear that the letter informing URSEC of Trigosul's move bears no seal or signature confirming receipt, *see* Letter from L. Herbón (Trigosul) to G. Lombide (Communication Services Regulatory



205. In this respect, URSEC's memorandum recommending the revocation expressly states in relation to its conclusion that the company was not providing services, as follows: "[i]n this regard, it also emerges that the last sworn statement on the Regulatory Framework's Control Rate submitted by the company corresponds to the July-September 2009 semester, which states that no income was accrued in that period."<sup>309</sup> In view of this fact, Italba's argument regarding the lack of grounds for the revocation is completely false.

206. Italba cannot, nor does it attempt to, demonstrate that Trigosul was providing commercial services at the time its permits were revoked. Instead, it argues that it was no longer providing services because it lacked an updated license.<sup>310</sup> Uruguay has already shown that this is not a valid excuse.<sup>311</sup>

207. Italba, on the other hand, argues that around December 2010, Trigosul was providing services free of charge and had active business initiatives. Specifically, Italba maintains that Trigosul had deals in place with Channel 7 in Maldonado and Dr. Garcia's clinic, and claims to have had a business project with what it calls the "Mary Affinity Group." In reality, Trigosul never provided services to Channel 7; its activities were limited to conducting supposed tests, but they did not culminate in closing any business deals or providing any

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Agency) (12 January 2011), p. 6 (C-026); nor does the record show that it presented evidence of the sending or receipt of the fax with said letter, *see* Dr. Cendoya's First Witness Statement, note 62 ("A second possibility accepted by the Uruguayan administrative procedure [...] is the submission of notes or documents by fax. In this case, the way to prove submission is the receipt slip, but this was not produced in this case.").

<sup>309</sup> URSEC, Technical Assistance Memorandum No. 2010/5/00064 (28 December 2010), p. 2 (C-066).

<sup>310</sup> Reply, ¶ 279.

<sup>311</sup> Reply, Section III.A; Counter-Memorial, ¶¶ 230-231. Moreover, Mr. Valle acknowledges that Trigosul could provide the same services as Dedicado with the pre-2003 authorization, *see* Expert Report of Eng. Valle, ¶ 58.

services.<sup>312</sup> In the case of Dr. Garcia’s clinic, there is also no evidence that it was a concrete deal. In the discussions relevant to the alleged deal, Dr. Alberelli not only lied about the status of Trigosul’s frequency allocation, which had been revoked,<sup>313</sup> but it also appears that it was not providing any services to the clinic.<sup>314</sup> Dr. Fernando García reiterates in a second witness statement that he did not receive any services from Trigosul.<sup>315</sup> And as far as the “Mary Affinity Group” is concerned, it’s been shown to be another unicorn pursued by Trigosul; no such group exists, formally or informally,<sup>316</sup> and Italba fails to provide any evidence to the contrary.

208. The weaknesses of these alleged business opportunities are analyzed in detail in Section V.A.1.b, but certainly, the revocation of the frequency allocation had nothing to do with the failure of these nonexistent deals. Instead, these incipient deals near the revocation date are mere distractions intended to obscure the fact that Trigosul was not operating commercially.

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<sup>312</sup> Letter from D. Bobre (Channel 7) to M. Toma, President of the Oriental Republic of Uruguay (9 November 2016) (R-72); First Expert Report of Dr. Daniel Flores, Econ One Research (27 January 2017) (“First Expert Report of Econ One”), ¶ 95 (“Claimant has not provided evidence proving that Canal 7 had any interest in receiving services provided by Trigosul, nor the terms of service that were supposedly agreed upon by the two companies.”); *See also* Second Expert Report of Dr. Daniel Flores, Econ One Research (11 August 2017) (“Second Expert Report of Econ One”), ¶¶ 98-100.

<sup>313</sup> Emails between G. Alberelli (Italba) and M. Tellez (10 February 2011) (C-196) (“MARCELLA, TRIGOSUL HAS A LICENSE GRANTED BY URSEC INSIDE THE NATIONAL TERRITORY WITH A FREQUENCY OF 3.4 Ghz FOR DATA TRANSMISSION. I GIVE THEM FREE SERVICE FOR THE FIRST 90 DAYS.”).

<sup>314</sup> As Econ One explained, the evidence of the alleged deal with Dr. García’s Clinic is a “trial” agreement, which is a temporary thing, and would have required Dr. García to subsequently sign a true service agreement. *See* First Expert Report of Econ One, ¶¶ 81-83.

<sup>315</sup> Second Witness Statement of Dr. Fernando García Piriz (26 June 2017) (“Dr. Garcia’s Second Witness Statement”), ¶¶ 4-6.

<sup>316</sup> Counter-Memorial, ¶ 236; First Expert Report of Econ One, ¶ 99 (“Claimant uses only one document to claim that negotiations between Grupo Afinidad Mary and Trigosul were at an advanced stage: a letter dated May 1, 2012 and signed by Richard Weber as a ‘permanent resident of Uruguay.’ Claimant has not presented a single document from Grupo Afinidad Mary showing that there were any discussions or negotiations between the group and Trigosul. It is worth noting that Mr. Weber’s letter does not mention the Grupo Afinidad Mary even once.”) (citation omitted).

209. Italba cannot maintain in the face of all the evidence to the contrary, that Uruguay would not have had grounds to revoke the frequency allocation in view of Trigosl's failure to provide services.<sup>317</sup> At the same time, Uruguay is not attempting to relitigate the matter before the TCA.<sup>318</sup> It is not in dispute that the TCA ruled that the inspection conducted could not serve as grounds for the revocation, and consequently decided to annul the challenged administrative decisions;<sup>319</sup> but this circumstance, far from prejudicing Uruguay, shows that any defect of form that the revocation decision might have contained was corrected by the TCA's Judgment.

**C. URUGUAY DID NOT VIOLATE THE TREATY BY REALLOCATING THE FREQUENCIES PREVIOUSLY ALLOCATED TO TRIGOSUL**

210. Uruguay disputes the characterization of the facts described in the "[u]contested facts"<sup>320</sup> and in several references in the Reply regarding the allocation of frequencies to Dedicado in 2013. Italba's position is based on two false premises: (1) that the frequencies allocated to Dedicado belonged to Trigosl, and (2) that the allocation to Dedicado was done "in secret" and in bad faith. These errors are in addition to the jurisdictional defect that the revocation took place in 2011, years before the temporal limitation in the Treaty.

211. First of all, the situation as it stood following the 2011 revocations was clear: as of that moment, Trigosl no longer "had" the alleged rights it is now claiming in these arbitration proceedings. Thus, the argument that "URSEC had given Trigosl's allocated frequencies away

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<sup>317</sup> See Decree No. 114/003, Art. 26 (C-017).

<sup>318</sup> Reply, ¶ 12 and note 472.

<sup>319</sup> TCA Judgment No. 579 (C-076).

<sup>320</sup> See Reply, ¶ 25(ff); see also *id.*, ¶¶ 11, 179-190.

to a competitor”<sup>321</sup> is false; at the time they were allocated to Dedicado, the frequencies were not “assigned to Trigosl.” They were unused and unallocated.<sup>322</sup>

212. Secondly, it is completely untrue that “Uruguay had secretly reallocated its frequencies to another party while its action seeking return of the Spectrum was still before the TCA.”<sup>323</sup> The transfer was not done in “secret”: the allocation of the 3425-3450 and 3525-3550 MHz sub-band frequencies was duly published, just like any other frequency allocation, on URSEC’s website.

213. Apart from these basic false premises, in this section, Uruguay will first reiterate the reasonableness of URSEC’s action in granting Dedicado, in response to its request, the allocation of frequency sub-bands 3425-3450 and 3525-3550 MHz. Secondly, Uruguay will respond to the Claimant’s allegations that the allocation to Dedicado was “lawless, contrary to due process, in bad faith, arbitrary and discriminatory,”<sup>324</sup> including the fact that there is not now, nor has there ever been any requirement that the government give any notice, as explained in the Counter-Memorial. Lastly, Uruguay will review the multiple opportunities Trigosl had to protect its alleged rights after the revocation, of which it never availed itself.

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<sup>321</sup> *Id.*, ¶ 11.

<sup>322</sup> Nor did Trigosl do anything to protect the frequencies from transfer while the case was before the TCA, as described in *infra* Section IV.B.

<sup>323</sup> Reply, ¶ 155.

<sup>324</sup> *Id.*, ¶ 157.

**1. The Government's Response to Dedicado's Request was Not Only Reasonable under the Circumstances, It Was Also Mandatory**

214. As explained in the Counter-Memorial, the September 2013 allocation of the frequency sub-bands 3425-3450 and 3525-3550 MHz was not preconceived by URSEC in January 2011 (when these bands were revoked from Trigosl). The allocation of frequencies was in response to an application filed by Dedicado in August 2012.<sup>325</sup> At the time they were allocated to Dedicado, the frequencies in question *were not in use*. And, in fact, they had not been in use during most of Trigosl's period of possession (from 2000 until they were revoked in 2011).<sup>326</sup>

215. The Claimant complains that "Uruguay never explains, however, why it would have been reasonable for Trigosl to expect URSEC to reassign frequencies that were the subject of active litigation to a third party [...]."<sup>327</sup> The Claimant apparently failed to read paragraphs 253 to 257 of Uruguay's Counter-Memorial. In those paragraphs, Uruguay explains exactly why it was reasonable to allocate the frequencies in sub-bands 3425-3450 and 3525-3550 MHz to a third party. Not only was it reasonable to allocate the frequencies, it was mandatory to do so.

216. *First*, the primary mission of URSEC is to "ensure efficient use of the spectrum, making certain that there is no unused or inefficiently used spectrum."<sup>328</sup> This is because the

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<sup>325</sup> Counter-Memorial, ¶ 253.

<sup>326</sup> *See supra* Section III.A.

<sup>327</sup> Reply, ¶ 187.

<sup>328</sup> Dr. Cendoya's First Witness Statement, ¶ 21.

“radio spectrum [is] a public asset with limited frequencies.”<sup>329</sup> The Constitution and Convention of the International Telecommunication Union (UIT, per its Spanish acronym) and the administrative regulations that implement them in Uruguay also *require* the “efficient use of the radio electric spectrum, endeavoring to keep the number of frequencies and spectrum usage to the minimum extent necessary to ensure the adequate functioning of services and systems.”<sup>330</sup> Thus, the State must “adopt the relevant measures to optimize its rational use.”<sup>331</sup>

217. *Secondly*, in this context, Dedicado was implementing a new technology called “4Motion” that had the capacity to provide Internet services at nearly three times the current speeds, as the company explained in the request it filed with URSEC.<sup>332</sup> In order to launch these services, it needed a “wireless data network [that] ha[s] *adjacent channels*, thus optimizing the radio communication spectrum resource, and achieving maximum speeds while minimizing guard bands.”<sup>333</sup> In its request to exchange Spectrum bands 3600-3625 and 3675-3700 MHz for 3425-3450 and 3525-3550 MHz, the company explained that the exchange would achieve “adequate separation between the outgoing and incoming frequencies, *avoid spectrum partition* that prevents an adequate deployment of new technologies and obtaining the largest broadbands possible, and increase *efficiency in band use*.”<sup>334</sup> As the graph below clearly shows, granting the

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<sup>329</sup> *Id.*, ¶ 76; Decree No. 114/003, Art. 3 (C-017) (establishing that the radio Spectrum is a scarce natural resource that is the publicly-owned property of the State).

<sup>330</sup> Decree No. 114/003, Art. 2 (C-017); *see also id.*, Art. 12 (“efficient use of the spectrum.”)

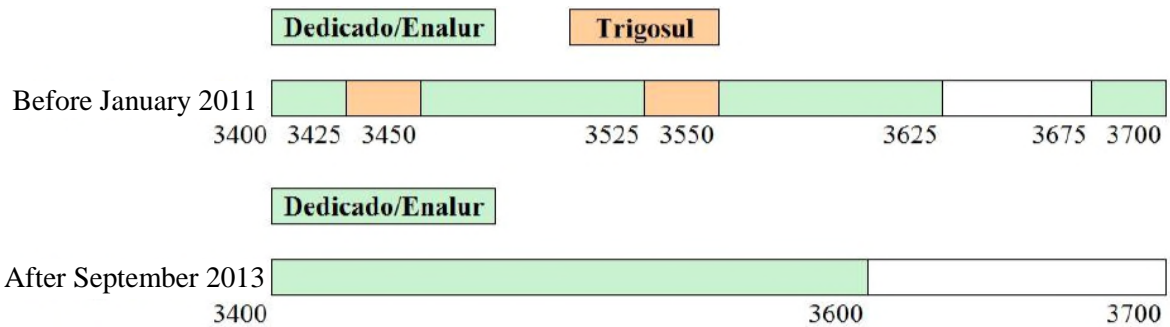
<sup>331</sup> Second Expert Opinion of Dr. Pereira, ¶ 14 (emphasis omitted); *see also* Dr. Cendoya’s Second Statement, ¶ 13.

<sup>332</sup> URSEC, Request from Dedicado S.A., No. 00789 (29 August 2012), ¶ 5 (R-46).

<sup>333</sup> *Id.*, ¶ 6 (emphasis added).

<sup>334</sup> *Id.*, ¶ 8 (emphasis added).

frequencies in the 3400 and 3500 MHz bands to Dedicado was a necessary decision, and completely reasonable, in order to use the Spectrum efficiently. And, in fact, Dedicado continues to use these frequencies to provide services.<sup>335</sup>



218. *Thirdly*, at the time they were assigned to Dedicado, the frequencies were “free of allocation.”<sup>336</sup> It is incorrect and misleading to suggest that the actions taken by the URSEC constituted a “re-allocation” of “Trigosl’s rights.”<sup>337</sup> As Dr. Pereira explains in his second report, the administrative decisions to revoke them were implemented immediately, and these decisions remained valid until the TCA annulled them.<sup>338</sup> In this case, the authorization to provide services and the frequencies were revoked in January and July 2011, respectively. After

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<sup>335</sup> Dr. Cendoya’s Second Statement, ¶ 37.

<sup>336</sup> Resolution No. 220/013 (C-084).

<sup>337</sup> See Reply, ¶ 25(ff) (“On September 5, 2013, while the proceedings in the TCA had already been pending for nearly a year, URSEC re-allocated Trigosl’s rights to operate in the Spectrum to [...] Dedicado [...].”).

<sup>338</sup> Second Expert Opinion of Dr. Pereira, ¶ 112 (“These frequency sub-blocks were free and available since January 20, 2011, when the provisional and revocable allocation of frequencies to Trigosl was revoked, given that the revocation decision was enforced immediately by legal imperative and Trigosl did not effectively request its suspension.”) (emphasis omitted).

remaining unused for 26 months, *i.e.*, two years and two months, URSEC allocated the frequencies to Dedicado in response to its application.

219. In conclusion, as Dr. Cendoya explained, “from the legal point of view and also from the technical point of view, it made complete sense to reallocate those frequency sub-blocks to Dedicado at that time.”<sup>339</sup> Not only that, but the government has an obligation to regulate the Spectrum as efficiently as possible. Allowing frequencies to remain unused during an administrative proceeding—potentially for years—would amount to dereliction of a serious duty on the part of the government.<sup>340</sup>

**2. The Claimant’s Characterization of Uruguay’s Conduct as “Lawless, Contrary to Due Process, in Bad Faith, Arbitrary and Discriminatory”<sup>341</sup> is False**

220. Uruguay acted entirely reasonably; it did not “actively conceal[] its unlawful and discriminatory animus.”<sup>342</sup> First of all, nothing prohibited URSEC from allocating the frequencies in question.<sup>343</sup> In fact, it was the government’s responsibility, as the regulator of a scarce resource, to allocate the frequencies in response to Dedicado’s application, as described above. The Claimant cannot cite to anything that would support any other conclusion.

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<sup>339</sup> Dr. Cendoya’s First Witness Statement, ¶ 86.

<sup>340</sup> This is particularly true since Trigosl took no action to prevent any future allocation. *See* Second Expert Opinion of Dr. Pereira, Part VI.

<sup>341</sup> Reply, ¶ 157.

<sup>342</sup> *Id.*, ¶ 10.

<sup>343</sup> *See* Second Expert Opinion of Dr. Pereira, ¶ 94 (“Complying with the command of national legal rules and in accordance with the prevailing rules of sound administration, Uruguay could only and should allocate the revoked frequencies to another company.”) (emphasis omitted); *see also id.*, Part VII.



221. Nor was there any requirement for the government to give any notice. The frequencies were not “Trigosul’s.” As Dr. Pereira explained in his first report:

In light of the above, it was not necessary to notify Trigosul of these actions given that it was not *the holder of any right with respect to the use of the frequency sub-blocks in question*. However, it was also not necessary to notify Trigosul of these actions given that, from its actions, it failed to show *that it maintained any interest in the use of these frequencies*.<sup>344</sup>

222. However, despite the fact that there was no requirement to notify Trigosul, it was notified. Resolution 220/13 of September 2013 was published, like any other government action—in a public resolution, accessible to everyone.<sup>345</sup> Thus, the allocation to Dedicado was not a “secret.”<sup>346</sup> In fact, Trigosul’s alleged lack of knowledge of the allocation merely serves to highlight its disinterest in the frequencies themselves and its inability to manage its so-called investments in Uruguay.<sup>347</sup>

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<sup>344</sup> First Expert Opinion of Dr. Pereira, ¶ 200 (certain emphasis added; certain emphasis omitted); Second Expert Opinion of Dr. Pereira, Part VII.

<sup>345</sup> URSEC, Resolution 220, Meeting Record 029 (5 September 2013) (R-118); *see also* Resolution No. 220/013 (C-084); Second Statement of Dr. Cendoya, ¶ 19; URSEC, List of Resolutions (2013), *available at* <https://www.ursec.gub.uy/inicio/transparencia/resoluciones/2013/> (last accessed: 4 July 2016) (R-122).

<sup>346</sup> Reply, ¶ 11 (“After the TCA Judgment, URSEC took no responsibility for its secret re-allocation of Trigosul’s frequencies [...].”).

<sup>347</sup> This is particularly true given that Dr. Alberelli was aware of the possibility that the frequencies would be allocated. *See* Counter-Memorial, ¶ 258. In an email dated March 29, 2011, Dr. Alberelli anticipated that URSEC would put “the frequencies up for public auction.” Email from R. Gorter to G. Alberelli *et al.* (14 April 2011) (C-071). The Claimant is attempting to suggest that there is a significant difference between knowledge of the fact that the frequencies could be put up for public auction, and the possibility of a direct allocation. The point is that Dr. Alberelli was aware of the possibility that the government could ensure that the frequencies were being used in some way, and he did nothing to protect his alleged rights to them.

223. And, in any event, URSEC informed Trigosul of the allocation directly, contrary to what the Claimant now claims.<sup>348</sup> As Dr. Cendoya explained in his first statement:

It was during that process that I learned that the frequencies that Trigosul had had allocated to it had been reallocated to Dedicado. I called Dr. Durán Martínez 24 hours after our conversation and *told him directly that the frequencies had been allocated to Dedicado* and I suggested to him that he send a note requesting re-registration in the Register of Data Transmission Service Providers and the restitution of the frequencies, which he did on February 5, 2015.<sup>349</sup>

The Claimant does not deny this basic fact.

### **3. Neither Trigosul nor the Claimant Attempted to Protect their Alleged Rights after the Revocation**

224. The Claimant is employing a subterfuge (the alleged lack of notice) to obscure the fact that it did not take responsibility for protecting its own alleged rights. As Uruguay explained in the Counter-Memorial, between October 2011 and September 2013,<sup>350</sup> Trigosul could have asked the TCA to stay the challenged decision at any time, which, had the tribunal agreed, would have kept the frequencies allocated to Trigosul and prevented any reassignment until the conclusion of the proceeding.<sup>351</sup>

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<sup>348</sup> Reply, note 481 (“URSEC certainly did not advise Trigosul that its Spectrum had already been allocated to another entity.”).

<sup>349</sup> Dr. Cendoya’s First Witness Statement, ¶ 90 (emphasis added); Dr. Cendoya’s Second Statement, Section D.

<sup>350</sup> Trigosul filed the proceeding with the TCA in October 2011. Trigosul, S.A., Petition for annulment (28 October 2011) (C-074); *see also* Trigosul, S.A., Petition for annulment (22 March 2012) (C-075).

<sup>351</sup> First Expert Opinion of Dr. Pereira, Section VII. Dr. Pereira explains in his first report that “Trigosul only requested administratively—albeit in an unfounded and inefficient manner—the suspension of the revocation of the allocation of frequencies. However, it did not request before the administrative authority the suspension of the authorization, and it did not request the suspension of either of the two revocations before the TCA, nor did it carry out any other valid action for such purpose.” First Expert Opinion of Dr. Pereira, ¶ 174.

225. This type of request is very common in administrative proceedings.<sup>352</sup> As such, Trigosul failed in its duty to protect its alleged rights by failing to take “any valid acts aimed at suspending the effects of the revocation decisions, which determined their compliance without its opposition to the immediate enforcement.”<sup>353</sup>

**D. URUGUAY COMPLIED WITH THE TCA’S JUDGMENT**

226. In the Counter-Memorial,<sup>354</sup> Uruguay described the measures taken to comply with Judgment No. 579 of 2014,<sup>355</sup> which annulled the two 2011 resolutions that had revoked Trigosul’s frequency allocation and its authorization to provide services.<sup>356</sup> The outcome of this process was Executive Resolution No. 156/016, authorizing it to provide the services established in the original 1997 resolution, and allocating it the corresponding frequencies. With this resolution, and the subsequent offer of frequencies in the 3600-3625 MHz and 3675-3700 MHz bands, Uruguay complied with both the domestic obligation imposed by the Judgment and its obligations under the Treaty.<sup>357</sup> Recognizing that this point is fatal to its claims, in its Reply, the Claimant presents new justifications for its rejection of the frequencies offered URSEC. These reasons are newly invented and false.

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<sup>352</sup> Second Expert Opinion of Dr. Pereira, ¶ 105.

<sup>353</sup> *Id.*, ¶ 107 (emphasis omitted).

<sup>354</sup> *See* Counter-Memorial, ¶¶ 269-281.

<sup>355</sup> TCA Judgment No. 579 (C-076); Notification from TCA to URSEC (27 November 2014) (R-48).

<sup>356</sup> TCA Judgment No. 579 (C-076).

<sup>357</sup> *See, generally, infra* Section IV.

227. First of all, it is important to note that Uruguay's actions following the Judgment are linked to the first action in the alleged series of wrongs: the revocation of Trigosul's frequencies in 2011. The revocation took place entirely outside the three-year limitations period stipulated in Article 26(1) of the Treaty.<sup>358</sup> Consequently, the actions claimed in relation to the Judgment are also outside the three-year limitations period.

**1. Uruguay Complied with the Judgment in an Appropriate and Reasonable Manner**

228. Uruguay completely rejects the claim made in the Reply that "URSEC never returned the 3425-3450 MHz and 3525-3550 MHz frequencies to Trigosul."<sup>359</sup> The Claimant's indignation at the alleged inadequacies in the government's actions is unmerited since the Claimant was the one who explained that by March 2015 it had decided that it no longer had any interest in the return of the frequencies.<sup>360</sup> This confession indicates that since that time, *any* action on the part of Uruguay in compliance with the Judgment would have been met with rejection.

229. Moreover, the Claimant's arguments have changed at every stage. First, the Claimant raised a claim for compliance with the Judgment, which was achieved with the offer of frequencies that were equivalent to those it had before the revocations. Italba then said that these frequencies were inferior and demanded the original frequencies. When the government offered

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<sup>358</sup> *See, supra* Section II.C.

<sup>359</sup> Reply, ¶ 177.

<sup>360</sup> *Id.*, ¶ 190 ("Thus, once Italba discovered the reality of the situation in March 2015, there would have been no point in waiting any longer for Uruguay to comply with the TCA Judgment").

the Claimant the original frequencies, without any obligation under the law and in good faith, the Claimant rejected those as well, saying that it did not wish to offer telecommunications services in Uruguay and demanding money instead. Now for the first time in the Reply, Italba is arguing that it was allegedly “impossible” for Uruguay to restore its original frequencies, given the allocation to Dedicado, and that Italba rejected them for that reason. This argument is nothing more than a last minute invention, an attempt to provide a justification that Italba lacked when it was unable to see the government’s internal documents before the document production phase.

**a. The First Offer: Compliance with the Judgment and Uruguay’s International Obligations**

230. On Uruguay’s part, the compliance process began in early 2015, when Dr. Nicolás Cendoya, one of the Directors of URSEC, learned of the Judgment.<sup>361</sup> Following a series of telephone conversations with Trigosl’s attorney, Dr. Durán Martínez,<sup>362</sup> Trigosl filed an administrative request to enforce the Judgment with URSEC in February 2015.<sup>363</sup> In May 2015, URSEC’s Legal and Economic Affairs Manager circulated an internal memorandum describing the company’s request.<sup>364</sup> This memorandum showed that the agency was taking action in order to comply with the Judgment—there is no other interpretation. The Claimant cannot ignore this,

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<sup>361</sup> URSEC received official notification of the Judgment on November 27, 2014. Notification from TCA to URSEC (27 November 2014) (R-48).

<sup>362</sup> Note that these communications between URSEC and Dr. Durán Martínez are part of the context in which the parties were working. The Claimant’s description of the interactions that took place during this period is misleading. For example, the Claimant suggests that URSEC ignored Trigosl’s letter of February 5, 2015. Reply, ¶ 25(hhh)-(iii). However, it was URSEC that specifically requested such a letter in order to have a record of Trigosl’s request. See Dr. Cendoya’s First Witness Statement, ¶ 90. Given the communications between the parties that took place before and after said letter, it did not require any response.

<sup>363</sup> Letter from L. Herbón (Trigosl S.A.) to G. Lombide (URSEC) (5 February 2015) (C-082).

<sup>364</sup> URSEC, Notification of Record No. 2015/1/00070 (12 May 2015) (R-50).

and that is why, in its Reply, it criticizes the translation.<sup>365</sup> Even so, Italba admits in the Reply that the memorandum “recognized that they had been asked to [comply with the TCA Judgment].”<sup>366</sup> After the memorandum was circulated, on July 7, 2015, the file was sent to technical services so that they could study the matter of the equivalency of the frequencies.<sup>367</sup>

231. In January 2016, URSEC communicated via a memorandum that four sub-blocks were available for allocation in the 3400-3700 MHz band.<sup>368</sup> On February 1, 2016, the Board of Directors of URSEC approved a draft resolution by the Executive that complied with the TCA’s Judgment.<sup>369</sup> On February 11, 2016, the Minister of Industry, Energy and Mining was notified.<sup>370</sup> On the following day, Italba submitted its Request for Arbitration to ICSID. Despite this, the process continued to move forward: The MIEM approved the resolution, and the President signed it on April 5, 2016.<sup>371</sup>

232. This resolution, Executive Resolution No. 156/016, authorized the provision of the original services and ordered the “allocat[ion] [of] the corresponding frequencies for the

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<sup>365</sup> See Reply, ¶ 180 and note 483.

<sup>366</sup> *Id.* And, given that the government did indeed comply with the Judgment, the argument regarding the alleged distinction in the translation is irrelevant.

<sup>367</sup> Dr. Cendoya’s First Witness Statement, ¶ 91.

<sup>368</sup> URSEC, Notification of Record No. 2015-2-9-1000070 (29 January 2016) (R-58). These sub-blocks were: 3600-3625 MHz., 3625-3650 MHz., 3650-3675 MHz., and 3675-3700 MHz.

<sup>369</sup> URSEC, Notification of Record No. 2015-2-9-1000070 (1 February 2016) (R-59).

<sup>370</sup> URSEC, Notification of Record No. 2015-2-9-1000070 (11 February 2016) (R-60).

<sup>371</sup> See Ministry of Industry, Energy, and Mining, Approval of Decree EI 156 (1 April 2016) (R-62); Ministry of Industry, Energy, and Mining, Decree IE 156 (5 April 2016), p. 3 (C-094).

provision of the service.”<sup>372</sup> The resolution ordered URSEC to allocate the frequencies corresponding to the provision of the service.<sup>373</sup>

233. On April 11, 2016, URSEC proposed the allocation of frequencies in the 3600-3625 MHz and 3675-3700 MHz bands.<sup>374</sup> Trigosul rejected it, arguing that the frequencies “are not as useful or valuable as the frequencies that TRIGOSUL S.A. had previously, which were taken from it by the annulled decision.”<sup>375</sup> In its Reply, the Claimant now argues in addition that Dedicado asked to replace these frequencies due to the “technical limitations of the 3600-3625 MHz and 3675-3700 MHz ranges.”<sup>376</sup> Trigosul’s reasoning and Italba’s arguments lack any basis.<sup>377</sup>

234. First of all, Uruguayan law allows action in accordance with the TCA that places the winning litigant “*as close as possible* to the situation of which it was deprived.”<sup>378</sup> In other

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<sup>372</sup> Decree IE 156, p. 3 (C-094).

<sup>373</sup> *Id.*; Dr. Cendoya’s First Witness Statement, ¶ 95.

<sup>374</sup> URSEC, Notification of Record No. 2015-2-9-1000070 (11 April 2016) (R-63).

<sup>375</sup> URSEC, Letter from L. Herbón (Trigosul S.A.) in Record No. 2015-2-9-1000070, ¶ VII (27 April 2016) (R-64); *see also* Letter from A. Yanos to P. Reichler *et al.* (6 May 2016) (C-096); *see also* Memorial, ¶ 82 (arguing that the frequencies “[t]he frequencies in the 3600-3700 MHz range are significantly less valuable than the Spectrum that Trigosul previously held [...].”).

<sup>376</sup> Reply, ¶ 25(mmm) (“These were the same frequencies that Dedicado had held prior to September 2013, when it had asked URSEC to exchange them for Trigosul’s Spectrum because of the technical limitations of the 3600-3625 MHz and 3675-3700 MHz ranges.”).

<sup>377</sup> And in fact, to date, the Claimant has not shown any evidence of any “technical limitation” in relation to the frequencies in the 3600-3625 MHz. and 3675-3700 MHz. bands. *See* Reply, ¶ 25(nnn) and note 122 (*citing* correspondence between the parties’ attorneys and First Statement of Dr. Alberelli). As described below, the report by Mr. Valle that was submitted along with the Reply does not justify (and could not provide *a posteriori* justification) for the rejection of the alternative frequencies. *See* Expert Report of Eng. Valle.

<sup>378</sup> First Expert Opinion of Dr. Pereira, ¶ 265 (*citing* TCA Judgment No. 1050 of 8/19/1992 (SPC-046)) (certain emphasis added; certain emphasis omitted).

words, *it is not necessary* that “the issuance of the mandatory decision translates into the reestablishment of the situation prior to its issuance, in identical circumstances to those existing at the time.”<sup>379</sup> Here, URSEC analyzed the situation and determined that “the sets of frequency blocks were the same.”<sup>380</sup>

235. The government’s analysis was correct. As was explained in the Counter-Memorial, the frequencies offered were not “substandard” or of less value than the frequencies Trigoslul had prior to the revocation. Dr. Cendoya stated that “[t]he whole band from 3.4 to 3.8 (which includes the alternative and original frequencies) is appropriate for point to point and point to multi-point data transmission. These frequencies were equivalent in technical, economic and legal terms to the originals.”<sup>381</sup>

236. The report by Uruguay’s technical expert, the Dr. Alejandro Paz, submitted with this Rejoinder, confirms this analysis, and refutes the alleged justifications offered for the first time in the report submitted by Dr. Valle, the technical expert hired by Italba, in the Reply.<sup>382</sup> All the “technical limitations” relating to the alternative frequencies were “limitations” applicable to the other frequencies in the same band of the Spectrum. As Dr. Paz explains: “[f]rom a technical point of view (i.e. Propagation of the band, bandwidth, and capacity of the links and equipment availability), the bands 3.4 to 3.6 GHz and 3.6 to 3.7 GHz are equivalent. Trigoslul could

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<sup>379</sup> *Id.* (citing TCA Judgments No. 413/2013 (SPC-048) and No. 246/2009 (SPC-049)).

<sup>380</sup> Dr. Cendoya’s First Witness Statement, ¶ 100.

<sup>381</sup> *Id.*, ¶¶ 97-98.

<sup>382</sup> Expert Report of Eng. Valle, ¶¶ 102-105.



perfectly well have developed the business for which it was authorized in that band given that the main suppliers of equipment for [PTP and PTMP] sell configurable equipment for the entire band from 3.4 to 3.7...”<sup>383</sup>

237. The Claimant is now attempting to argue that Dedicado’s request to exchange these frequencies for those originally assigned to Trigosul *confirms* that the alternative frequencies were less valuable.<sup>384</sup> The Claimant is unable to provide a shred of evidence to suggest that the reason for Dedicado’s request had anything to do with the frequencies being worth less.<sup>385</sup> In fact, in another section of the Reply, the Claimant admits that 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.*”<sup>386</sup> As Dedicado itself explained in its request, the reasons for its petition were specific to Dedicado; the company was implementing a new technology for which it was needed to have a “wireless data network [that] ha[s] *adjacent* channels, thus optimizing the radio communication spectrum resources.”<sup>387</sup>

238. The equivalence between the frequencies in bands 3400 MHz to 3800 MHz is also confirmed by the fact that Dedicado *did not have to pay* for switching them. It was an equivalent exchange at that time and it is still an equivalent exchange today. And in any event,

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<sup>383</sup> Expert Report of Eng. Alejandro Paz (10 August 2017), ¶ 50; *see also* Second Expert Report of Econ One, Section IV.E.

<sup>384</sup> Reply, ¶ 193 (“These frequencies were, *as confirmed by Dedicado’s petition to have URSEC replace them, significantly less valuable than Trigosul’s original Spectrum*”) (emphasis added).

<sup>385</sup> *See* Resolution No. 220/013 (C-084). Nowhere in Dedicado’s request does it mention anything about any “substandard” value of the frequencies in the 3600 and 3700 bands.

<sup>386</sup> Reply, ¶ 25(fff) (emphasis added). As such, the Claimant is not only mistaken but also internally inconsistent.

<sup>387</sup> URSEC, Request from Dedicado S.A., No. 00789, ¶ 6 (R-46) (emphasis added).

the Claimant itself acknowledges the equivalent value of the alternative frequencies. In its arguments on damages, the Claimant is advocating for the use of a variety of different frequencies to assess the value of its original frequencies.<sup>388</sup> As such, the Claimant cannot argue that the alternative frequencies were different in a way important to it.

239. The facts speak for themselves. Uruguay, within a reasonable period,<sup>389</sup> issued Executive Resolution No. 156/016 and a few days later, offered Trigosul frequencies in the 3600-3625 and 3675-3700 MHz bands, frequencies that were technically, economically and legally equivalent to the original frequencies.<sup>390</sup> With this action, the government complied with its domestic and international obligations.

**b. The Second Offer: Demonstrating Uruguay's Good Faith**

240. When Trigosul rejected the alternative frequencies, URSEC proposed—in good faith and in an attempt to put an end to the dispute—a new offer in May 2016. In this offer, URSEC agreed to revoke the frequency allocations from Dedicado in the 3425-3450 and 3525-3550 MHz band and return them to Trigosul.<sup>391</sup> But Italba rejected this offer as well and, in its own words, “elected to receive monetary damages as the remedy.”<sup>392</sup>

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<sup>388</sup> See Reply, Section V.

<sup>389</sup> See *infra* Section IV.A.2.

<sup>390</sup> Dr. Cendoya's First Witness Statement, ¶¶ 97-98.

<sup>391</sup> URSEC, Draft Resolution (9 May 2016) (C-098).

<sup>392</sup> Letter from A. Yanos to P. Reichler (31 May 2016), p. 1 (C-099) (“Italba elected to receive monetary damages as the remedy for Uruguay's breaches of the Treaty [...]. Italba elected to reject restitution as a potential remedy for the expropriation, due, in particular, to the fact that, after Italba learned that URSEC would not comply with the judgment of the Uruguayan courts and had re-allocated Trigosul's frequencies to its competitor Dedicado [...].”).

241. Italba did not have the right to “elect” monetary compensation, rather than the return by the government of the frequencies requested by the TCA proceeding.<sup>393</sup> Thus, the rejection shows that Italba did not want the frequencies returned, and that, just as in the years prior to the revocation, it had no interest in offering the services it was authorized to offer. Allowing a claim for monetary compensation under these circumstances would be an abuse of the international arbitration system.

242. The Claimant is now also introducing a new argument in its Reply: that if Italba had been willing to accept the frequencies, it would have been “impossible” to comply with the TCA’s Judgment.<sup>394</sup> First of all, URSEC offered to return the original frequencies to Trigosl, but Italba rejected them. The Claimant cannot justify its *post hoc* act, as it has done in the Reply, based on the interactions between URSEC and Dedicado that were revealed in Uruguay’s document production in these arbitration proceedings.<sup>395</sup> Such interactions could not have been the cause of its rejection in May 2016.

243. And in fact, it *was not* the explanation. In its Memorial, the Claimant makes it clear that it considers it *possible* to comply with the Judgment. In paragraph 198, it explains that the transfer of “Trigosl’s rights [...] *need not have been an impediment* to Uruguay’s fulfillment of its obligations to Italba under the Treaty.”<sup>396</sup> It went on to say that “Uruguay *could have*

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<sup>393</sup> See *infra* Section V.D.

<sup>394</sup> Reply, ¶ 186 (“URSEC—by its own actions—had placed itself in a position in which strict compliance with the TCA Judgment was functionally impossible.”).

<sup>395</sup> *Id.*, ¶¶ 183-190.

<sup>396</sup> Memorial, ¶ 108 (emphasis added).

*revoked the transfer* of Trigosul's rights to Dedicado and restored those rights to Trigosul in accordance with the TCA Judgment, *as Uruguay itself acknowledged by its recent offer to do just that.*<sup>397</sup> The arguments it makes for the sake of convenience in the Reply are completely contradictory and baseless.

244. The truth is that returning the original frequencies to it, as Uruguay explained in its Counter-Memorial, was not simple but it was possible.<sup>398</sup> As the Claimant correctly points out, the frequencies could only be revoked from Dedicado for reasons of public interest.<sup>399</sup> Here, that criterion was met. The expert Dr. Pereira explains:

If it is considered [...] that the only way in which Uruguay could have complied with the judgment of the TCA was to allocate to Trigosul the frequencies it possessed before the revocation that were subsequently allocated to Dedicado, this situation did not make it impossible for Uruguay to comply. [...] *The existence of a final unappealable judgment of the TCA annulling the decision to revoke Trigosul's frequencies would have been sufficient grounds to demonstrate the general or public interest involved in the decision to revoke that could have been issued against Dedicado if Trigosul had accepted the Administration's offer.*<sup>400</sup>

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<sup>397</sup> *Id.*

<sup>398</sup> Counter-Memorial, ¶¶ 270-281.

<sup>399</sup> The Claimant falsely implies that this action would have required compensation. *See* Reply, ¶ 183 (“after due process *and* with compensation”) (emphasis added). In fact, earlier in its arguments, the Claimant explains that only an unlawful revocation, without reasons of public interest, requires annulment or compensation. Reply, ¶¶ 106-107. There is nothing in Uruguayan law that requires compensation when the government takes an action for reasons of public interest. Second Expert Opinion of Dr. Pereira, ¶ 5(g)(iii).

<sup>400</sup> Second Expert Opinion of Dr. Pereira, ¶¶ 168, 172 (certain emphasis added; certain emphasis omitted).

Thus, “Uruguay did not place itself in any forced noncompliance situation as Italba argues. On the contrary, the Government acted within the framework of legal rules and sound administration that the situation called for.”<sup>401</sup>

245. In addition to arguing the alleged impossibility of returning the original frequencies, in the Reply (contradicting what it argued in the Memorial), the Claimant also attempts to develop a new justification for rejecting said frequencies: claiming that they would have been the subject of a lawsuit filed by Dedicado had they been returned to Trigosul.<sup>402</sup> Once again, the Claimant only learned of the communications between Dedicado and the government as a result of these arbitration proceedings; an alleged lawsuit could not have been the justification for rejecting the frequencies. In fact, neither Trigosul nor the Claimant has used this reasoning thus far. And in any event, the actions of Dedicado have nothing to do with the Trigosul’s alleged rights—had the Claimant accepted the return of its original frequencies, the government would have worked with Dedicado to protect its interests.<sup>403</sup>

## 2. Uruguay Complied in a Timely Manner

246. First of all, under Uruguayan law, there is no set period for compliance with a

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<sup>401</sup> *Id.*, ¶ 178.

<sup>402</sup> Reply, ¶ 195 (“Furthermore, the Spectrum that URSEC proposed to wrest from Dedicado was fundamentally different than the Spectrum in which Trigosul originally had rights, in that the Spectrum was now under a cloud of administrative irregularity and subject to potential litigation by Dedicado.”).

<sup>403</sup> Dr. Cendoya’s Second Statement, ¶ 37. The Claimant argues that Uruguay “conced[ed] that Dedicado was not given an opportunity to defend its own rights.” Reply, note 488 (*citing* Counter-Memorial, ¶ 272). This paragraph in no way concedes this point.

TCA judgment,<sup>404</sup> a legal reality with which the Claimant expressly agrees.<sup>405</sup> Uruguay began the process and complied with the Judgment within fifteen months, a reasonable period of time given the circumstances of the case.<sup>406</sup> And it never indicated in any way that it would not comply.

247. It is particularly cynical for the Claimant to complain about the period of time<sup>407</sup> when it admits that it had not been interested in the return of the frequencies since May 2015. It states in the Reply that, as of that moment, “there would have been no point in waiting any longer for Uruguay to comply with the TCA Judgment.”<sup>408</sup> This attitude explains the lack of communication with the government after February 2015.<sup>409</sup> As Dr. Cendoya explains: “It was quite clear that Trigosul, in line with its historical position, had no interest in providing any service but only in speculating with the frequency allocation in order to achieve enormous gains from the ICSID [arbitration].”<sup>410</sup> This was because the Claimant realized that “the revocation of

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<sup>404</sup> First Expert Opinion of Dr. Pereira, Section IX.G.

<sup>405</sup> Reply, ¶ 189 (agreeing that there is no “no formal limit on URSEC’s time to comply with the TCA Judgment”).

<sup>406</sup> See Counter-Memorial, ¶¶ 269-281, 286; Dr. Cendoya’s First Statement, ¶ 92; First Expert Opinion of Dr. Pereira, Sections IX.G-H.

<sup>407</sup> Reply, ¶ 174 (“Uruguay’s belated attempts to comply with that Judgment [...] made only at the eleventh hour”); ¶ 180 (“By February 5, 2015 [...] URSEC had taken no action to fulfill its obligation to return the Spectrum to Trigosul”); ¶ 181 (“It was not until seven months after the TCA Judgment that Dr. Graciela Coronel [...] circulated an internal ‘memorandum’”) (emphasis omitted); ¶ 182 (“URSEC’s inaction was unsurprising”).

<sup>408</sup> *Id.*, ¶ 190. As it was explained in the Counter-Memorial, even URSEC noticed the change in Trigosul’s focus. As of February 2015, Trigosul ceased to press URSEC to return the frequencies. Dr. Cendoya’s First Statement, ¶ 91; First Expert Opinion of Dr. Pereira, Section X. In fact, after February 2015, Italba had no interest in recovering its authorization and the frequencies. See Counter-Memorial, ¶¶ 271-272.

<sup>409</sup> See Counter-Memorial, ¶¶ 271-272; Dr. Cendoya’s First Statement, ¶¶ 91, 94, 101-106.

<sup>410</sup> Dr. Cendoya’s First Witness Statement, ¶ 102.

the authorization and allocation of frequencies did not cause it any harm, [and] it preferred to stick to its arbitration claim.”<sup>411</sup>

248. As such, the lament that “Italba’s faith in Uruguayan justice was not rewarded”<sup>412</sup> is completely insincere. Italba saw an opportunity to reap an outlandish profit using the international arbitration system.<sup>413</sup> Faced with this possibility, the return of its authorization and frequencies were much less attractive.

249. In conclusion, there is no doubt that Uruguay complied with the Judgment, and did so in a reasonable manner within a reasonable period of time. The TCA itself was satisfied that Uruguay had complied with its Judgment. URSEC went to the TCA to report that it had attempted to comply with the Judgment, explaining that its attempt to do so had been frustrated by the Claimant’s rejections.<sup>414</sup> The TCA confirmed<sup>415</sup> and Trigosl did not appeal. Thus, the order is final and the execution of the Judgment has closed.<sup>416</sup>

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<sup>411</sup> *Id.*, ¶ 103.

<sup>412</sup> Reply, ¶ 10.

<sup>413</sup> See Letter from Italba Corporation to Directorate of International Economic Affairs, Ministry of Foreign Affairs (5 August 2015) (C-090).

<sup>414</sup> URSEC, Request to TCA (3 August 2016) (R-66); see also Dr. Cendoya’s First Witness Statement, ¶ 106.

<sup>415</sup> TCA, Decree 6172/2016 (9 August 2016) (R-67).

<sup>416</sup> First Expert Opinion of Dr. Pereira, ¶ 363

#### IV. LEGAL CLAIMS

##### A. URUGUAY DID NOT EXPROPRIATE ITALBA'S ALLEGED INVESTMENT

250. In its Reply, Italba argues, as it also does in its Memorial, that (a) Uruguay did not comply with the TCA Judgment<sup>417</sup> and (b) the “noncompliance” was not temporary,<sup>418</sup> and that this noncompliance constitutes an expropriation of its rights. Uruguay has already shown in its Counter-Memorial that these tired arguments are wrong, first of all because the TCA Judgment was fully and promptly complied with, and because this compliance was recognized by the court itself. The Reply attempts to offer new arguments on Uruguay’s alleged “noncompliance,” which are nothing more than new presentations of the same arguments that have already been defeated. Faced with the reality of Uruguay’s compliance with the Judgment, Italba simply has no response.

251. Nor can Italba respond to the evidence submitted by Uruguay in its Counter-Memorial to the effect that its alleged rights to use certain frequencies in the Spectrum and provide wireless data services were “provisional and revocable”—as is expressly stated in the resolutions granting them—and as such they are not subject to expropriation.<sup>419</sup> Nor does Italba have any response to the evidence offered by Uruguay showing that the revocation of its alleged rights in 2011 was consistent with the letter and spirit of Uruguayan law to promote the efficient

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<sup>417</sup> Reply, ¶¶ 177-196.

<sup>418</sup> *Id.*, ¶¶ 197-206.

<sup>419</sup> *Id.*, ¶¶ 175-76.



use of the Spectrum: motivated by the fact that Trigosul had ceased to operate, had not used the frequencies, and had not provided the services promised for more than twelve years.

**1. Because Uruguay Complied with the TCA’s Judgment, There Was No Expropriation**

252. As Uruguay explained in its Counter-Memorial, if a measure does not constitute expropriation, Article 6 of the Treaty does not apply.<sup>420</sup> The Reply offers no response to those cases that establish the need to determine the “foundational threshold inquiry of whether the property or property right was in fact [expropriated].”<sup>421</sup> Thus, the Claimant is basing its expropriation analysis on a false premise: that an expropriation took place at all.

253. However, while ignoring the legal grounds on which Uruguay has based its position, the Claimant is attempting to argue 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.”<sup>422</sup> But the cases cited are completely inapplicable to the analysis of the present situation. For example,

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<sup>420</sup> Counter-Memorial, ¶¶ 282-285.

<sup>421</sup> *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award (8 June 2009) (Young, Caron, Hubbard), ¶ 356 (RL-75) (“There is for all expropriations, however, the foundational threshold inquiry of whether the property or property right was in fact taken.”); *see also Fireman’s Fund Insurance Co. v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, Award (17 July 2006) (van den Berg, Lowenfeld, Saavedra Olavarrieta), ¶ 174 (RL-54) (in which the tribunal determined that it could not “start an inquiry into whether expropriation has occurred by examining whether the [four conditions] for avoiding liability in the event of an expropriation have been fulfilled,” precisely because said conditions “do not bear on the question as whether an expropriation has occurred”); *Saluka Investments B.V. (Holland) v. Czech Republic*, UNCITRAL, Award (17 March 2006) (Watts, Fortier, Behrens), ¶ 264 (CL-018) (“It thus inevitably falls to the adjudicator to determine whether particular conduct by a state ‘crosses the line’ that separates valid regulatory activity from expropriation. Faced with the question of when, how and at what point an otherwise valid regulation becomes, in fact and effect, an unlawful expropriation, international tribunals must consider the circumstances in which the question arises. The context within which an impugned measure is adopted and applied is critical to the determination of its validity.”) (emphasis omitted).

<sup>422</sup> Reply, ¶ 173.

the Claimant cites the *Saipem v. Bangladesh* case and proposes that a declaration by the Supreme Court of Bangladesh annulling an arbitral award could constitute an expropriation.<sup>423</sup> However, as the Claimant itself admits, in that case, the Supreme Court declared that the arbitral award was null and void, and the annulment was “tantamount to a taking” of the claimant’s rights.<sup>424</sup> Here, the situation is the reverse: the TCA declared that the *revocation* of the Claimant’s alleged rights was null and void. The TCA did not “take” anything from Italba; on the contrary, it granted it. What is more, the evidence shows that Uruguay did comply with the Judgment, (i) by recognizing Trigosl’s former rights, (ii) by URSEC’s offer to give Trigosl equivalent frequencies, and (iii) in response to the rejection of that offer, by offering to give it the same frequencies it had before, which were also rejected. This situation is fundamentally different from the situation in *Saipem*.<sup>425</sup>

254. The fact is that the government did comply with the TCA Judgment. As Dr. Pereira explains, the TCA Judgment annulled the administrative decisions made in 2011 with regard to Trigosl.<sup>426</sup> This Judgment, “as with every [TCA] judgment, [] has a declaratory effect.”<sup>427</sup> Moreover, according to Uruguayan jurisprudence, an annulment judgment requires “as

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<sup>423</sup> *Id.*, ¶ 173 and note 463.

<sup>424</sup> *Saipem S.p.A. v. People’s Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award (30 June 2009) (Kaufmann-Kohler, Otton, Schreuer), ¶¶ 124, 129 (RL-76).

<sup>425</sup> The situation is different from the circumstances in the *EnCana v. Ecuador* case as well. In that case, the tribunal observed that an expropriation could occur via judgments of state tribunals that “are not themselves overridden or repudiated by the State.” *EnCana Corp. v. Republic of Ecuador*, LCIA Case No. UN 3481, Award (3 February 2006) (Crawford, Grigera, Thomas), ¶ 194 (CL-032). In this case, Uruguay never “repudiated” and in fact fully complied with the Judgment of the TCA.

<sup>426</sup> First Expert Opinion of Dr. Pereira, Section IX.

<sup>427</sup> *Id.*, ¶ 210.

a rule and insofar as is possible, the situation should be returned to precisely the state in which it would have been if the annulled decision had never been issued.”<sup>428</sup> Here there is no doubt that the government carried out a “series of acts and ma[d]e certain administrative decisions to return the situation to the condition prior to the annulled (revoking) decisions.”<sup>429</sup>

255. The government’s actions in compliance with the TCA Judgment are described in detail in other sections of this pleading.<sup>430</sup> It is thus sufficient to briefly review the measures taken by the government to comply with the Judgment:

- In 2015, URSEC participated in discussions with Trigosul and subsequently took actions aimed at restoring its authorization to provide the same services it had before and the allocation of the corresponding frequencies.<sup>431</sup>
- In January 2016, URSEC reported via an internal memorandum that four sub-blocks in the 3400-3700 MHz band were available for allocation to Trigosul.<sup>432</sup>
- In April 2016, Uruguay formally offered Trigosul frequencies equivalent to the 3600-3700 MHz band, of the same nature and value, as a replacement for the frequencies that were formerly allocated to it.<sup>433</sup> With this action, the State complied with its obligations under Uruguayan and international law.

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<sup>428</sup> *Id.*, ¶ 211 (emphasis omitted).

<sup>429</sup> *Id.*, ¶ 215 (emphasis omitted).

<sup>430</sup> *See supra* Section III.D; *see also* Counter-Memorial, ¶¶ 269-281.

<sup>431</sup> Dr. Cendoya’s First Witness Statement, Section VI; Dr. Cendoya’s Second Statement, Section D.

<sup>432</sup> URSEC, Notification of Record No. 2015-2-9-1000070 (29 January 2016) (R-58).

<sup>433</sup> *See supra* Section III.D.1; URSEC, Notification of Record No. 2015-2-9-1000070 (11 April 2016) (R-63); Dr. Cendoya’s First Witness Statement, ¶¶ 94-100; Dr. Cendoya’s Second Witness Statement, Section D.

- When Trigosul rejected the alternative frequencies,<sup>434</sup> in May 2016, Uruguay took the extraordinary step of proceeding to reacquire the original frequencies and offer them to Trigosul—exactly the same frequencies Trigosul sought the revocation of [sic] in the claim filed with the TCA.<sup>435</sup> The Claimant also rejected these frequencies.<sup>436</sup>
- Uruguay never suggested or expressed in any way that it was not going to comply with the Judgment.<sup>437</sup>
- In August 2016, the TCA issued a formal recognition of URSEC’s compliance with the Judgment.<sup>438</sup>

256. Faced with the irrefutable proof of this entire story, the Claimant, in its Reply, comes up with an entirely new argument that URSEC’s compliance with the Judgment was “impossible” because it was allegedly unable to give the Claimant the same frequencies it had before 2011. According to the Claimant, it was legally impossible for URSEC to recover its former frequencies from Dedicado (to which it had allocated them in 2013) in order to once again allocate them to Trigosul.

257. This new argument is completely unfounded. It does nothing to change the conclusion that there was no expropriation. First of all, compliance with the Judgment was

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<sup>434</sup> Letter from A. Yanos to P. Reichler *et al.* (6 May 2016) (C-096).

<sup>435</sup> Dr. Cendoya’s First Statement, ¶¶ 101-106; URSEC, Draft Resolution (C-098); Dr. Cendoya’s Second Statement, Section D.

<sup>436</sup> Dr. Cendoya’s First Statement, ¶¶ 101-106; Letter from A. Yanos to P. Reichler (31 May 2016) (C-099); Dr. Cendoya’s Second Statement, Section D.

<sup>437</sup> In fact, the allegations made by Dr. Alberelli, in an attempt to discredit URSEC and Dr. Cendoya, in reality merely support their good-faith attempts to comply as efficiently and as fairly as possible. *See, e.g.*, Reply, ¶ 181 and note 482.

<sup>438</sup> URSEC, Request to TCA (3 August 2016) (R-66); TCA, Decree 6172/2016 (9 August 2016) (R-67).

complete with the first offer of the equivalent frequencies.<sup>439</sup> They were truly equivalent, with the same value, and as such, they were sufficient under both Uruguayan and international law, to satisfy the obligations imposed by the tribunal.<sup>440</sup> In other words, the Judgment had already been complied with even before the second offer of the original frequencies.

258. Moreover, even if one were to assume that the only way to comply would have been to allocate the original frequencies, “this situation did not make it impossible for Uruguay to comply.”<sup>441</sup> This is because the government “had the power and the duty to revoke the frequencies allocated to Dedicado and allocate them to Trigosul,” and the existence of “a final unappealable judgment of the TCA annulling the decision to revoke Trigosul’s frequencies would have been sufficient grounds to demonstrate the general or public interest involved in the decision to revoke that could have been issued against Dedicado if Trigosul had accepted the Administration’s offer.”<sup>442</sup> It is therefore incorrect that URSEC “had placed itself in a position in which strict compliance with the TCA Judgment was functionally impossible.”<sup>443</sup>

259. In conclusion, there is no question that the State complied with its responsibilities under the Judgment. And given the compliance with the Judgment, no expropriation could have occurred.

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<sup>439</sup> See *supra* Section III.D.1.

<sup>440</sup> See *supra* Section III.C; Second Econ One Report, Section IV.E.

<sup>441</sup> Second Expert Opinion of Dr. Pereira, ¶ 168 (emphasis omitted).

<sup>442</sup> *Id.*, ¶¶ 171(a), 172 (emphasis omitted).

<sup>443</sup> Reply, ¶ 186.

## 2. Compliance Was Timely under Domestic and International Law

260. The Claimant acknowledges that the alleged measures would have to be definitive and permanent to establish that an expropriation occurred.<sup>444</sup> This conclusion is clear in the jurisprudence of international investment cases,<sup>445</sup> including those cited by the Claimant.<sup>446</sup>

261. Clearly, this requirement does not mean that a State can “escape liability for expropriation simply because it might someday, somehow, reverse its measures.”<sup>447</sup> However, the premise on which the Claimant bases its argument is that there was a measure *to be reversed*. Uruguay never took any action, before or after the TCA Judgment, that deprived Trigosl of its alleged rights (and note that the Claimant specifically argues that the revocations in and of

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<sup>444</sup> *Id.*, ¶ 204.

<sup>445</sup> Counter-Memorial, ¶¶ 284-285; *TECMED v. Mexico*, ¶ 116 (CL-009) (“it is understood that the measures adopted by a State, whether regulatory or not, are an indirect *de facto* expropriation if they are *irreversible and permanent* [...]”) (emphasis added); see also *Fireman’s Fund v. Mexico*, ¶ 176(d) (RL-54) (an expropriation contains a series of elements, including that “[t]he taking must be permanent, and not ephemeral or temporary”); *LG&E Energy Corp. et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006) (de Maekelt, Rezek, van den Berg), ¶¶ 193, 200 (CL-046) (“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 [...]. [T]he effect of the Argentine State’s actions has not been permanent on the value of the Claimants’ shares’, and Claimants’ investment has not ceased to exist. Without a permanent, severe deprivation of LG&E’s rights [...] [there is no] expropriation”); *Archer Daniels Midland Co. et al. v. United Mexican States*, ICSID No. ARB(AF)/99/1, Award (21 November 2007) (Cremades, Rovine, Siqueiros), ¶ 243 (CL-055) (citing with approval the decision in *LG&E v. Argentina*); *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAgua Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability (30 July 2010) (Salacuse, Kaufmann-Kohler, Nikken), ¶ 129 (RL-84) (concluding that the measures taken by Argentina to deal with the financial crisis “did not constitute a permanent and substantial deprivation of the Claimants’ investments); *Glamis Gold v. United States*, ¶ 360 (RL-75) (“the delay and temporary denial occasioned by the federal government themselves effected an expropriation [...]”); *Cargill Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009) (Pryles, Caron, McRae), ¶¶ 339-341 (RL-79) (in which the Claimant argued that an interference in the investment lasting more than five years could not be “temporary” but the tribunal determined that the Claimant had not established the possibility of basing a claim on a “temporary” taking and rejected the argument.)

<sup>446</sup> See, e.g., *Les Laboratoires Servier, S.A.S., Biofarma, S.A.S., Arts et Techniques du Progres S.A.S. v. Republic of Poland* UNCITRAL, Award (14 February 2012) (Park, Hanotiau, Lalonde), ¶ 577 (CL-129) (“deprivation must possess a character which is more than transitory.”).

<sup>447</sup> Reply, ¶ 203.

themselves were *not* expropriations). This includes the frequency allocation of the sub-bands 3425-3450 and 3525-3550 MHz to Dedicado in 2013, which was reasonable *and required* under the circumstances.<sup>448</sup> As Uruguay has already explained,<sup>449</sup> the restoration of these specific frequencies to Trigosul was not necessary under Uruguayan or international law, and even if it had been mandatory, Uruguay could still have restored them to it, and in fact, offered to do so.<sup>450</sup>

262. Here, any delay alleged by the Claimant in complying with the TCA Judgment is not sufficient to invoke Uruguay's international liability. First of all, with regard to Uruguay's obligations under the Treaty, the date on which the Claimant began the arbitration proceedings is legally irrelevant and the Claimant has submitted no evidence to suggest otherwise.<sup>451</sup> When and why the Claimant decided to initiate these arbitration proceedings has no bearing on the question of the State's liability.

263. The cases that clarify the expropriation standard and discuss the "permanent and irreversible" requirement, examine the question in terms of quality and quantity. In fact, one of the few cases cited in the Reply by the Claimant is a specifically useful basis for the conclusion here. In *S.D. Myers v. Canada*, the tribunal declared that the closure of the border for 18 months

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<sup>448</sup> See *supra*, Section III.C.1.

<sup>449</sup> See *supra*, Section III.D.1.

<sup>450</sup> The Claimant argues that even had Uruguay intended to return the frequencies, "they could not." Reply, ¶ 201. Therefore, the alleged noncompliance with the TCA Judgment was "permanent." Reply, ¶ 201. However, this argument directly contradicts the Claimant's arguments in its first pleading: in that version of events, Uruguay "could have revoked the transfer of Trigosul's rights to Dedicado and restored those rights to Trigosul in accordance with the TCA Judgment, as Uruguay itself acknowledged by its recent offer to do just that. Memorial, ¶ 108; see also *supra*, Section III.D.1. In any event, Uruguay was able and in fact did so. See URSEC Draft Resolution (9 May 2016) (C-098).

<sup>451</sup> See Reply, ¶¶ 191-192.

“does not support the proposition on the facts of this case that *the measure should be characterized as an expropriation* within the terms of Article 1110.”<sup>452</sup> The tribunal added that the measures in question only gave rise to an “opportunity” that was “delayed”<sup>453</sup> and concluded that that case “is not a case of expropriation.”<sup>454</sup> Similarly, in *ADM v. Mexico*, the tribunal concluded that any lost profits incurred by the claimant did not support “a conclusion that the Tax had effects similar to an outright expropriation.”<sup>455</sup> The measure in question lasted from January 2002 to December 2006.<sup>456</sup> The tribunal in that case also concluded once again that “this is not an expropriation case.”<sup>457</sup> And in *Cargill v. Mexico*, in which the claimant argued that interference with an investment lasting more than five years could not be “temporary,” the tribunal determined that the claimant had not established that it was possible to base a claim on a “temporary” taking.<sup>458</sup> The tribunal rejected the claim on these grounds.<sup>459</sup> Moreover, under Uruguayan law, the Claimant admits that there is no “formal limit on URSEC’s time to comply with the TCA Judgment.”<sup>460</sup>

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<sup>452</sup> *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Award (13 November 2000) (Hunter, Schwartz, Chiasson), ¶ 284 (CL-057) (emphasis added).

<sup>453</sup> *Id.*, ¶ 287.

<sup>454</sup> *Id.*, ¶ 288.

<sup>455</sup> *Archer Daniels v. Mexico*, ¶ 246 (CL-055).

<sup>456</sup> *Id.*

<sup>457</sup> *Id.*, ¶ 251.

<sup>458</sup> *Cargill v. Mexico*, ¶¶ 339-341, 377 (RL-79).

<sup>459</sup> *Id.*, ¶¶ 339-341, 377.

<sup>460</sup> Reply, ¶ 189; *see also* First Expert Opinion of Dr. Pereira, Section IX.G; Second Expert Opinion of Dr. Pereira, Section IX.C.



264. Here, a *maximum* of 18 months passed between the time when URSEC received the notice of the Judgment (in November 2014) and when URSEC complied with it (April 2016). As explained in Section III.D, Uruguay's actions following the TCA Judgment were completely reasonable given the circumstances of the case.<sup>461</sup> Despite the apparent loss of interest on the part of Trigosul, as of March 2015,<sup>462</sup> in pursuing the administrative proceeding in Uruguay to implement the court's Judgment, the process continued to be driven by URSEC, and culminated with the two offers: first, of the equivalent frequencies, and after that, of the original frequencies. Therefore, in accordance with international and Uruguayan law, there was no "[frustration of] the implementation of the TCA Judgment," much less any "permanent" frustration.<sup>463</sup> Uruguay took steps to comply, and did comply with the Judgment. Any "frustration," if it did exist, was entirely attributable to the Claimant, in not accepting the return of the frequencies. The Claimant cannot seriously argue the existence of an "expropriation" by the State under these circumstances.

265. And lastly, not only did the State comply in a timely manner with the Judgment, but it always had the intention of doing so. The Claimant argues that Uruguay's subjective

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<sup>461</sup> See *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Counter-Memorial of the United States (19 September 2006), pp. 213-214 (RL-56) ("In any event, Glamis has failed to cite a single international law case where a mere delay in the processing of a permit has been found to constitute an expropriation of the claimant's property rights. Nor do normal delays in obtaining government actions constitute takings under U.S. law. *Particularly where the regulatory issues are complex*, the government must be afforded considerable leeway in conducting permit review processes.") (emphasis added).

<sup>462</sup> Reply, ¶ 190 (after March 2015 "there would have been no point in waiting any longer for Uruguay to comply with the TCA Judgment.")

<sup>463</sup> In the Reply, the Claimant argues that the "Uruguay's non-compliance with the TCA Judgment permanently eliminated Trigosul's rights in the Spectrum." Reply, ¶ 205 (emphasis in the original). Putting the word "permanent" in bold does not mean that it is so. In the words it used in reference to the use of cursive writing on the part of the Respondent, the "Tribunal should not be deceived by such artifice." *Id.*, note 590.

“‘intent’ has little bearing on its liability under the Treaty” and that “Article 6 of the Treaty does not apply an intent standard to a State’s liability for expropriation.”<sup>464</sup> Contrary to what the Claimant argues, the State’s intention is indeed relevant under the Treaty. Annex B, entitled “Expropriation,” explains that “the determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a *case-by-case, fact-based inquiry*.”<sup>465</sup> And the provision explicitly establishes that “the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, *standing alone, does not establish that an indirect expropriation has occurred*.”<sup>466</sup> The Treaty requires the investigation of various factors, including whether the measure or action interferes with distinct, reasonable investment-backed expectations and the “character of the government action.”<sup>467</sup> As such, the Claimant cannot maintain that “subjective intent” has no relevance under the Treaty.

266. Moreover, although some tribunals have determined that the effects of the State’s action should be the primary focus of the analysis,<sup>468</sup> others stress the importance of considering

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<sup>464</sup> *Id.*, ¶ 200.

<sup>465</sup> Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, signed on November 4, 2005, entered into force on November 1, 2006 (Uruguay-U.S. BIT), Annex B (C-001) (emphasis added).

<sup>466</sup> *Id.* (emphasis added).

<sup>467</sup> *Id.* See also *Spence International Investments, LLC, Berkowitz et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Submission of the United States of America (17 April 2015), ¶ 30 (RL-111) (requiring the consideration of the “nature and character of the government action, including whether such action involves physical invasion by the government or whether it is more regulatory in nature.”)

<sup>468</sup> See Reply, ¶ 200 (citing *Fireman’s Fund v. Mexico* (RL-54), *Phillips Petroleum Co. Iran v. The Islamic Republic of Iran*, Award No. 425-39-2 (29 June 1989) reprinted in 21 IRAN-US. CLAIMS TRIBUNAL REP. NO. 79 (CL-127); *TECMED v. Mexico* (CL-009)).

the government's intent when determining whether an expropriation has occurred. For example, in *LG&E v. Argentina*, the tribunal explained:

The question remains as to whether one should only take into account the effects produced by the measure or if one should consider also the context within which a measure was adopted and the host State's purpose. It is this Tribunal's opinion that there must be a *balance in the analysis* both of the causes and the effects of a measure in order that one may qualify a measure as being of an expropriatory nature. It is important not to confound the State's right to adopt policies with its power to take an expropriatory measure.<sup>469</sup>

267. In this case, the Claimant cannot point to a single instance showing Uruguay's intention *not to comply* with the Judgment.

268. Moreover, in any event, in this situation, not only was there the intent to comply with the Judgment, but also action. Uruguay followed through with its intention when it offered the alternative frequencies in April 2016, and once again when it offered the original frequencies in May 2016.<sup>470</sup>

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<sup>469</sup> *LG&E v. Argentina*, ¶¶ 189, 194 (CL-046) (emphasis added); see also *S.D. Myers v. Canada*, ¶¶ 281, 285 (CL-057) (determining whether there has been an expropriation requires an investigation of the "real interests involved and the purpose and effect of the government measure;" in this case, the tribunal concluded that "this is not an 'expropriation' case."); *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award (7 December 2011) (Hanotiau, Giardina, Reisman), ¶ 330 (CL-050) ("the intention or purpose of the State is relevant but is not decisive of the question whether there has been an expropriation"); cf. *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award (28 September 2007) (Orrego Vicuña, Lalonde, Morelli Rico), ¶ 282 (RL-63) (requiring "positive intent" to expropriate); UNCTAD, *Expropriation: UNCTAD Series on Issues in International Investment Agreements II* (2012), pp. 70-73 (RL-143) (discussing investment treaties and declaring that more recently, tribunals are focusing on the interests and the purpose of the government measure in the expropriation analysis.)

<sup>470</sup> See *supra*, Section III.D.

**3. Even without the State’s Timely Compliance, Trigosl’s Alleged Rights Could Not Have Been Expropriated due to their “Revocable and Provisional” Nature**

269. In Uruguay, there is no natural right to the use of certain frequencies.<sup>471</sup> As Dr. Pereira explains: “the allocation of radio frequencies formerly enjoyed by the claimant company was provisional and revocable in nature, and as such it cannot claim any legitimate expectation that said allocation would not be revoked, or the existence of alleged vested rights in maintaining said allocation, since the claimant was aware of the provisional nature of the situation.”<sup>472</sup> In the Counter-Memorial, Uruguay showed that “for there to have been an expropriation of an investment or return (in a situation involving legal rights or claims as distinct from the seizure of physical assets), the rights affected must exist *under the law which creates them*.”<sup>473</sup> The Claimant considers it irrelevant that the government might have revoked the rights to the frequencies based on the public interest. However, these characteristics (“revocable and provisional”) are what determine any right claimed under international law.

270. For example, in *M.C.I. Power Group v. Ecuador*, the tribunal concluded that the revocation of an operating permit, in and of itself, did not constitute expropriation.<sup>474</sup> In its discussion, the tribunal explained that “the operating permit is fundamentally related to the

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<sup>471</sup> Dr. Cendoya’s First Witness Statement, ¶ 9.

<sup>472</sup> First Expert Opinion of Dr. Pereira, ¶ 99 (citing TCA Judgment Nos. 454/2004 and 441/2007).

<sup>473</sup> Counter-Memorial, ¶ 248 (citing *EnCana v. Ecuador* (CL-032)) (certain emphasis added, certain emphasis omitted); see also *Accession Mezzanine v. Hungary*, ¶ 75 (RL-150) (“The question of whether the Claimants had any right to broadcast over a radio frequency in Hungary at the critical point in 2009 can only be answered by reference to Hungarian law.”).

<sup>474</sup> *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award (31 July 2007) (Viñuesa, Greenberg, Irarrázabal), ¶¶ 297-306 (RL-135).

requirement to install, put into operation, and operate the electricity generating plants.”<sup>475</sup>

However, given that the claimant had transferred its rights over the plants, and as such there was no ownership of the investment relating to the installation and operation of the plants, this then limits “the possibility of alleging a revocation of the operating permit as an expropriation.”<sup>476</sup>

The situation in our case is similar (although the Claimant is not claiming any breach of the Treaty as a result of the revocations): Trigosl’s alleged rights in the Spectrum were provisional and revocable—and Trigosl had no other right or property in Uruguay with respect to these alleged rights. Thus, the possibility of alleging an expropriation on the basis on these rights is “limited.”<sup>477</sup>

271. In the Reply, the Claimant is seeking to distort the fundamental nature of its licenses, attempting to attribute to them characteristics that are beyond what they actually have, by arguing that the TCA Judgment “created” additional rights protected under domestic law. Italba states that “[a]rguments 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 court.”<sup>478</sup> However, as Dr. Pereira explains: “[t]he Judgment of the TCA [...] *neither analyzes nor rules on the nature of Trigosl’s rights* that were revoked by the annulled resolutions, but rather it merely considers that those resolutions suffered from an

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<sup>475</sup> *Id.*, ¶ 299 (RL-135).

<sup>476</sup> *Id.*, ¶ 300 (RL-135).

<sup>477</sup> *See* Reply, note 472.

<sup>478</sup> Reply, ¶ 176.

erroneous reasoning,”<sup>479</sup> In fact, the TCA Judgment “does not affect in any way the position that Trigosul’s rights are ‘weakened,’ provisional, and essentially revocable, because the Administration may revoke them at any time and without any compensation by a duly founded resolution.”<sup>480</sup> As such, the Judgment could not have “crystallized” or augmented any alleged right on Trigosul’s part.

272. Nor does the *White v. India* case support the Claimant’s arguments. In that case, the claimant itself admitted that it was not arguing that the “rights under the Award represent an investment in itself.”<sup>481</sup> The tribunal determined that the rights were not created by the award but rather *arose from the contracts*.<sup>482</sup> These were the rights that “crystallized”<sup>483</sup> under the award. As previously discussed, Trigosul’s alleged rights were revocable and provisional and the TCA Judgment did nothing to change their fundamental nature.

#### **4. There Was No Wrongful Expropriation**

273. Since there was no expropriation, there could not have been any wrongful act. However, in the interests of thoroughness, here follows an explanation of how Uruguay acted in the public interest (subsection a) with due process (subsection b) and without discrimination

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<sup>479</sup> Second Expert Opinion of Dr. Pereira, ¶ 5(v) (some emphasis added; some emphasis omitted).

<sup>480</sup> *Id.*

<sup>481</sup> *White Industries Australia Ltd. v. Republic of India*, UNCITRAL, Final Award (30 November 2011) (Rowley, Brower, Lau), ¶ 7.6.2 (CL-125) (emphasis in the original.)

<sup>482</sup> *White Industries v. India*, ¶ 7.6.4 (CL-125) (citing *Saipem S.p.A. v. Bangladesh*, ¶ 127 (RL-76)).

<sup>483</sup> Reply, ¶ 176.

(subsection c). Moreover, Uruguay presented multiple, timely, and adequate offers of compensation for the alleged damage (subsection d).

**a. Uruguay Acted in the Public Interest**

274. Although the Treaty does not define “the public interest,” the concept has been developed in international law. In general, a sovereign State enjoys broad authority to determine whether to take a measure for a public purpose or in the public interest,<sup>484</sup> as the Claimant acknowledges.<sup>485</sup>

275. Applying this criterion, the Claimant appears to be confused (revealing the breakdown in the logic regarding the act it considers to be expropriatory). The Claimant argues that “Uruguay attempts to rehabilitate URSEC’s revocation of Trigosul’s rights to use the Spectrum by alleging alternative grounds that it never raised in the TCA proceedings.”<sup>486</sup> However, the Claimant itself argues that the “expropriation” was not the revocation, but rather the alleged “frustration” of the Judgment resulting from the allocation of the 3425-3450 and 3525-3550 MHz frequency sub-bands to Dedicado.<sup>487</sup> As such it is *this* act—the alleged “frustration” of the Judgment—that requires analysis under the standard. Uruguay must make clear that the Claimant is not arguing that the allocation of the frequencies to Dedicado was not a

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<sup>484</sup> See, e.g., *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case No. ARB/07/15 (3 March 2010) (Fortier, Orrego Vicuña, Lowe), ¶ 391 (RL-83); *Railroad Development Corp. v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award (29 June 2012) (Rigo Sureda, Eizenstat, Crawford), ¶¶ 93, 110 (CL-036).

<sup>485</sup> Reply, ¶ 209 (the “precise contours of public purpose . . . lie with the internal constitutional and legal order of the State in question.”).

<sup>486</sup> *Id.*, ¶ 210.

<sup>487</sup> *Id.*, ¶¶ 179-190.

decision made in the public interest—because it cannot. As explained in Section III.C, the allocation of the 3425-3450 and 3525-3550 MHz frequency sub-bands in September 2013 was not only reasonable, but also mandatory. Allocating the Spectrum, a scarce resource, in the most efficient way possible could not be anything other than a step taken in the public interest.

**b. Uruguay Did Not Violate Due Process**

276. In general, due process with respect to an expropriation requires (1) adherence to “procedures established in domestic legislation and fundamental internationally recognized rules in this regard” and (2) “that the affected investor have an opportunity to have the case reviewed before an independent and impartial body.”<sup>488</sup> Thus, when a claimant has judicial and administrative remedies at its disposal, “there appears to have been no denial of due process or denial of justice there as would rise to the level of a violation of international law,”<sup>489</sup> since such remedies adhere to basic international rules in accordance with international law, and are free of any arbitrariness.

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<sup>488</sup> UNCTAD, *Expropriation*, p. 36 (RL-143); *see also* A. Reinisch, *STANDARDS OF INVESTMENT PROTECTION* (2008), p. 193 (RL-137) (“[A] fair procedure offering the possibility of judicial review is crucial.”)

<sup>489</sup> *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002) (Kerameus, Covarrubias Bravo, Gantz), ¶ 140 (RL-129) (concluding that there had been a denial of due process or denial of justice that could be equated with a violation of international law because the claimant had had the corresponding judicial and administrative procedures at its disposal). *See also*, *ADC Affiliate Ltd. and ADC & ADMC Management Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award (2 October 2006) (Kaplan, Brower, van den Berg), ¶ 435 (CL-014) (“The Tribunal agrees with the Claimants that ‘due process of law’, in the expropriation context, demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it.”) (emphasis omitted).



277. The Claimant is claiming a violation of due process with regard to (1) “defiance of a State’s own courts”<sup>490</sup> and (2) the allocation of “Trigosul’s rights” to Dedicado “without notice while Trigosul’s claims before the TCA concerning the Spectrum were still pending.”<sup>491</sup>

278. Here, even if one were to assume that an expropriation did occur, which Uruguay denies, Uruguay did not act “contrary to the orders of [its] own courts.” Unlike the case of *Siag v. Egypt*, cited by the Claimant, in which the government “failed to comply with numerous judicial rulings in the investor’s favor,”<sup>492</sup> in this case Uruguay respected the judgment by offering frequencies that were equivalent to those Trigosul had prior to the 2011 revocation. Claimant’s rejection of these frequencies cannot serve as the basis for a claim that Uruguay acted “contrary to what its own courts ordered.” Also, as discussed in Section III.C, there can be no denial of due process in relation to the allocation “without prior notice” since there was no right or obligation on the part of the government to specifically notify Trigosul.<sup>493</sup> The allocation to Dedicado took place two years after the frequencies allocated to Trigosul had been revoked, when Trigosul no longer had any rights to them. Furthermore, a formal public notice of the allocation was published. There is no basis for the argument that the transfer took place without notice.

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<sup>490</sup> Reply, ¶ 216.

<sup>491</sup> *Id.*

<sup>492</sup> *Id.*, note 564 (citing *Waguih Elie George Siag and Clorinda Vecchi v. the Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (1 June 2009) (Williams, Pryles, Orrego Vicuña), ¶¶ 441, 453-455 (CL-016)).

<sup>493</sup> *See also* Second Expert Opinion of Dr. Pereira, Part VII.

279. Moreover, the Claimant had the option to resort to judicial or administrative proceedings in Uruguay to challenge the allocation to Dedicado.<sup>494</sup> The fact that the Claimant opted to submit its claims to arbitration rather than asserting its rights under Uruguayan law, entirely invalidates the due process claim based on the alleged unavailability of any legal remedy.<sup>495</sup>

**c. Uruguay Did Not Discriminate against the Claimant**

280. Here, there was no “frustration of the TCA judgment,”<sup>496</sup> but even if that had been the case, there was no discriminatory basis. The Claimant fails to establish any basis for this claim in its Reply.<sup>497</sup> However, after not citing the revocation as an expropriatory act, the Claimant astonishingly declares that *Uruguay* “makes no serious effort to argue that the expropriation of Italba’s investment [...] was anything but discriminatory.”<sup>498</sup> In other words, the Claimant seems to be suggesting that the burden is on Uruguay to prove that its actions were not discriminatory.<sup>499</sup> The burden is *on the Claimant* to prove discrimination, and it has failed to meet it. It has failed to submit any evidence showing that Trigosl is (1) in a situation similar to the other companies or (2) that it was afforded different treatment.<sup>500</sup> Secondly, the Claimant

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<sup>494</sup> First Expert Opinion of Dr. Pereira, Part X; Second Expert Opinion of Dr. Pereira, Part X.

<sup>495</sup> The case of *Siag v. Egypt* is not relevant here. In that case, the parties agreed that there had been an expropriation. *Siag v. Egypt*, ¶ 427 (CL-016). In this case, there was no “taking” of an alleged investment, but rather a revocation, and said revocation is not part of the basis for the expropriation claim. In any event, in this case, the government did comply with the judgments in the Claimant’s favor, as asserted through this pleading.

<sup>496</sup> Reply, ¶ 211.

<sup>497</sup> *Id.*

<sup>498</sup> *Id.*

<sup>499</sup> *Id.* (“Nor is it clear how Uruguay could make such a showing [...]”).

<sup>500</sup> Counter-Memorial, ¶¶ 79-181, 262. In the case of *ADC v. Hungary* (CL-014), cited by the Claimant, the tribunal determined that it was necessary to analyze the foreign investors “as a whole.” In this case, the other foreign

ignores paragraphs 179 through 181 and 262 of the Counter-Memorial, in which Uruguay addressed this point directly.

281. We must remind the Claimant that in general, arbitral tribunals determine that the non-discrimination standard has not been met only “when a State has discriminated against foreign nationals on the basis of their nationality.”<sup>501</sup> In other words, the measure must have been taken *because of* the investor’s nationality in order to be discriminatory.<sup>502</sup> Thus, if there is a “reason [that] exists for the measure which was not itself discriminatory,”<sup>503</sup> tribunals generally rule that there was no discrimination. It is certainly not necessary to prove that URSEC had “ever wrongfully revoked the licenses of any of Trigosul’s competitors.”<sup>504</sup> Much less given the fact that the Claimant has not offered any explanation for its discrimination claim.

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operators in Uruguay have successfully used their allocated frequencies. *See* Counter-Memorial, ¶ 151 (citing the number of customers served by Telstar, a subsidiary of a Mexican company, and Telefónica Móviles, a subsidiary of a Spanish company). Italba cannot blame Uruguay for its business failures based on a groundless allegation of discrimination.

<sup>501</sup> UNCTAD, *Expropriation*, p. 34 (RL-143).

<sup>502</sup> *Id.*

<sup>503</sup> *GAMI Investments, Inc. v. United Mexican States*, UNCITRAL, Award (15 November 2004) (Paulsson, Reisman, Lacarte Muró), ¶ 114 (RL-132). In this case, the Mexican government expropriated a series of sugar mills belonging, in part to foreign companies. The tribunal held that the reason for the expropriation was not the origin of the investments, but rather the financial condition of the expropriated sugar mills. As such, the tribunal concluded that there was no discrimination. *Id.*; *see also The Government of the State of Kuwait v. The American Independent Oil Company (AMINOIL)*, Award (24 March 1982) (Reuter, Sultan, Fitzmaurice), 21 I.L.M. 976, ¶ 87 (RL-122) (in which it was determined that there was no discrimination despite the fact that the US claimant had its property expropriated while an oil company from another country did not); *Amoco Int’l Finance Corp. v. Islamic Republic of Iran*, Award No. 310-56-3 (14 July 1987), *reprinted in* 15 IRAN-UNITED STATES CLAIMS TRIBUNAL REP. No. 189, ¶ 142 (RL-34) (in which the tribunal concluded that the differences in the treatment could be justified by “[r]easons specific to the non-expropriated enterprise, or to the expropriated one, or to both.”)

<sup>504</sup> Reply, ¶ 211.

**d. Uruguay Offered Prompt, Adequate, and Effective Compensation**

282. Once again, there was no expropriation, and as such, it is not relevant to argue about the payment of any compensation whatsoever. However, in the hypothetical case that there was a “taking” of any sort, it is well established that the reparation must restore the situation that would have existed had the illegal act never been committed.<sup>505</sup>

283. Here, Italba’s argument defies logic to an even greater degree. The Claimant argues that “[a]n expropriation is per se unlawful if the State does not, at a minimum, make a *good faith offer* of prompt, adequate, and effective compensation.”<sup>506</sup> As Uruguay has explained throughout this pleading that its offers were reasonable, in good faith and met the standard of the Treaty.<sup>507</sup>

**B. URUGUAY DID NOT DENY ITALBA JUSTICE**

284. In its Reply, Italba repeats its arguments that Uruguay’s actions following the TCA Judgment resulted in a denial of justice for the Claimant. In response to Uruguay’s arguments in the Counter-Memorial, regarding the fact that denial of justice under this Treaty is

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<sup>505</sup> *Case Concerning the Factory at Chorzów*, Judgment, 1928, P.C.I.J. Series A, No. 17, p. 47 (RL-120) (“The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”).

<sup>506</sup> Reply, ¶ 212 (emphasis added.)

<sup>507</sup> Nor is it relevant that the said offer was made following receipt of notice of a dispute under the Treaty. *See Id.*, ¶ 214 (“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.”) (emphasis omitted.) The Claimant neither explains nor cites anything in support of the suggestion that the compensation is not “adequate” because it came after the Claimant decided to proceed with the arbitration.

only applicable in judicial proceedings, Italba attempts to twist the language of the Treaty, arguing that it “is indifferent as to Uruguay’s internal constitution and makes no distinction between the different branches of Uruguay’s government.”<sup>508</sup> As an alternative argument, it argues that in any event, “the pursuit of the alleged ‘remedies’ Uruguay identifies would have been futile.”<sup>509</sup>

285. Uruguay did not deny the Claimant justice under the Treaty, as a matter of fact, in virtue of the Treaty, or with respect to the remedies available to Trigosul. Under the Treaty, the denial of justice standard applies only to judicial proceedings. The Claimant can cite cases and legal doctrine *ad infinitum* indicating a broader standard—but, in this case, they do not apply because the Parties established a specific limit in this Treaty, which does not apply in the cases cited in the Reply.<sup>510</sup> And with regard to the Claimant’s alternative argument, Uruguay will explain the numerous remedies at Trigosul’s disposal, and how the company failed to avail itself of any of them. There could not be any denial of justice here.

### **1. The Treaty Explicitly Limits the Scope of the Denial of Justice Standard to Judicial Proceedings**

286. There is no basis for Italba’s argument that URSEC’s alleged “frustration”<sup>511</sup> of the TCA Judgment constituted a denial of justice in violation of Article 5 of the Treaty. In any

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<sup>508</sup> Reply, ¶ 221.

<sup>509</sup> *Id.*, ¶ 220.

<sup>510</sup> Note that Uruguay is not taking the position that the denial of justice standard *could never* apply to the executive, in certain circumstances. However here, the Parties to the Treaty made the decision to limit the application of the standard to judicial proceedings.

<sup>511</sup> In its memorial, Italba argued that the alleged denial of justice “stems from the frustration of a judgement [sic] of the TCA.” Memorial, ¶ 128.

case, compliance with, or the alleged “frustration” of the Judgment by URSEC is not within the scope of the denial of justice standard applicable in this case because the Treaty language clearly states that, here, the standard only applies to judicial proceedings, and not administrative acts. The relevant jurisprudence confirms this interpretation.

**a. The Language Is Clear**

287. As a principle of international law, the expression of a standard in an international agreement must be interpreted in accordance with the guidelines established in the Vienna Convention on the Law of Treaties. The Vienna Convention requires treaties 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.”<sup>512</sup>

288. Here, despite what the Claimant argues,<sup>513</sup> the ordinary meaning of the Treaty is clear: the obligation under Article 5 is “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.”<sup>514</sup> This standard applies exclusively to judicial proceedings and not to administrative acts like those taken by URSEC before or after the TCA’s Judgment. Uruguay participated in and drafted the Treaty specifically on this basis. And the interpretation

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<sup>512</sup> Vienna Convention on the Law of Treaties (23 May 1969), 1155 U.N.T.S. 331. Art. 31(1) (RL-32).

<sup>513</sup> Reply, ¶ 221 (the Treaty does not distinguish “between the different branches of Uruguay’s government.”).

<sup>514</sup> Uruguay-U.S. BIT, Art. 5(2)(a) (C-001) (emphasis added).

of the standard chosen by the Parties through their clear use of specific terms in the Treaty falls well within the range of interpretations of the standard under international law.<sup>515</sup>

289. The Claimant appears to misunderstand the point. In the Reply, it argues that “The Treaty [...] makes no distinction between the different branches of Uruguay’s government.”<sup>516</sup> In fact, the Treaty establishes a clear distinction. The central issue is whether the alleged violation occurred within the specific procedures articulated by the Treaty. Although it may be true that the Uruguayan government as a whole is bound by the Treaty, with respect to acts that could deny a claimant justice, this claim can only apply “in *criminal, civil, or administrative adjudicatory proceedings*.” Here, the “proceeding” before the *Tribunal de lo Contencioso Administrativo* (TCA) did not deny the Claimant justice, for the simple and sufficient reason that the Judgment rendered by the TCA was in Trigoslul’s favor.

**b. The Jurisprudence in Investment Matters Supports Uruguay’s Interpretation**

290. The Claimant, in its Reply, cites a few cases in which the treaties do not share the

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<sup>515</sup> See OECD, *Fair and Equitable Treatment Standard in International Investment Law*, OECD Working Papers on International Investment (2004), pp. 28-29 (RL-131) (“In the broadest sense, [denial of justice] ‘seems to embrace the whole field of State responsibility, and has been applied to all types of wrongful conduct on the part of the State towards aliens.’ It includes therefore acts or omissions of the authorities of any of the three branches of government, *i.e.* executive, legislative or judiciary. In the narrowest sense, it is ‘limited to refusal of a State to grant an alien access to its courts or a failure of a court to pronounce a judgment.’ There is also an intermediary sense, in which it is ‘employed in connection with the improper administration of civil and criminal justice as regards an alien, including denial of access to courts, inadequate procedures, and unjust decisions.’”) The language of the Treaty here is consistent with the “intermediary” interpretation of the standard. See also A. Newcombe & L. Paradell, *LAW AND PRACTICE OF INVESTMENT TREATIES: Standards of Treatment* (2009) p. 239 (RL-74) (a denial of justice properly refers to “serious inadequacies in the state’s judicial or administrative system with respect to the judicial protection of foreigners and their rights.”).

<sup>516</sup> Reply, ¶ 221.

explicit language or involve the Parties to the Treaty discussed here.<sup>517</sup> By contrast, in the cases governed by treaties with the same language as our Treaty, the conclusion reached was the same as that reached by Uruguay.<sup>518</sup> Moreover, in their interpretation of NAFTA, to which the United States is a Party, the tribunals have interpreted the denial of justice standard restrictively.

291. For example, in *Corona Materials v. Dominican Republic*, a case under CAFTA-DR—a treaty with identical language as the Treaty between Uruguay and the United States—the tribunal ruled as follows:

The Tribunal begins by noting the Claimant’s observation that a denial of justice can *arise* under international law by an act of the administrative branch of the State. To the extent that a denial of justice can originate in a State’s administrative act, the Tribunal agrees that this is the case. However, as discussed further below, *the Tribunal does not believe that an administrative act, in and of itself, particularly as the level of a first instance decisionmaker, can constitute a denial of justice under customary international law, when further remedies or avenues of appeal are potentially available under municipal law.*<sup>519</sup>

292. The Claimant argues that the tribunal in this case “recogni[zed] that ‘a denial of justice can originate in a State’s administrative act.’”<sup>520</sup> Of course, the *origin* of any claim in judicial proceedings may be administrative—or legislative, or even private. The point the tribunal was making in *Corona Materials* was that it did “not believe that *an administrative act*

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<sup>517</sup> *Id.*, ¶¶ 223-230.

<sup>518</sup> See Counter-Memorial, ¶¶ 288-89.

<sup>519</sup> *Corona Materials v. Dominican Republic*, ¶ 248 (RL-114) (emphasis added).

<sup>520</sup> Reply, ¶ 231.



[...] can *constitute* a denial of justice under customary international law.”<sup>521</sup> In our case, the Claimant is arguing that the denial of justice *is* URSEC’s action through its alleged failure to comply with the TCA Judgment. This action, an administrative act, cannot constitute the basis for a claim of denial of justice.<sup>522</sup>

293. Similarly, the NAFTA cases recognize the same interpretation of the standard that has been adopted in the CAFTA-DR cases. For example, in *Feldman v. Mexico*, the claimant argued that “the various actions of Mexican authorities, particularly SHCP, in denying the IEPS rebates on cigarette exports to CEMSA” resulted in a denial of justice, among other NAFTA violations.<sup>523</sup> In evaluating the arguments the tribunal noted that the Claimant “actually alleges a denial of justice primarily with regard to SHCP’s failure—the failure of the Executive Branch—to implement the 1993 *Amparo* decision”<sup>524</sup> The tribunal ruled that:

In this instance, the allegations of denial of due process or denial of justice are weakened by several factors. Here, as in *Azinian*, the Claimant *does not effectively contend that there was a denial of justice by Mexican courts*, either with regard to the Supreme Court’s *Amparo* decision or the various lower courts’ subsequent determinations in the nullification and assessment cases. Rather, in

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<sup>521</sup> *Corona Materials v. Dominican Republic*, ¶ 248 (RL-114) (emphasis added).

<sup>522</sup> See also *Spence v. Costa Rica*, ¶ 13 (RL-111) (emphasis added) (citations omitted) (“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.’”). The Claimant argues that the use of “for example” by the United States in a description means that a denial of justice “may arise under different circumstances.” Reply, ¶ 232. Uruguay agrees: according to the submission by the United States, the plain text of the CAFTA-DR and the Treaty here, a denial of justice can arise, for example, in administrative law proceedings, if the administrative branch of government administered justice in a ‘notoriously unjust’ [] or ‘egregious’[] manner ‘which offends a sense of judicial propriety.’”). *Spence v. Costa Rica*, ¶ 13 (RL-111).

<sup>523</sup> *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (16 December 2002) (Kerameus, Covarrubiaz Bravo, Gantz), ¶ 89 (CL-056).

<sup>524</sup> *Feldman v. Mexico*, ¶ 138 (CL-056).

the instant case *the Claimant's assertions of denial of justice relate to actions of SHCP rather than the courts.*<sup>525</sup>

294. Citing the decision in another NAFTA-related case, the tribunal declared that “a governmental authority surely cannot be faulted for acting in a manner validated by its own courts *unless the courts themselves are disavowed at the international level.*”<sup>526</sup> In *Feldman*, the tribunal concluded that: “[g]iven, as noted earlier, that Mexican courts and administrative procedures at all relevant times have been open to the Claimant, the Claimant’s victory in the 1993 *Amparo* decision, [...] there appears to have been no *denial of due process or denial of justice there as would rise to the level of a violation of international law.*”<sup>527</sup>

295. Here, as in the *Feldman* case, the “Claimant has not challenged any of the Mexican court’s decision [...] as breaching the international law standard for denial of justice.”<sup>528</sup> In fact, the TCA rendered a decision that was favorable to Trigoslul, as was the legal victory that the local court gave to the claimant in *Feldman*. According to the tribunal in *Feldman*, these factors significantly weaken any claim for a denial of justice in this case.

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<sup>525</sup> *Id.*, ¶ 139 (CL-056) (emphasis added).

<sup>526</sup> *Id.*, ¶ 139 (CL-056) (emphasis added) (summarizing the decision in *Azinian* which suggests that there must be a showing that the court decision itself is a violation of NAFTA, or that the relevant courts have not accepted the suit, or there is ‘a clear and malicious misapplication of the law’); *see also Azinian et al. v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award (1 November 1999) (Paulsson, von Wobeser, Civiletti), ¶¶ 97, 102, 103, 14 (RL-128).

<sup>527</sup> *Id.*, ¶ 140 (CL-056) (emphasis added); *see also Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (8 April 2013) (Cremades, Hanotiau, Knieper), ¶ 445 (RL-99); *Jan Oostergetel y Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award (23 April 2012) (Kaufmann-Kohler, Wladimiroff, Trapl), ¶ 273 (RL-90).

<sup>528</sup> *Id.*, ¶ 84 (CL-056).

296. The Claimant once again cites the case of *Siag v. Egypt*, in which the tribunal determined that the failure to comply with “many judicial rulings in Claimant’s favour” over a period of “seven-and-a half years”<sup>529</sup> resulted in a denial of justice in violation of the requirement to ensure that the investment is given fair and equitable treatment.<sup>530</sup> The Claimant attempts to use this case to prove 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.”<sup>531</sup> However, this case is completely inapplicable to the circumstances that concern us here, in which there is a treaty that clearly expresses the Parties’ intention to restrict the scope of the denial of justice standard. In *Siag v. Egypt*, the treaty between Italy and Egypt does not even mention the denial of justice standard, much less restrict it.<sup>532</sup> The other cases cited fail for the same reason.<sup>533</sup>

## 2. The Claimant Has Not Exhausted the Domestic Remedies

297. It is a well-established principle that a claimant must exhaust all judicial remedies

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<sup>529</sup> *Siag v. Egypt*, ¶ 454 (CL-016).

<sup>530</sup> *Siag v. Egypt*, ¶ 455 (CL-016).

<sup>531</sup> Reply, ¶ 222.

<sup>532</sup> Treaty between Italy and the Arab Republic of Egypt for the Promotion and Protection of Investments, signed on February 3, 1989, took effect on January 5, 1994 (RL-124).

<sup>533</sup> See *Iberdrola Energía S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Arbitral Award (17 August 2012) (Zuleta, Oreamuno, Derains), ¶¶ 446, 452 (CL-132) (the treaty does not mention denial of justice and in any case, the tribunal concluded that none of the Claimant's claims constituted a denial of justice). Nor is the *Eliza Case*, of 1863 applicable here because there was no treaty or agreement between the parties with respect to the content of a denial of justice. See, generally, A. de Lapradelle and N. Politis, COMPILATION OF INTERNATIONAL ARBITRATION PROCEEDINGS (1856-1872) (CL-133). Nor do any of the statements made in the context of human rights help the Claimant when there is no agreement between the Parties defining the scope of a denial of justice. See *Case of Timofeyev v. Russia*, Eur. Ct. HR No. 58263/00, Judgment (23 October 2003), 43 I.L.M. 768, ¶ 40 (CL-134); Inter-American Court of Human Rights, Opinion OC-9/87 (6 October 1987), ¶ 24 (CL-043). Moreover, the fact that there is some convergence between various fields of international law, such as between human rights and investment treaty law, is irrelevant here for the reasons stated above. See Reply, note 582.

before presenting a claim for a denial of justice.<sup>534</sup> The Claimant argues that it “had already exhausted local remedies” because it submitted its claim to the TCA and won a judgment in its favor.<sup>535</sup> According to the Claimant, with this decision all of its responsibility to protect its own alleged rights dropped away.

298. However, the requirement to exhaust internal remedies is not limited to direct remedies. A claimant must exhaust extraordinary remedies as well, provided that they are reasonably available and are able to provide effective reparation.<sup>536</sup> As Professor Pereira explains, “Trigosul failed to use the multiple legal instruments at its disposal to obtain compliance with the TCA Judgment, if it had such an urgent interest in that compliance.”<sup>537</sup> The

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<sup>534</sup> J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL (2005), p. 111 (RL-133) (“The very definition of the delict of denial of justice encompasses the notion of exhaustion of local remedies. *There can be no denial before exhaustion*”) (emphasis added); *Loewen Group, Inc. v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award (26 June 2003) (Mason, Mikva, Mustill), ¶ 154 (CL-041) (noting that there was no instance in which “an international tribunal has held a State responsible for a breach of international law constituted by a lower court decision where there was available an effective and adequate appeal within the State’s legal system.”); *Arif v. Moldova*, ¶ 443 (RL-99) (“as long as the judicial system is not tested as a whole, the fair and equitable treatment standard is not violated via a denial of justice. The State does not mistreat a foreign investor unfairly and inequitably by a denial of justice through an appealable decision of a first instance court, but only through *the final product of its administration of justice which the investor cannot escape.*”). (emphasis added).

<sup>535</sup> Reply, ¶¶ 234-35.

<sup>536</sup> *Ambatielos Claim (Greece v. United Kingdom and Northern Ireland)*, Award (6 March 1956) (Alfaro, Bagge, Bourquin, Spiropoulos, Thesiger) 12 U.N.R.I.A.A. 83, p. 120 (RL-29) (“It is the whole system of legal protection, as provided by municipal law, which must have been put to the test”); *see also Apotex Inc. v. United States*, UNCITRAL, Award on Jurisdiction and Admissibility (14 June 2013) (Landau, Davidson, Smith), ¶ 282 (RL-100) (“[a] claimant cannot raise a claim that a judicial act constitutes a breach of international law, without first proceeding through the judicial system that it purports to challenge, and thereby allowing the system an opportunity to correct itself.”); J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL (2005), p. 125 (RL-110) (“National responsibility for denial of justice occurs only when the system as a whole has been tested and the initial delict has remained uncorrected.”); International Law Commission Draft Articles on Diplomatic Protection (2006), Art. 14(2) (RL-51) (the articles, which reflect general international law, establish that duty to exhaust all remedies includes any and all remedies that are “open to an injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for causing the injury.”).

<sup>537</sup> First Expert Opinion of Dr. Pereira, ¶ 311; *see, generally id.*, Section X; Second Expert Opinion of Dr. Pereira, Part X.

Claimant failed to take advantage of these known and easily requested remedies because, in reality, it was not interested in its alleged rights—as it admitted in its Reply. The Claimant declared that, after March 2015, “there would have been no point in waiting any longer for Uruguay to comply with the TCA Judgment.”<sup>538</sup> This declaration alone should bar any claim based on the standard of denial of justice, which requires that all domestic remedies are first exhausted.

299. There were many remedies available to the Claimant to protect its alleged rights while the administrative appeals and the action for annulment were being processed by the TCA. As Professor Pereira explains,<sup>539</sup> Trigosl could have requested a stay of execution of the effects of these revocatory decision on three occasions:

1. from the Government agency, when filing the administrative appeals;
2. from the Government agency, sometime later, during the resolution stage of the administrative appeals; or
3. from the TCA, after having exhausted all administrative remedies, when filing the claim (or even before with an anticipated claim).<sup>540</sup>

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<sup>538</sup> Reply, ¶ 190. Nor does the *Eliza Case* help the Claimant. In this case, as Uruguay agrees, “[t]he obligation of a foreigner to exhaust all remedies under local law [. . .] should be construed in a *reasonable* way.” A. de Lapradelle and N. Politis, p. 275 (CL-133) (emphasis added) (translation by Uruguay; original text in French: “[l]’obligation d’un étranger d’épuiser les voies de recours de droit interne, avant de solliciter la protection de son gouvernement, doit être comprise d’une manière raisonnable.”). Once the claimant received a final judgment, “one would think that the claimant would only need to submit a court writ of execution.” *Id.*, p. 275 (translation by Uruguay; original text in French: “on devait croire que le réclamant n’avait qu’à mettre le writ à exécution.”). The situation here is identical.

<sup>539</sup> Second Expert Opinion of Dr. Pereira, Part VI.

<sup>540</sup> *Id.*, ¶ 97.

300. Moreover, the Claimant did not take any legal steps to demand Uruguay's compliance with the Judgment after it was issued. Once again, Professor Pereira explained the remedies available to Trigosul.<sup>541</sup> Trigosul could have filed:

1. a request with the TCA demanding the Government agency comply with the Judgment;<sup>542</sup>
  2. criminal lawsuits against the civil servants involved, for dereliction of duty or contempt;<sup>543</sup>
  3. an action for constitutional relief (*amparo*) in a court of law,<sup>544</sup>
  4. a judgment enforcement action in a court of law;<sup>545</sup>
  5. an action for compensatory damages in a court of law;<sup>546</sup>
  6. a request for the application of monetary penalties or fines (*astreintes*);<sup>547</sup>
- or

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<sup>541</sup> First Expert Opinion of Dr. Pereira, Part X; Second Expert Opinion of Dr. Pereira, Part X.

<sup>542</sup> First Expert Opinion of Dr. Pereira, ¶¶ 315-318

<sup>543</sup> *Id.*, ¶ 313, note 165.

<sup>544</sup> *Id.*, ¶¶ 327-330. “The writ of amparo proceeds[] against any decision, act, or omission of the State that violates rights recognized in the Constitution, when ‘... there are no other judicial or administrative means that permit the obtaining of the same result set forth in paragraph B) of Article 9 or when, if such means do exist, they would, due to the circumstances, be clearly ineffective in protecting the right...’”*Id.*, ¶ 328 (emphasis omitted).

<sup>545</sup> First Expert Opinion of Dr. Pereira, ¶¶ 331-335. If Trigosul “had requested before the TCA any decision for the execution of the judgment (which it did not) and the TCA had denied its execution, declaring that it did not have jurisdiction for such purpose (which also did not occur), Trigosul could have filed for its execution before the courts of the Judiciary, which it also did not do.” *Id.*, ¶ 331.

<sup>546</sup> *Id.*, ¶¶ 344-359. According to Dr. Pereira, “[h]aving obtained the TCA Judgment annulling the revocation of the authorization and of the allocation of frequencies, Trigosul could have filed a legal action in Uruguay before the Judiciary to obtain the redress for possible damages, if any.” *Id.*, ¶ 344.

<sup>547</sup> *Id.*, ¶¶ 319-326 (“astreintes” are “economic sanctions or fines that may be imposed on a litigant who fails to comply with a judicial ruling.”)

7. an administrative petition with the same government agency that is required to comply with the judgment or the agency head, and in the event of an express or presumptive denial, a challenge of the denial via administrative appeal and, if applicable, an appeal for annulment to the TCA.<sup>548</sup>

Trigosul did not make use of any of these remedies.

301. The Claimant argues—without citing any authority or expert opinion—that “[s]ome of Professor Pereira’s proposed ‘remedies’ are truly extraordinary.”<sup>549</sup> To begin with, in this statement the Claimant admits that some of the remedies listed above were accessible to it and were not “extraordinary.” And in reality, as the expert Professor Pereira explains, in Uruguay all of these remedies are used frequently— they are not exceptional or strange.<sup>550</sup>

302. More importantly, they are often granted.<sup>551</sup> As such, Italba can cite all the authorities it wishes to justify the exception of futility in the context of a denial of justice.<sup>552</sup> However, availing itself of these remedies would not have been futile for Trigosul. It simply did not wish to make use of them, and that is why it is now claiming that such remedies “would [not]

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<sup>548</sup> First Expert Opinion of Dr. Pereira, ¶¶ 336-343

<sup>549</sup> Reply, ¶ 239.

<sup>550</sup> Second Expert Opinion of Dr. Pereira, Part X. Dr. Pereira explained that the point is that “none of them were attempted by Trigosul, which chose arbitration directly.” Second Expert Opinion of Dr. Pereira, ¶ 189 (emphasis omitted).

<sup>551</sup> Second Expert Opinion of Dr. Pereira, Part X.

<sup>552</sup> See Reply, ¶¶ 236-237.

have resolved the core problem in the ‘complex situation’,<sup>553</sup> *in other words*, the fact that the original frequencies were now in the possession of Dedicado. The Claimant’s claim that compliance was impossible due to the complexity of the situation is manifestly incorrect. As Uruguay has explained in Section III.D.1 herein, compliance with the Judgment was not impossible, as the Claimant is now attempting to argue.<sup>554</sup> In fact, not only was it possible, but Uruguay did it, and the Claimant rejected all of its opportunities to recover its alleged rights.

303. In short, Uruguay did not deny the Claimant justice. First of all, the actions claimed by the Claimant are not part of the definition of a denial of justice provided by the Treaty in this case. However, even if they had been included, there could be no denial of justice when the Claimant did not avail itself of the numerous opportunities to recover its alleged rights, including but not limited to having accepted the offer of the equivalent frequencies, in compliance with the TCA Judgment.

**C. URUGUAY HAS NOT VIOLATED ITS OBLIGATION TO PROVIDE FAIR AND EQUITABLE TREATMENT**

304. In the Reply, the Claimant continues to insist on applying a legal standard that does not exist. The fatal flaw in its argument is that Article 5 of the Treaty requires only the

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<sup>553</sup> *Id.*, ¶ 238.

<sup>554</sup> The Claimant is arguing the “impossibility” of complying with the Judgment, despite the fact that in the Memorial, it admitted that that the transfer of “The transfer of Trigosul’s rights [...] *need not have been an impediment* to Uruguay’s fulfillment of its obligations to Italba under the Treaty. [...] *Uruguay could have revoked the transfer* of Trigosul’s rights to Dedicado and restored those rights to Trigosul in accordance with the TCA judgment, *as Uruguay itself acknowledged by its recent offer to do just that.*” (emphasis added). See Memorial, ¶ 108; *supra*, Section III.D. See also Second Expert Opinion of Dr. Pereira, Part IX.B.



*minimum standard of treatment* recognized under customary international law.<sup>555</sup> That is what the two Parties to the Treaty, Uruguay and the United States, agreed to,<sup>556</sup> a key point that even the Claimant has felt bound to acknowledge.<sup>557</sup> As such, the failure of Italba’s forced attempt to apply a higher standard based on a cocktail of obligations over and above the minimum standard comes as no surprise. What is even worse for the Claimant, even if one were to assume, *quod non*, the existence of such a fictitious standard, there is no evidence that Uruguay in any way violated any of its obligations under Article 5.

**1. Even Under Italba’s Unjustified Interpretation, Uruguay Has Not Violated the Treaty**

305. Extending the fair and equitable treatment (FET) standard to cover the protections that Italba is attempting to transplant from inapplicable contexts would be a clear contradiction with the applicable Treaty, as discussed in IV.C.2 below. Nonetheless, Uruguay has not violated the Treaty in any way, even under a broader FET standard, like the one Claimant advocates.

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<sup>555</sup> Uruguay-U.S. BIT, Art. 5 (C-001) (“1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. 2. *For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments.* The concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide: (a) ‘fair and equitable treatment’ includes 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” (emphasis added).

<sup>556</sup> Uruguay-U.S. BIT, Annex A (C-001) (“The Parties confirm their shared understanding that ‘customary international law’ generally and as specifically referenced in Article 5 and Annex B results from a general and consistent practice of States that they follow from a sense of legal obligation. With 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.”)

<sup>557</sup> Memorial, ¶ 122.

306. The Reply highlights that under a broader FET standard, a violation would have to meet the following criteria:<sup>558</sup>

- “manifest arbitrariness and flagrant unfairness;”
- “gross denial of justice;”
- “bad faith;”
- “complete lack of due process;”
- “evident discrimination;” or
- “manifest lack of reasons, or other similar conduct.”

307. “Manifest,” “gross,” “bad faith,” “complete lack,” “evident”: none of these words characterize Italba’s claims, or the actions Uruguay actually took. The Claimant makes accusations without any substance or basis, hoping the Tribunal will find some instance of “manifest arbitrariness” or “evident discrimination” that cannot be seen or proven. As discussed below, at the end of the written pleadings stage, Italba has not been able to present any evidence or legal basis for its claim that Uruguay acted in violation of due process, in bad faith, or in an arbitrary or discriminatory manner—much less any evidence that any such conduct was manifest.

**a. Uruguay Did Not Violate Due Process**

308. Italba argues that the failure to notify it of the allocation of the frequencies revoked from Trigosl to Dedicado while the TCA proceeding was in progress violates due

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<sup>558</sup> Reply, ¶ 250.

process.<sup>559</sup>

309. In the first place, the argument that Uruguay failed to provide “*any* notice to Trigosl,”<sup>560</sup> is objectively false. As shown, Uruguay openly published the resolution for this allocation on URSEC’s web portal, thereby complying with its legal duty to publish it.<sup>561</sup> As such the Claimant is in error. Notice was given.<sup>562</sup> And the law was followed. The alleged violation of due process does not exist.

310. Knowing this, Italba argues that the government ought to have notified Trigosl personally,<sup>563</sup> but it fails to produce any evidence that this notice was required under Uruguayan law. In the face of this, it notes that even if Uruguayan law allowed—as it in fact does—the procedure followed by the Uruguayan government, this procedure would not be allowed under international law.<sup>564</sup> This argument is also wrong.

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<sup>559</sup> *Id.*, ¶ 265.

<sup>560</sup> *Id.* Second Statement by Dr. Cendoya, ¶¶ 19, 20 (URSEC Resolution 220/13, which allocated the frequencies in the 3425-3450 and 3525-3550 MHz bands to Dedicado S.A., was published on URSEC’s website on September 16, 2013 (eleven days after its issuance) and has been publicly available ever since. [...] That Trigosl did not take cognizance of the allocation of frequencies to Dedicado before, is due to its own lack of interest. URSEC did not hide anything in this regard. On the contrary, it facilitates public access to all its resolutions.

<sup>561</sup> *See* Section III.C.

<sup>562</sup> Second Statement by Dr. Cendoya, ¶¶ 19, 20, footnote 26 (URSEC’s resolutions are published so that all companies and other stakeholders in the telecommunications industry can monitor all resolutions and have current information on relevant regulatory decisions. This is a routine exercise involving minimal diligence that does not represent a disproportionate burden to anyone. [...] 327 resolutions were issued in 2013, 228 of them did not need to be read or reviewed by a radio communications company because they dealt directly with postal matters (2013 was the year when the system was introduced and more than 80 postal licenses were issued), broadcasting matters (mainly calls for auction for digital television and community broadcasting deployment) or internal URSEC affairs (calls for tender for operational matters, appointment of civil servants, declaration of bad credits, etc.).

<sup>563</sup> Reply, ¶ 269.

<sup>564</sup> *Id.*, ¶ 265.

311. Dr. Pereira explained in his first report that administrative acts such as the revocation of Trigosul's allocation of frequencies, take immediate effect even when a challenge of the act is pending.<sup>565</sup> Thus, at the time they were allocated to Dedicado, Trigosul had no rights relating to the frequencies in question;<sup>566</sup> and consequently URSEC had no obligation to notify it personally. Italba ignores Dr. Pereira's well-grounded explanation and responds to it by stating that Trigosul was at least "the holder of a claim" with regard to the frequencies, but it does not explain what the legal relevance of that is. Nor does it cite any norm that supports this position.<sup>567</sup>

312. On the other hand, Trigosul did have the right to ask the TCA to stay the execution of the revocation of the frequencies for the duration of the proceedings, which would have prevented the frequencies from being allocated to another company. As Dr. Pereira has explained: "In the Uruguayan system, those who feel aggrieved by the issuance of an administrative decision may request the suspension of that decision in an administrative proceeding process and, additionally, through a proceeding before the TCA, until such time as the final and conclusive judgment on the core issue is confirmed [...]."<sup>568</sup> Trigosul did not

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<sup>565</sup> First Expert Opinion of Dr. Pereira, ¶¶ 176,189

<sup>566</sup> *Id.*, ¶ 200.

<sup>567</sup> Reply, ¶ 268 (Emphasis omitted.) Dr. Pereira responded to these arguments in his second opinion, explaining that "Italba argues that the argument advanced in my first report that Trigosul did not have to be notified because it was not the holder of any right to the frequencies at the time of the proceeding before the TCA must not be taken into account, because it is impossible to ignore that Trigosul was at least the holder of a 'claim'. As I already indicated in my previous report, the Administration did not have an obligation to notify Trigosul for it to eventually participate in the administrative proceeding of 2013 that ended with the issuance of URSEC Resolution No. 220/2013, which allocated to Dedicado the sub-blocks of frequencies 3425-3450 MHz and 3525-3550 MHz." *See* Second Expert Opinion of Dr. Pereira, ¶¶110-111 (emphasis omitted).

<sup>568</sup> First Expert Opinion of Dr. Pereira, ¶ 175 (emphasis omitted).

exercise this prerogative, and as such the frequencies were unallocated, available, and not in use.<sup>569</sup> Italba cannot seriously claim the absence of due process when the appropriate legal remedy to protect its interests was available, and the only party responsible for not having used it is the Claimant itself.

313. Italba also claims that Article 91 of decree 500/991 required that Trigosul be personally notified because it allegedly caused it “‘irreparable’ [...] harm,”<sup>570</sup> because the allocation of its former frequencies rendered compliance with the TCA Judgment “‘impossible.’”<sup>571</sup> This argument is surprising because after not mentioning it once in its Memorial, Italba repeats the word “‘impossible’” like a mantra in the Reply, hoping that the

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<sup>569</sup> Italba admits that Dr. Alberelli was aware that the frequencies were going to be auctioned, but offers the timid excuse that he had no specific knowledge that they were going to be allocated to Dedicado. Reply, ¶ 267. We must ask ourselves, what is the difference? In either case Dr. Alberelli knew that the reallocation, for any reason, would take place, and did nothing to prevent it. It does not matter, for the purpose of the argument regarding due process, to whom the frequencies were to be allocated, just that they could be allocated to another company. The Claimant admits having that knowledge and it did nothing to protect its rights. *See* Second Expert Opinion of Dr. Pereira, ¶¶ 91, 95, 97, 102, 104 (“Italba has no right to be aggrieved about the circumstance that, upon the revocation of the authorization and allocation of frequencies to Trigosul, the Administration has allocated the frequencies to another company. [...] This conduct from the Administration could only have been prevented if the suspension of the enforcement of the revocation decision had been ordered. But it did not happen. [...] Trigosul could have requested the suspension of the enforcement of the effects of the revocation decisions on three occasions: a) before the Administration, concurrently with the filing of the administrative appeals. b) before the Administration, subsequently to it, during the proceeding of resolution of the administrative appeals. c) before the TCA, upon the exhaustion of administrative proceedings, at the time of bringing a lawsuit (or even before with an early lawsuit). Italba does not provide a single reasonable argument regarding Trigosul’s failure to request the suspension of the enforcement of the decision within the administrative proceedings, or through the action to protect constitutional rights or—even more importantly—its failure to request it before the TCA. [...] Given the lack of suspension of the enforcement of the decision, Trigosul could only reasonably expect that the frequencies would be allocated to another operator, because it was the only thing that was appropriate to do in compliance with the principle of enforceability of administrative decisions and the rules of sound administration of a limited public resource such as the radio spectrum.” (emphasis omitted.)

<sup>570</sup> Reply, ¶ 269.

<sup>571</sup> *Id.*

repetition will lend it some credibility.<sup>572</sup> But this new theory is completely baseless. URSEC had full authority to offer the frequencies, and in fact did so, and Italba voluntarily rejected them.<sup>573</sup> The indisputable fact that the alleged harm could have been repaired renders the requirement under Article 91 of decree 500/991 inapplicable.

314. Italba argues that notice of imminent administrative decisions that affect legal rights or property is a basic notion of due process.<sup>574</sup> But in reality, due process only requires that there be a substantive process whereby a foreign investor can challenge acts that impact his or her rights that are either about to be carried out or have already been implemented.<sup>575</sup> Such remedies exist in Uruguay, Trigosl did not make use of them with regard to the frequencies in question, as a result Trigosl had no legal or property right to protect at the time the frequencies were allocated to Dedicado.<sup>576</sup>

315. Even if one were to assume that the lack of personal notice was a procedural irregularity, just any irregularity cannot violate the fair and equitable treatment standard—the

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<sup>572</sup> In its letter rejecting the original frequencies, Italba does not mention that this is due to their allocation to Dedicado. *See* Letter from A. Yanos to P. Reichler et al. (31 May 2016) (C-099). It made no mention whatsoever of this position in its Memorial. It is only now in the Reply when it raises this *post hoc* argument for the first time. *See* Reply, ¶ 269.

<sup>573</sup> *See* Section III.D.4.b; Counter-Memorial, ¶ 267.

<sup>574</sup> Reply, ¶ 270.

<sup>575</sup> *ADC v. Hungary*, ¶ 435 (CL-014).

<sup>576</sup> As Dr. Pereira, has also explained, Trigosl could have challenged the decision to allocate the frequencies to Dedicado at the time the decision was issued or as soon as it learned of it. *See* First Expert Opinion of Dr. Pereira, ¶ 280 (“Lastly, it is fitting to point out that Trigosl did not contest the decision whereby the Administration granted Dedicado the allocation of the respective frequencies [...] *it would have administratively contested said decision in the knowledge of such circumstance*, which, to date, has not occurred, in spite of the fact that Trigosl has declared that it was aware of such situation.”) (certain emphasis omitted; certain emphasis added.)

requirements for administrative due process are less strict than they are in judicial proceedings.<sup>577</sup> There can only be a violation of the FET standard if the lack of due process is sufficiently serious and is not remedied. Consequently, there would be no violation of the FET standard if in the exercise of its administrative powers, a defective decision is later annulled and its effects therefore turn out to be temporary.<sup>578</sup>

316. In addition to failing to file any appeals against the allocation to Dedicado, Italba pretends not to know that the effects of the allocation were merely provisional and Italba was the one that stubbornly refused to accept the frequencies, be they the original frequencies or equivalent frequencies.<sup>579</sup> Thus, no liability whatsoever should be attributed to Uruguay.

**b. Uruguay's Actions Were Taken in Good Faith and Did Not Lack Transparency**

317. Italba argues that the alleged frustration of the TCA Judgment, the alleged lack of communication that it was not going to be granted an upgraded license, and the revocation of its

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<sup>577</sup> *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL, Award (26 January 2006) (van den Berg, Wälde, Portal-Arriosa), ¶ 200 (CL-109).

<sup>578</sup> *ECE Projektmanagement International GmbH and Kommanditgesellschaft Panta Achtundsechzigste Grundstücksgesellschaft GmbH & Co v. Czech Republic*, UNCITRAL, Award (19 September 2013) (Berman, Bucher, Thomas), ¶ 4.805 (CL-121) (“Taking first the question of due process, the Tribunal has no doubt that a failure to accord due process in administrative or judicial proceedings may, if unremedied and of sufficient seriousness, result in a violation of the fair and equitable treatment standard. The purpose of due process is however, while enabling the decision-maker to exercise its administrative or judicial powers, to see to it that that is done in a manner which is fair to the interests of an investor; it follows that there can be no violation of fair and equitable treatment in a flawed decision at first instance which is subsequently reversed on appeal, and the effects of which were therefore only temporary.”).

<sup>579</sup> See Section III.D.4.

permits, are all bad faith actions that lack transparency in violation of the obligation to accord fair and equitable treatment.<sup>580</sup>

318. It should be noted that, beyond this purely declarative list of allegations, the arguments put forward in the Reply reveal the lack of depth of Trigosul's actual claim. Italba offers nothing more than a sentence justifying its claim concerning the license revocation, in which it argues that URSEC revoked the license "on the basis of facts that it knew to be false."<sup>581</sup> It cites investment cases, but fails to provide any evidence. There is no evidence that URSEC believed that the facts on which the revocation was based were false—the documents from the administrative proceeding confirm the opposite.<sup>582</sup>

319. The argument in support of the claim concerning compliance with the TCA Judgment was relegated to a footnote. In view of this, the response can be equally brief: URSEC complied with the TCA Judgment (twice); moreover, the allocation to Dedicado was in compliance with its obligation to ensure the effective use of the Spectrum which is a guiding

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<sup>580</sup> Reply, ¶ 271.

<sup>581</sup> *Id.*

<sup>582</sup> Italba cannot deny that it had not reported having any activities since September 2009, as mentioned in the URSEC memorandum of December 28, 2010. *See* URSEC Technical Assistance Memorandum No. 2010/5/00064 (28 December 2010), p. 2 (C-066). Similarly, documents from that time confirm that the URSEC conducted the inspection at the address it had on record for Trigosul. *See* Memorandum No. 2010-2-9-5000064 from the Radio Spectrum Frequency Department GAF/Debtors to the URSEC Commission (21 December 2010) (NC-016). Uruguay has also demonstrated that the letter through which the URSEC allegedly reported Trigosul's change of domicile to Punta del Este, does not contradict these facts, given that it was sealed, and cannot be corroborated via any other administrative practice in Uruguay. *See* Dr. Cendoya's Second Witness Statement, ¶ 62.



principle of URSEC, and was transparently published on the URSEC website, in strict accordance with the law.<sup>583</sup>

320. Italba focuses its attack on the fact that it did not receive an updated license, and URSEC's alleged obligation to grant it. The Claimant's arguments require Uruguay to reiterate that despite the fact that Italba repeats *ad nauseam* that Uruguayan law required URSEC to issue an updated license, it has failed to produce any proof of this.

321. In support of its position that URSEC "knew it was required to issue conforming licenses under the new regulations" and failed to do so, Italba cites a report from URSEC's Department of Radio Frequencies.<sup>584</sup> The report contains no mention whatsoever that any such update was mandatory. When quoting this document, Italba prefers to leave out the following sentence, which confirms that "[w]e therefore understand that the fact that the license has not been updated to date, *by no means invalidates the project of TRIGOSUL S.A.* Furthermore, Uruguay should state for record that to date *no authorization has been updated for data transmission service operators* in the bands of 3.5 GHz, 10 GHz, 27 GHz, and 38 GHz to the telecommunications license system."<sup>585</sup> It is not surprising that the Claimant wishes to ignore this reality. The update was not necessary; whether it was granted or not would have no effect on the

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<sup>583</sup> See Section III.C.

<sup>584</sup> Reply, ¶ 272 and note 662, URSEC Report (30 March 2006) (R-100).

<sup>585</sup> URSEC Report (30 March 2006), p. 3 (R-100) (emphasis added.)

company's operations; and what is more, no updated license had been issued to any other competitor.<sup>586</sup>

322. Italba also cites Decree 114/003 in support of URSEC's alleged obligation to grant it an updated license.<sup>587</sup> Italba is unaware, or still does not understand, that decree 14/003 is the regulation that applies to *frequency allocations*,<sup>588</sup> and not *authorizations to provide services*.<sup>589</sup> This decree is not applicable: Trigosul is not applying for a new permit concerning its allocated frequencies, but rather concerning its authorization to provide services.

323. Similarly, Italba's assertion, and that of Messrs. Alberelli and Herbón in particular, that URSEC officials assured Trigosul that it would receive an updated license has been refuted by all URSEC officials named.<sup>590</sup> In the document production stage, Uruguay

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<sup>586</sup> *Id.*

<sup>587</sup> Reply, ¶ 272.

<sup>588</sup> Decree No. 114/003, Art. 38 (C-017) ("The Regulatory Unit for Communications Services will dictate regulations for the regularization of authorizations and permits granted before the new system approved through this Regulation *became effective*." (emphasis added).

<sup>589</sup> First Expert Opinion of Dr. Pereira, ¶¶ 93, 94 ("Additionally, it is worth to mention that the fact that an authorization to provide services was received from the Executive does not create a right for the company to have frequencies allocated thereto, nor the obligation of the State to allocate frequencies. [...] It is clear from said norm, that the authorization is one thing, and the allocation of frequencies is another—very different—thing.") (emphasis omitted).

<sup>590</sup> Statement by Mr. Piaggio, ¶¶ 4-6; Statement by Mr. Lombide, ¶ 4; Statement by Mrs. Grauert, ¶¶ 6-7; Statement by Mrs. Fernández, ¶ 3; Statement by Mr. Pérez Tabó, ¶ 4; Statement by Mr. León Lev, ¶ 4-6; Note also the change in Italba's strategy in its Reply, in mentioning that it was never informed that an upgraded license was not necessary. *See* Reply, ¶¶ 25(s), 25(ii), 38, 272. In this regard, Uruguay must note that none of the communications in which the upgrade of Trigosul's license is discussed is the question ever asked regarding the need to do so (Letter from L. Herbón (Trigosul S.A.) to J. Piaggio (URSEC) (6 July 2005) (C-020); Letter from L. Herbón (Trigosul S.A.) to J. Piaggio (URSEC) (5 August 2005) (C-021); Letter from L. Herbón (Trigosul S.A.) to Cr. R. Martínez (URSEC) (26 January 2006) (C-022); Letter from L. Herbón (Trigosul) to G. Lombide (URSEC) (12 January 2011) (C-026)), in addition to the fact that the URSEC officials who dealt with Trigosul uniformly report that all applications filed by individuals are reviewed by the URSEC's technical and legal services, which raises serious doubts as to whether this question was ever asked in a timely manner by Trigosul. The very recent presentation of these arguments evidences

requested documents that would elucidate the basis for these perceptions, but Italba failed to produce them.<sup>591</sup> This last point should be stressed: the Claimant has failed to produce—despite numerous requests—a single document justifying its claim that URSEC told Trigosl that it would need a new license or that URSEC was going to grant it a new license.

**c. The Treatment Afforded to Trigosl Was Not Arbitrary**

324. Italba argues that Uruguay acted arbitrarily in revoking the permits without any legal basis; in failing to grant Trigosl an updated license, and in frustrating compliance with the TCA Judgment by allocating the frequencies to Dedicado. In all these respects, Italba is basing its arguments on erroneous assumptions.

325. The arbitrariness standard used by various tribunals<sup>592</sup> was formulated by the International Court of Justice in the *ELSI* case, and establishes that “[a]rbitrariness [...] is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety[.]”<sup>593</sup> In this sense, none of Uruguay’s actions reaches this high threshold of

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their *post hoc* nature, since Uruguay has shown that the statements with regard to the alleged verbal assurances received by Trigosl are groundless. See Counter-Memorial, ¶¶ 160-165.

<sup>591</sup> Uruguay’s request for the production of documents (13 February 2017), request nos. 9, 10 and 11.

<sup>592</sup> *ECE v. Czech Republic*, ¶ 4.822 (CL-121); *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (18 August 2008) (Kaufmann-Kohler, Gómez Pinzón, van den Berg), ¶ 381 (RL-72); *LG&E v. Argentina*, ¶ 157 (CL-046); *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award (14 July 2006) (Rigo Sureda, Lalonde, Martins), ¶ 392 (RL-53); *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award (12 October 2005) (Böckstiegel, Lever, Dupuy), ¶ 176 (RL-134); *Alex Genin, Eastern Credit Ltd., Inc. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award (25 June 2001) (Fortier, Heth, Van Den Berg), ¶ 371 (CL-012).

<sup>593</sup> *Eletronica Sicula SpA (United States v. Italy)*, Ruling (29 July 1989), REP. C.I.J. 1989, p. 15, ¶ 128 (CL-048)

shocking judicial propriety. On the contrary, Uruguay's actions taken by Uruguay are not at all surprising.

326. As was established in the Counter-Memorial, the obvious consequence for Trigosul's contempt for its obligations to provide services was that its permits would be revoked.<sup>594</sup> Trigosul itself reported no income or customers and had a long history of defaulting on payments owed to URSEC.<sup>595</sup> This in and of itself would be reasonable grounds for the revocations.<sup>596</sup> Italba claims that its lack of activity was due to the fact that URSEC refused to issue it the proper license.<sup>597</sup> However, this version is at odds with reality: while Trigosul was not providing any services, the other companies were doing business normally with their pre-2003 authorizations that had not been "updated."<sup>598</sup>

327. Even if one were to assume, *quod non*, that the decision to proceed to revoke Trigosul's permits was incorrect, a violation of domestic law does not automatically constitute a violation of international law.<sup>599</sup> Much less if a tribunal has already remedied the infraction,<sup>600</sup> as occurred with the TCA's Judgment.<sup>601</sup>

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<sup>594</sup> Counter-Memorial, ¶ 237.

<sup>595</sup> URSEC, Technical Assistance Memorandum No. 2010/5/00064 (28 December 2010), (C-066).

<sup>596</sup> Decree No. 114/003, Art. 26 (C-017).

<sup>597</sup> Reply, ¶ 276.

<sup>598</sup> See Section III.A.1; Counter-Memorial, ¶¶ 230, 231; Dedicado S.A. Statistical Table (2016) (R231); Enalur S.A. Statistical Table (2016) (R-52); Trigosul S.A. Statistical Table (2016) (R-53); Telefónica Móviles del Uruguay S.A. Statistical Table (2016) (R-55); Telstar S.A. Statistical Table (2016) (R-56).

<sup>599</sup> *Elettronica Sicula*, p. 15, ¶ 124 (CL-048).

<sup>600</sup> *ECE v. Czech Republic*, ¶ 4.805 (CL-121).

<sup>601</sup> See Section III.B.1.

328. With regard to the updated license, Uruguay disagrees with the statements made in the Reply<sup>602</sup> given that (a) Trigosul was not entitled to receive an “updated license,” as Uruguay has repeatedly explained;<sup>603</sup> and (b) in fact, Trigosul’s applications were denied in accordance with Uruguayan constitutional norms (presumptive denial).<sup>604</sup> Trigosul also had all the remedies at its disposal to challenge these presumptive denials, but never did so.<sup>605</sup> Its alleged purgatory was self-imposed.

329. Similarly, the allocation of the frequencies formerly allocated to Trigosul to Dedicado cannot be abhorrent to judicial propriety given that as shown above, it was accomplished in accordance with the law. The TCA itself confirmed its lack of astonishment with respect to Uruguay’s actions when it recorded its acts in compliance with the Judgment.<sup>606</sup>

**d. Uruguay Did Not Discriminate against Trigosul**

330. One of the most dramatic changes in Italba’s arguments relates to its allegations on discrimination. In its Memorial, Italba maintained that Uruguay had discriminated against

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<sup>602</sup> Reply, ¶ 276.

<sup>603</sup> See Sections III.A.1 and III.A.3.

<sup>604</sup> First Expert Opinion of Dr. Pereira, ¶ 156 (“Indeed, in the case of an application submitted to the administration, the applicable norms stipulate that after the term of 150 days of its submission, it shall be deemed implicitly denied (Article 318 of the Constitution).”).

<sup>605</sup> *Id.*, ¶¶ 157-158; Second Expert Opinion of Dr. Pereira, ¶ 5(r), 57, 84 (In light of the Administration’s silence (presumptive denial), the citizen has efficient legal remedies, and the citizen must challenge the presumptive denial of the requests. Trigosul failed to do so. [...] In addition, it is striking that Italba’s Reply does not explain at all why given the presumptive denials of these submitted requests, Trigosul did not challenge them. If its requests were not resolved, it only needed to challenge the presumptive denials [...] [...] If it was in Trigosul’s interest to demand from the Administration a determination on these requests, it should have complied with the procedures provided in the Constitution, the laws, and the regulations of the Uruguayan legal system; it failed to do so.” (emphasis omitted.)

<sup>606</sup> See in general, TCA, Decree 6172/2016 (9 August 2016) (R-67).

Trigosul because it issued updated licenses to its competitors.<sup>607</sup> In its Counter-Memorial, Uruguay showed that this was false<sup>608</sup> and it is likely for this reason that Italba has now relegated this argument to a footnote in its Reply.<sup>609</sup> Italba now maintains that the discrimination lies in the fact that Uruguay allegedly responded to requests for URSEC to take “administrative action” on applications submitted by “numerous Trigosul competitors” and because URSEC did not revoke the permits of other operators, and failed to restore Trigosul’s permits after receiving a court order to do so.<sup>610</sup>

331. Italba’s new arguments have the same defects as its earlier ones: there was no differentiated treatment, nor are there any companies whose circumstances were comparable to Trigosul’s.<sup>611</sup>

332. With regard to the requests, none of Trigosul’s competitors submitted applications to update their licenses,<sup>612</sup> nor did Trigosul submit any request to modify its frequency allocation as described by Italba. URSEC’s own report, cited by Italba, confirms that “no authorization has been updated for data transmission service operators in the bands of 3.5 GHz, 10 GHz, 27 GHz, and 38 GHz to the telecommunications license system.”<sup>613</sup> Moreover, the allocations and authorizations of Trigosul’s competitors were never revoked for the simple reason that those

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<sup>607</sup> Memorial, ¶ 155.

<sup>608</sup> Counter-Memorial, note 219.

<sup>609</sup> Reply, note 181.

<sup>610</sup> *Id.*, ¶ 279.

<sup>611</sup> Counter-Memorial, ¶ 170.

<sup>612</sup> *Id.*, ¶ 151.

<sup>613</sup> URSEC Report (30 March 2006), p. 3 (R-100).

companies, unlike Trigosl, were providing services to hundreds or thousands of Uruguayans.<sup>614</sup>

There was no reason to revoke their permits, unlike Trigosl, which had not reported any significant activities since 2003.<sup>615</sup>

333. Even with its change in strategy, the Claimant has failed to meet the burden of proof that it understands it must meet. Footnote 680 to the Reply confirms the elements of proof that Italba is required to show in its discrimination claim. Despite this, the Reply makes no attempt to remedy its failure to articulate arguments meeting these criteria, much less offers any evidence to prove them.

334. The Reply's silence is even more serious and revealing for the claims concerning national treatment under Article 3 and the MFN clause in Article 4 of the Treaty. These claims do not warrant more than half a line in a 185-page pleading.<sup>616</sup> They are not serious and have all but disappeared. For all practical purposes, the Claimant has given up on that point. To put an end to the matter, Articles 3 and 4 do nothing to support Italba's claims because at no time, either with regard to a domestic or foreign investor, has Italba been able to establish that any other company received more favorable treatment than Trigosl.

## **2. In Any Event, These Protections Are Not Part of the Minimum Standard of Treatment Required by the Treaty**

335. Italba no longer disputes that the treatment to be accorded to investors protected

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<sup>614</sup> Dedicado S.A. Statistical Table (2016) (R-52); Enalur S.A. Statistical Table (2016) (R-53); Telefónica Móviles del Uruguay S.A. Statistical Table (2016) (R-55); Telstar S.A. Statistical Table (2016) (R-56).

<sup>615</sup> Trigosl S.A. Statistical Table (2016) (R-54).

<sup>616</sup> Reply, ¶ 278.

under Article 5 of the Treaty is clearly identified as the minimum standard of treatment accorded to foreign nationals under customary international law (“MSTCIL”).<sup>617</sup> As such, the Treaty clarifies that the concept of fair and equitable treatment does not require treatment in addition to or beyond that which is required by that standard, and does not create additional substantive rights,<sup>618</sup> which is likewise undisputed by Italba.

336. As Uruguay explained in its Counter-Memorial,<sup>619</sup> the obligation not to deny justice is the only obligation that the Parties to the Treaty have expressly acknowledged as part of the MSTCIL set forth in Article 5. Moreover, it was clear that Italba has failed to provide adequate proof to show that the cocktail of obligations it argued were included in Article 5 should be considered part of the MSTCIL.<sup>620</sup>

337. As it did in its Memorial, Italba once again attempts to prove its arguments primarily based on the decisions of arbitral tribunals. Ignoring the true scope of its burden as the claimant,<sup>621</sup> Italba responds that it is valid for a tribunal to use indirect means such as the jurisprudence of arbitral tribunals, to rule that the MSTCIL includes the obligations it proposes.<sup>622</sup>

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<sup>617</sup> *Id.*, ¶ 255.

<sup>618</sup> Uruguay-U.S. BIT Art. 5 (C-001).

<sup>619</sup> Counter-Memorial, ¶ 184.

<sup>620</sup> Reply, ¶¶ 245-254.

<sup>621</sup> As the tribunal established in *Glamis* “[i]n the context of arbitration, however, it is necessarily Claimant’s place to establish a change in custom.” *Glamis Gold v. United States*, ¶ 603 (RL-75).

<sup>622</sup> Reply, ¶ 256.



338. As Uruguay explained in its Counter-Memorial, the decisions of arbitral tribunals do not reflect State practice and as such do not constitute proof of the existence of any customary international law standard.<sup>623</sup> In this regard, in the case of *Glamis Gold*, the tribunal provided a description of the elements of proof that can evidence the conduct of a State: “treaty ratification language, statements of governments, treaty practice (e.g., Model BITs), and sometimes pleadings.”<sup>624</sup> Italba, once again, fails to present any such evidence in support of its arguments.<sup>625</sup>

339. By contrast, Uruguay has submitted evidence that the United States has expressed its position and understanding of the proper *opinio juris* in *Teco*, *Spence*, and *Apotex*. In these cases, the United States only identifies the obligation not to deny justice<sup>626</sup> as part of the MSTCIL and FET protection. There is no mention of any of the alleged obligations Italba maintains are part of the minimum standard of treatment. As such, this Tribunal cannot ignore

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<sup>623</sup> Counter-Memorial, ¶ 185.

<sup>624</sup> *Glamis Gold v. United States*, ¶ 603 (RL-75).

<sup>625</sup> Italba's arguments insinuating that the tribunals' decisions in *Teco* and *Spence* prove its position is completely upside down. These decisions are, in any case, proof that the practice that the two States consider legally obligatory, as stated in the submissions of the United States, does not include protections that were recognized by arbitral tribunals. See *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award (19 December 2013) (Mourre, Park, von Wobeser), ¶¶ 454-456 (CL-139); *Spence International Investments, LLC et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Provisional Award (25 October 2016) (Bethlehem, Kantor, Vinuesa), ¶ 282 (RL-117); *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Submission of the United States (23 November 2012), ¶ 6 (RL-94); *Spence v. Costa Rica*, ¶¶ 15,17 (RL-111).

<sup>626</sup> *Glamis Gold v. United States*, ¶ 605 (RL-75).

the evidence of the practice of the States submitted by Uruguay in favor of the secondary sources submitted by Italba.<sup>627</sup>

340. Italba also indicates that there are other examples of United States practice that are not stressed by Uruguay that show that the recognition of the prohibition of arbitrary and discriminatory measures is part of the minimum standard of treatment required under Article 5 of the Treaty, but furnishes no proof of this State practice.<sup>628</sup>

341. The most important fact relevant to this case relating to the practice concerning U.S. Investment Treaties is that the U.S. Model BIT of 2004, which is the basis for the text of the Treaty with Uruguay (signed just one year after the model), presents a clear distinction with

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<sup>627</sup> In support of its argument that the tribunal may use indirect evidence to determine the content of ordinary international law, Italba cites an extract of the case of *Windstream Energy*, but conveniently leaves out of its quote the tribunal's decision to the effect that relying on indirect evidence would only be appropriate in the event that none of the parties had provided evidence from a primary source, which is not the case here. See *Windstream Energy LLC v. Government of Canada*, UNCITRAL, Award (27 September 2016) (Heiskanen, Bishop, Cremades), ¶ 351 (CL-143) (“The Tribunal further agrees with the Respondent that in principle the content of a rule of customary international law such as the minimum standard of treatment can best be determined on the basis of evidence of actual State practice establishing custom that also shows that the States have accepted such practice as law (*opinio juris*). However, the Tribunal notes that neither Party has produced such evidence in this arbitration. In the circumstances, the Tribunal must rely on other, indirect evidence in order to ascertain the content of the customary international law minimum standard of treatment; the Tribunal cannot simply declare *non liquet*. Such 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.”) (emphasis added).

<sup>628</sup> The Claimant merely quotes an academic analysis by Professor Vandeveld, from 2009, which also cannot be considered evidence of State practice. Professor Vandeveld's opinion alone, without any additional corroboration, does not represent the official stance of the government of the United States or its government officials, and as such does not meet the necessary publicity requirement to evidence State practice. Moreover, even if one were to take this professor’s analysis into account, it supports Uruguay’s position. The professor quotes United States letters confirming that it considered the FET as a protection separate from the protection against arbitrary and discriminatory measures. K. Vandeveld, p. 264-265 (CL-117). And he confirms that the second protection against arbitrariness was eliminated from the language of certain United States treaties, such as is the case with our Treaty. *Id.*, p. 264. The passage quoted by the Claimant refers to letters sent in 1995, prior to the 2004 treaty model that served as the basis for this Treaty, which refers solely to the FET, and not to any protection against arbitrary or discriminatory measures.

regard to earlier US practice,<sup>629</sup> since the most recent model eliminated the inclusion of the prohibition on unreasonable and discriminatory measures.<sup>630</sup>

342. Italba’s position is simply incompatible with the language of the Model Treaty and the Treaty with Uruguay. It must not be ignored that Article 5 identifies in its text “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”<sup>631</sup> as part of the standard applicable to the FET.

343. In this regard, Italba argues that the text does not limit the protections under the FET standard to the obligation not to deny justice because it mentions that the FET includes but “[is] not limited to” the protection of the obligation not to deny justice.<sup>632</sup> This argument does not appear to be logical in light of the express designation of the protection against denial of justice and the omission of any other protection that was included in the past. Italba is attempting to rewrite the requirements that the Parties to the Treaty considered it wiser to omit.

344. But even assuming, for the sake of argument, that the FET standard chosen by the parties included other protections, Italba ought to have followed the interpretation guidelines agreed to by the Parties in Annex A to the Treaty. The Parties specifically agreed that it was their common understanding that “‘customary international law’ [...] results from a general and

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<sup>629</sup> *Id.*, p. 271 (CL-117) (“The United States, as it happens, more recently has foregone opportunities to assert that the international minimum standard includes a prohibition on unreasonable and discriminatory measures.”)

<sup>630</sup> United States Model BIT (2004), Art. 5 (RL-130).

<sup>631</sup> Uruguay-U.S. BIT Art. 5(2)(a) (C-001).

<sup>632</sup> Reply, ¶ 254 (Emphasis omitted.)

consistent practice of States that they follow from a sense of legal obligation.”<sup>633</sup> As such, the argument put forward by Italba has the same shortcomings as its previous arguments. Italba has failed to provide the Tribunal with any evidence of State practice that could demonstrate the content of customary international law.

345. It must remain perfectly clear that until the Claimant provides the Tribunal evidence that any obligation other than the obligation not to deny justice is covered under the MSTCIL, based on the general and consistent practice of the Parties to the Treaty, no protection can be extended beyond the obligation not to deny justice in relation to the FET protected under Article 5. In this regard, the United States has acknowledged that the MSTCIL consists of a series of rules that have crystallized over time;<sup>634</sup> however it has also clearly maintained that those areas are few in number and has only identified (1) the requirement to pay compensation for expropriations; (2) the obligation to provide full protection and security; and (3) the obligation not to deny justice.<sup>635</sup>

346. These statements by the United States confirm the will of Parties as it is reflected verbatim in the Treaty. Article 6.1(c) describes the requirement of providing compensation in the

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<sup>633</sup> Uruguay-U.S. BIT, Annex A (C-001)

<sup>634</sup> *TECO v. Guatemala*, Submission of the United States, ¶ 3 (RL-94) (“As the United States has noted in previous submissions under the NAFTA, the minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law in specific contexts.”).

<sup>635</sup> *Apotex v. United States*, Counter-Memorial on the Merits and Jurisdiction, ¶ 353 (RL-95) (“Sufficiently broad State practice and *opinio juris* thus far have coincided to establish minimum standards of State conduct in only a few areas, such as *the requirements to provide compensation for expropriation; [ ] to provide full protection and security (or a minimum level of internal security and law); [ ] and to refrain from denials of justice.*”) (emphasis added) (citations omitted).

event of expropriation;<sup>636</sup> Article 5.2(b)<sup>637</sup> establishes the obligation to provide full protection and security, specifically police protection;<sup>638</sup> and Article 5.2(a) confirms that the FET standard includes the obligation not to deny justice.<sup>639</sup> The Treaty does not recognize any other obligation, and obviously none of the obligations alleged by Italba.<sup>640</sup>

347. The Parties to the Treaty intentionally and expressly chose to include a “restricted” standard applicable to fair and equitable treatment, dispensing with other formulations they were familiar with, such as the one contained in the BIT between Uruguay and Switzerland. As such, applying the MFN clause to import an “unrestricted” standard contained in a BIT that predates the Treaty applicable here would render the wording used by the Parties in the Treaty absurd and superfluous. This situation would violate the doctrine of *effet utile* and would render the standard selected by the Parties inapplicable *ab initio*.<sup>641</sup>

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<sup>636</sup> Uruguay-U.S. BIT, Art. 6(1)(c) (C-001) (“Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (‘expropriation’), except: on payment of prompt, adequate, and effective compensation[.]”).

<sup>637</sup> *Id.*

<sup>638</sup> *Id.*, Art. 5(2)(b) (C-001) (“‘full protection and security’ requires each Party to provide the level of *police protection* required under customary international law.”) (emphasis added).

<sup>639</sup> *Id.*, Art. 5(2)(a) (C-001) (“‘fair and equitable treatment’ includes 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”) (emphasis added).

<sup>640</sup> Reply, ¶ 262.

<sup>641</sup> *ICS Inspection and Control Services Ltd. (United Kingdom) v. Argentine Republic*, PCA Case No. 2010-9 (UNCITRAL), Award on Jurisdiction (10 February 2012) (Dupuy, Torres Bernárdez, Lalonde), ¶ 317 (RL-144) (“The terms of the former, the MFN clause, should not be interpreted in a way that deprives the latter, the dispute resolution clause, of any meaning without a clear intention to achieve that result.”)

348. Italba attempts to base its erroneous interpretation of the applicability of the MFN clause on the decision in *Bayindir*;<sup>642</sup> but it is not applicable because in that case the tribunal used the MFN clause to import the protection included in another treaty that was *more recent* than the basic treaty.<sup>643</sup> As such, the examples used by Italba itself fail to support its argument,<sup>644</sup> given that in *Bayindir*<sup>645</sup> and *Rumeli*<sup>646</sup> the tribunals imported more favorable protections from treaties that were *more recent* than the governing treaty.

349. The terms of the MFN clause cannot be interpreted in a way that deprives the language chosen by the Parties of any meaning without a clear demonstration of an intent by the Parties to achieve that result.<sup>647</sup> Italba has failed to produce any evidence that the Parties were attempting to achieve any result other than the one they expressed in the text of the Treaty: linking the FET standard to the minimum standard of treatment recognized under customary international law.<sup>648</sup>

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<sup>642</sup> Reply, note 633.

<sup>643</sup> *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award (27 August 2009) (Kaufmann-Kohler, Berman, Böckstiegel), ¶ 160 (CL-039).

<sup>644</sup> Reply, note 632.

<sup>645</sup> In this case the tribunal imported the FET standard from Article 4 of the BIT between Switzerland and Pakistan of July 11, 1995 which is more recent than the basic treaty, the BIT between Turkey and Pakistan signed on March 16, 1995; see *Bayindir v. Pakistan*, ¶ 167 (CL-039).

<sup>646</sup> In this case the tribunal imported the FET standard from the BIT between the United Kingdom and Kazakhstan of January 23, 1995 which is more recent than the basic treaty, the BIT between Turkey and Kazakhstan signed on May 1, 1992; see *Rumeli v. Kazakhstan*, ¶ 575 (CL-027).

<sup>647</sup> *ICS v. Argentina*, ¶ 317 (RL-144).

<sup>648</sup> At the end of its arguments on this point, Italba argues that “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.” Reply, ¶ 261. This criticism is without merit. The *ADF* case clearly shows the intent of the United States to link the FET standard to the minimum standard of treatment, relevant to our case, and stresses its practice in this regard. See *ADF Group Inc. v. United States*, ICISID Case No. ARB(AF)/00/1, Award (9 January 2003) (Feliciano, deMestral, Lamm), ¶¶ 194-195 (CL-035); *ADF Group Inc. v. United States*, ICISID Case

350. Based on all of the foregoing, Uruguay has not violated its obligation to provide FET under Article 5 of the Treaty.

**D. URUGUAY DID NOT VIOLATE ITS OBLIGATION TO PROVIDE FULL PROTECTION AND SECURITY**

351. Italba has not even argued—much less proved—the necessary elements to justify a claim that Uruguay violated its obligation under Article 5 of the Treaty to provide full protection and security to its alleged investment. The relevant facts are undisputed: Trigosul was never physically threatened; it never experienced any physical danger; it did not require or request police protection at any time; and it did not suffer any physical damage.<sup>649</sup> In short, there is absolutely nothing to support the claim that Uruguay violated its obligation to provide full protection and security.

352. Conscious of this fact, the Claimant attempts to base its claim on arguments that are completely irrelevant. Specifically, Italba trots out the same tired litany of accusations against Uruguay, this time under the heading of denial of full protection and security. But it fails to explain how it is possible that the acts it repeatedly complains of—such as failing to issue Trigosul an “updated license,” revoking its authorizations, allocating the frequencies to Dedicado, or “ignoring the TCA Judgment”—could constitute a violation of the obligation to

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No. ARB(AF)/00/1, Rejoinder of the United States (29 March 2002), pp. 40-41 (RL-43). Uruguay has not changed its position with regard to the fact that the minimum standard of treatment does not include the protections Italba proposes, and as such the contradiction Italba is attempting to establish does not exist; on the contrary, Uruguay clearly indicates, as does the tribunal in *ADF*, that the parties’ intention is unequivocal in linking the FET standard to the MSTCIL. In the Treaty with Uruguay this was done expressly, in the other two (older) treaties the United States explains that that was the implicit intention.

<sup>649</sup> Counter-Memorial, ¶ 197.

provide full protection and security under Article 5 of the Treaty.

353. In fact, the Claimant does not cite the standard under the Treaty as the basis for its position. Instead, the Reply attempts to evade the applicable standard in the Treaty, seeking to replace it with the MFN clause<sup>650</sup> and citing inapplicable arbitral decisions.

354. None of these positions offers the refuge the Claimant seeks. Its attempt to apply the MFN clause based on a treaty that predates the Treaty here directly contradicts the intentions of the signatory parties. Moreover, the jurisprudence cited results from treaties with full protection and security clauses that do not have the same restrictions as Article 5 in this case. In any event, based on the express language of the applicable Treaty or the language of another treaty, the result is the same: Uruguay did not violate its obligation.

**1. The Obligation to Provide Protection and Security Does Not Include More than Police Protection**

355. In the Reply, Italba twists Uruguay's position, making the incredible claim that Uruguay has failed to refute its claim regarding full protection and security.<sup>651</sup> On the contrary, in its Counter-Memorial, Uruguay was clear that Italba's claim is without merit, because the obligation contained in the Treaty only requires the provision of police protection, which Italba does not claim to have needed.<sup>652</sup>

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<sup>650</sup> Reply, ¶ 283.

<sup>651</sup> *Id.*, ¶ 281.

<sup>652</sup> Counter-Memorial, ¶ 197.



356. Uruguay reiterates that Article 5 of the Treaty is clear in establishing that “[t]he obligation in paragraph 1 to provide: [...] ‘full protection and security’ requires each Party to provide the level of *police protection* required under customary international law.”<sup>653</sup> Similarly, Uruguay has produced evidence that this language was intentionally adopted by the parties to include the obligation to provide police protection only. The United States’ interpretation shows the clear understanding that this clause only covers physical and police protection. For example, in the *Loewen* case, the United States stated that the violation of this protection was limited to cases in which “a State failed to provide reasonable police protection against acts of a criminal nature that physically invaded the person or property of an alien.”<sup>654</sup> To avoid any doubt, the Treaty establishes that the concept of full protection and security does not require any treatment “in addition to or beyond that which is required by the [customary international law minimum standard of treatment], and do not create additional substantive rights.”<sup>655</sup>

357. Moreover, arbitral tribunals that have interpreted the scope of this protection, even when analyzing treaties with standards that lack the explicit clarifications our Treaty has in this case, have determined that the full protection and security obligation is limited to the physical protection of the investment.<sup>656</sup> These obligations do not contemplate providing

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<sup>653</sup>Uruguay-U.S. BIT Art. 5(2), 5(2)(b) (C-001) (emphasis added).

<sup>654</sup> Counter-Memorial, ¶ 201; *The Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, United States Counter Memorial (30 March 2001), p. 176-177 (RL-42).

<sup>655</sup> Uruguay-U.S. BIT Art. 5.2 (C-001).

<sup>656</sup> *Saluka v. Czech Republic*, ¶ 484 (CL-018); *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (22 September 2014) (Bernardini, Marie Dupuy, Williams), ¶ 623 (CL-071); *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (4 April 2016) (Lévy, Gotanda, Boisson de Chazournes), ¶ 632 (CL-020).

protection against any type of harm to a foreign investment,<sup>657</sup> but merely against any physical harm<sup>658</sup> with respect to the physical safety of the investor or its investment.<sup>659</sup>

358. This was the conclusion in *Gold Reserve* in which the tribunal decided that:

[w]hile some investment treaty tribunals have extended the concept of full protection and security to an obligation to provide regulatory and legal protections, the more traditional, and commonly accepted view [...] is that this standard of treatment refers to protection against physical harm to persons and property.<sup>660</sup>

In that case, like *Italba*, the claimant complained that the State had violated the obligation to provide full protection and security from things other than physical harm, and as a result its claims were rejected.<sup>661</sup> This conclusion is even more applicable in cases in which the treaty adds

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<sup>657</sup> *Id.* (CL-018) (“The practice of arbitral tribunals seems to indicate, however, that the ‘full security and protection’ clause is not meant to cover just any kind of impairment of an investor’s investment, but to protect more specifically the physical integrity of an investment against interference by use of force. In light of the following findings, it appears not to be necessary for the Tribunal to precisely define the scope of the ‘full security and protection’ clause in this case”).

<sup>658</sup> *Rumeli v. Kazakhstan*, ¶ 668 (CL-027).

<sup>659</sup> *BG Group Plc. v. Argentine Republic*, UNCITRAL, Final Award (24 December 2007) (Aguilar Álvarez, Garro, van den Berg), ¶ 324 (RL-65).

<sup>660</sup> *Gold Reserve v. Venezuela*, ¶ 622 (CL-071).

<sup>661</sup> *Id.*, ¶ 623 (CL-071) (“Accordingly, the Tribunal finds that the obligation to accord full protection and security under the BIT refers to the protection from physical harm. *There has been no suggestion in the present case that Respondent failed to protect Claimant’s investment from physical harm, and therefore no breach of the full protection and security standard occurred.*”) (emphasis added). *See also Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award (22 June 22 2010) (Böckstiegel, Hobér, Crawford), ¶ 289 (RL-141) (“With regard to the standard of most constant protection and security, the Tribunal holds that this provision, which must have a meaning beyond, and distinct from, the standard of fair and equitable treatment, provides a standard which does not extend to any contractual rights but *whose purpose is rather to protect the integrity of an investment against interference by the use of force and particularly physical damage. The actions disputed in the present case do not involve any such interference and, therefore, are not covered by this additional standard.*”) (emphasis added).

the explicit limitation to “police protection” as seen here.<sup>662</sup>

**2. The Most Favored Nation Clause Cannot Be Invoked to Import Protections from an Earlier BIT thereby Contradicting the Express Intent of Uruguay and the United States**

359. Recognizing the impossibility of using the Treaty applicable here to support its position, Italba argues that it has the right to rely on Article 4 of the BIT between Venezuela and Uruguay, by applying the MFN clause contained in Article 4(2) of the Treaty.<sup>663</sup> However, allowing the MFN clause to be used to import language from a BIT that predates the Treaty is incompatible with the *effet utile* that must be accorded to the standard intentionally selected by the parties.<sup>664</sup> Given that the BIT with Venezuela that Italba attempts to use was concluded nearly a decade before the Treaty, it is logical that the parties were aware of the language in that BIT and decided not to use it in the Treaty.<sup>665</sup>

360. It bears stressing that the Treaty between Uruguay and the United States is based on the Model BIT introduced by the United States in 2004 to modernize the provisions of its

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<sup>662</sup> The Claimant has not established, or attempted to show, that customary international law includes any legal protection or security. Instead, it merely cites awards issued by arbitral tribunals that do not constitute proof of customary international law. *See* Section IV.C.2. Moreover, none of the awards cited by the Claimant analyzed a Treaty that included this additional language.

<sup>663</sup> Reply, ¶ 286.

<sup>664</sup> *See also*, Reply, ¶¶ 347-349.

<sup>665</sup> Venezuela-Uruguay, Agreement for the Reciprocal Promotion and Protection of Investment (20 May 1997) (CL-065). The Claimant argues in its Reply that “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.” Reply, ¶ 290. The Claimant’s analysis is certainly superficial: Article 4 excludes certain industries or types of regulations (e.g. taxes) from the application of the MFN clause. But it does not intend the MFN clause to be used to override all other rights and obligations under the Treaty, much less so with respect to another much older BIT than the Treaty between Uruguay and the United States, which has incorporated the changes introduced by the Model BIT adopted by the United States in 2004.

BITs for greater consistency with customary international law.<sup>666</sup> These modifications included adding more specific language regarding the obligation to provide full protection and security.<sup>667</sup> The purpose was to clarify that what is meant by that phrase is *physical* protection and security—consistent with the way it has traditionally been understood under international law.<sup>668</sup> The Treaty between the United States and Uruguay reflects the sovereign decision of both States to base their agreement on the Model BIT. Replacing this common understanding with obligations from other BITs that predate the Model BIT, which the latter intended to consign to history, would be to ignore and contradict the Parties’ intentions.

361. Italba suggests that similar arguments to the ones put forward by Uruguay concerning the prospective application of the MFN clause “have already been rejected.”<sup>669</sup> Italba’s opinion in this regard is erred. In support of its argument it refers only to the *Bayindir* case in which the tribunal did not use the MFN clause to import the provisions of a BIT in place prior to the applicable treaty.<sup>670</sup> Italba does not mention that the tribunal imported the applicable

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<sup>666</sup> Office of the United States Trade Representative, Archive, “Bilateral Investment Treaty with Uruguay,” available at [https://ustr.gov/archive/World\\_Regions/Americas/South\\_America/Uruguay\\_BIT/Section\\_Index.html](https://ustr.gov/archive/World_Regions/Americas/South_America/Uruguay_BIT/Section_Index.html) (last visited: August 6, 2017) (“The United States recently completed a rewrite of the model text it has used in BIT negotiations over the past two decades and the U.S.-Uruguay BIT was the first to be based on this new U.S. model text. The new model text includes provisions developed by the Administration to address the investment negotiating objectives in the Trade Promotion Act of 2002.”).

<sup>667</sup> The Model BIT of 1998 adopted by the United States contained more general language than the Model BIT of 2004 with regard to the obligation to provide full protection and security under Article II(3)(a) therein. “Each Party shall at all times accord to covered investments fair and equitable treatment and full protection and security, and shall in no case accord treatment less favorable than that required by international law.” See United States Model BIT (1998), Art II(3)(a) (RL-127).

<sup>668</sup> The change with respect to the previous model BIT is reflected in the text of Article 5(2)(b) which clarifies that “‘full protection and security’ requires each Party *provide the level of police protection required under customary international law.*” See Uruguay-U.S. BIT Art. 5(2)(b) (C-001) (emphasis added).

<sup>669</sup> Reply, ¶ 290.

<sup>670</sup> *Bayindir v. Pakistan*, ¶ 160 (CL-039).

substantive standard from *treaties that post-date* the governing treaty,<sup>671</sup> which the tribunal explicitly explained in the sentence following the one quoted by the Claimant.<sup>672</sup> *Italba* is not in a similar situation; as such, the only precedent on which it attempts to base its argument does not apply.

362. In contrast, in *ICS v. Argentina*, the Tribunal decided to block the use of the MFN clause to invoke provisions in older treaties that directly contradicted the intentions of the parties to the applicable treaty based on the principle of contemporaneity, which “requires that the significance and scope of this term be determined at the time [the parties] negotiated their BIT.” The tribunal explained that, “The doctrine of *effet utile* would be violated with respect to the noted treaties, because [a prerequisite] would have been void *ab initio*—immediately superseded by means of the treaties’ MFN clauses. [...] The terms of the former, the MFN clause, should not be interpreted in a way that deprives the latter [...] of any meaning, without a clear intention to achieve that result. The principle of contemporaneity avoids this incongruity by preferring the interpretation consistent with Argentina’s demonstrated treaty practice.”<sup>673</sup>

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<sup>671</sup> *Id.*, ¶ 167 (CL-039) Hence, by virtue both of *the time of its conclusion* [...], Article 4 of the Pakistan-Switzerland BIT can be used as the applicable FET standard in the present case.”); Treaty between the Swiss Confederation and the Islamic Republic of Pakistan on the Reciprocal Promotion and Protection of Investment, signed on July 11, 1995, entered into force May 6, 1996 (RL-126) (concluded after the basic treaty in *Bayindir v. Pakistan*); Treaty between the Islamic Republic of Pakistan and the Republic of Turkey on the Reciprocal Promotion and Protection of Investment, signed March 16, 1995, entered into force on September 3, 1996 (RL-125).

<sup>672</sup> *Id.*, ¶ 160 (CL-039) (“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. *In any event, the Claimant has also referred to BITs concluded subsequently to the Treaty.* The issue is therefore not whether the Claimant can invoke an FET obligation, but rather which one.”) (emphasis added).

<sup>673</sup> *ICS v. Argentina*, ¶¶ 289, 317 (RL-144).

363. Italba’s claims are merely a crude attempt to transplant its claims with regard to fair and equitable treatment and place them under the heading of full protection and security.<sup>674</sup> Contrary to what Italba argues, arbitral tribunals have held that “an overly extensive interpretation of the full protection and security standard may result in an overlap with the other standards of investment protection, which is neither necessary nor desirable.”<sup>675</sup> Similarly, it has been recognized that the obligation to provide fair and equitable treatment and the obligation to provide full protection and security are two distinct standards. Consequently, applying the principle of effective interpretation, they must have different functions and spheres of application.<sup>676</sup> The position Italba has taken by mixing the two standards in the Treaty in an

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<sup>674</sup> It has already been shown that none of the facts it claims violate any obligations under the fair and equitable treatment standard, under ordinary international law or the autonomous standard that the Claimant is incorrectly attempting to apply. See Section IV.C.1. Moreover, the Treaty itself makes it clear that a “determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of this Article.” Uruguay-U.S. BIT Art. 5(3) (C-001). Moreover, it has been recognized that the Claimants cannot base a claim under the Full Protection and Security standard on the same facts as argued under the Fair and Equitable Treatment standard, in the absence of additional elements constituting a breach. See *AES Corp. y Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, Award (13 November 2013) (Tercier, Lowe, Sachs), ¶ 339 (RL-147) (“The Arbitral Tribunal is of the opinion that Claimants have failed to substantiate their claim under the FPS standard. In particular, Claimants have not demonstrated that such claim, which is based ‘on adverse effects of regulatory measure or administrative actions on the investment’, is actually different from the claim raised under the FET standard and the obligation to refrain from unreasonable and arbitrary impairment. The Arbitral Tribunal has already found that Claimants’ claims under the FET standard and the obligation to refrain from unreasonable and arbitrary impairment cannot be sustained, and it sees no additional element in or aspect of Respondent’s conduct that constitutes a breach of the FPS standard”).

<sup>675</sup> *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19 and *AWG Group Ltd. v. Argentine Republic*, UNCITRAL, Decision on Liability (30 July 2010) (Salacuse, Kaufmann-Kohler, Nikken), ¶ 174 (RL-142). In any event, in *Rusoro*, the Tribunal determined that a challenged measure does not violate the FET standard, there can be no violation of the FPS standard, no matter how broadly construed. See *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (22 August 2016) (Fernández-Armesto, Orrego Vicuña, Simma), ¶ 548 (CL-021).

<sup>676</sup> *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award (25 November 2015) (Kaufmann-Kohler, Stern, Veeder), ¶ 7.83 (RL-151) (“In the Tribunal’s view, given that there are two distinct standards under the ECT, they must have, by application of the legal principle of “*effet utile*”, a different scope and role.”). *Ulysseas, Inc. v. Republic of Ecuador*, UNCITRAL, Final Award (12 June 2012) (Bernardini, Pryles, Stern), ¶ 272 (RL-92) (“Full protection and security is a standard of treatment other than fair and equitable treatment, as made manifest by the separate reference made to the two standards by Article II (3)(a) of the BIT. This standard imposes an obligation

attempt to “double” the chances that a breach will be declared based on the same facts is pernicious and must be rejected by the Tribunal.

364. Lastly, even if one were to accept, which Uruguay does not, the improper application of the MFN clause for the obligation to provide legal protection established by the BIT with Venezuela, Uruguay’s conduct with respect to the events in question would not have violated the obligation to provide full protection and security. It has been recognized that the obligation to provide full protection and security does not impose a strict liability standard on the State, but rather that it requires due diligence<sup>677</sup> that must be examined in the context of each case.<sup>678</sup> In reality, the obligation in question is not designed to insulate the investor from any damage to its investment, but merely to guarantee him a reasonable degree of prevention that a well-administered government would endeavor to provide under comparable circumstances.<sup>679</sup>

365. Moreover, even when it has been decided that the obligation to provide full protection and security includes legal certainty, this merely “extends [...] to [provide] legal

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of vigilance and care by the State under international law comprising a duty of due diligence for the prevention of wrongful injuries inflicted by third parties to persons [...]”)

<sup>677</sup> *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Award (7 June 2012) (van Houtte, Schwebel, Moghaizel), ¶ 227 (RL-145) (“The obligation of full protection and security is not a strict liability standard, but requires due diligence.”).

<sup>678</sup> *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award (10 March 2014) (Griffith, Jaffe, Knieper), ¶ 430 (RL-149) (“The Tribunal agrees with the observations in *Wena Hotels* that the FPS standard does not impose on the State a “strict liability” obligation. In other words, the State cannot insure or guarantee the full protection and security of an investment. The question of whether the State has failed to ensure FPS is one of fact and degree, responsive to the circumstances of the particular case.”).

<sup>679</sup> *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL, Final Award (15 December 2014) (Cremades, Hwang, Nariman), ¶ 625 (CL-063) (“The Tribunal is of the view that the host state has an obligation to provide no more than a reasonable measure of prevention, which a well administered government could be expected to exercise in similar circumstances.”).

protection for the investor [...]—including both substantive provisions to protect investments and appropriate procedures that enable investors to vindicate their rights.”<sup>680</sup> There is no doubt that these remedies were available to Italba. Clearly with regard to the revocation of its permits the TCA accepted the challenge filed by Trigosl;<sup>681</sup> but these remedies were also available for the acts Italba now complains of and Italba elected not to use them.

366. Dr. Pereira has explained how Trigosl has systematically ignored the remedies at its disposal under Uruguayan law. With respect to the allocation of the frequencies to Dedicado, Trigosl filed no challenge whatsoever, which it had the opportunity to do, even at the time it became aware of this action;<sup>682</sup> nor did it ask the TCA for a stay that would have provisionally prevented the allocation.<sup>683</sup> In relation to the failure to grant it a new license, it also chose not to challenge the fact that its alleged applications were presumptively denied,<sup>684</sup> despite having

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<sup>680</sup> *Frontier Petroleum Services Ltd. v. Czech Republic*, PCA (UNCITRAL), Final Award (12 November 2010) (Williams, Alvarez, Schreuer), ¶ 263 (CL-068) (“it is apparent 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.”).

<sup>681</sup> TCA Judgment No. 579/2014, p. 21 (C-076).

<sup>682</sup> First Expert Opinion of Dr. Pereira, ¶ 280 (“it is fitting to point out that Trigosl did not contest the decision whereby the Administration granted the allocation of the respective frequencies to Dedicado [...] if Trigosl had been affected by the allocation of said frequencies to Dedicado—as now affirmed thereby—it would have administratively contested said decision in the knowledge of such circumstance, which, to date, has not occurred, in spite of the fact that Trigosl has declared that it was aware of such situation.”) (emphasis and quote omitted).

<sup>683</sup> *Id.*, ¶ 26(m).

<sup>684</sup> *Id.*, ¶¶ 277-278 (“[i]n the event that it is deemed -contrary to my opinion- that any of the applications submitted complied with the requirements, *Trigosl opted not to exhaust the administrative channel through the filing an administrative appeals*[.] [...] As will be shown, if Trigosl were really interested in obtaining a favorable pronouncement by the Administration on its request to obtain an “updated license,” it should therefore have administratively appealed the presumptive denial, preventing such decision from becoming final. This would have allowed for the opening of an administrative review of the issue of the supposed “update” before the Administration and, in the event of a new denial, it could have been filed before the TCA. But none of this occurred. (emphasis in the original.) ++Second Expert Opinion of Dr. Pereira, ¶¶ 85-87, “In national administrative practice the occurrence of presumptive denials is very frequent and, in turn, citizens frequently challenge those presumptive denials first through administrative appeals and then, eventually, before the TCA. As DURÁN MARTÍNEZ and other authors



successfully availed itself of this legal institution to challenge the revocation of its permits.

Uruguay has the substantive laws and procedures required by international law to provide legal protection for investments; Italba and Trigosul were the ones who chose not to avail themselves of them.

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indicate, and given the amount of work of the public authorities, it is common for them not to expressly issue a decision during the period provided for that purpose; this implies that the request is rejected once the period for that purpose expired. [...] if we were to accept that Trigosul had submitted effective requests, there is no doubt that it could have brought administrative appeals against the presumptive denial [...] Trigosul, however, did nothing. It was its responsibility—if that was in its interests—to use the mechanisms provided by the legal system to seek to obtain an affirmative response to its request. But Trigosul waived—when it failed to use the legal instruments available to it—the exercise of its eventual rights, and therefore it cannot assert a claim based on the request to “update” an authorization, from which it voluntary withdrew.” (emphasis omitted).

**V. THE CLAIMANT HAS NO RIGHT TO COMPENSATION<sup>685</sup>**

367. The Reply and the second Compass Lexecon report reveal that the Parties agree on at least two basic facts for the purpose of calculating the alleged damages in this case:

- i. That Trigosul “was not historically profitable”<sup>686</sup>; and
- ii. That Trigosul’s original authorization for PTP/PTMP (point-to-point and point-to-multipoint wireless fixed data transmission, without public telephone network connection) is not comparable to a license to provide broadband mobile data transmission services.<sup>687</sup>

368. In its Reply, the Claimant seeks to minimize the impact of both facts in its compensation claim. First, the Claimant persists in faulting Uruguay for Trigosul’s performance.<sup>688</sup> The Claimant alleges that, if Trigosul failed to generate profits, it was because of

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<sup>685</sup> Uruguay reiterates its position that the Tribunal does not have jurisdiction in this case. *See* Counter-Memorial, ¶ 296; *See also* Section II *supra*. Therefore, Uruguay’s arguments in this section cannot in any way be interpreted as a waiver of its jurisdictional objections, let alone as an admission of liability.

<sup>686</sup> Reply, ¶ 303.

<sup>687</sup> Second Compass Lexecon Report, ¶ 9. Compass Lexecon has confirmed that its valuation of Trigosul depends on the Claimant’s success in its claim regarding an adjusted license: “... my assessment of the FMV of the rights held by Trigosul assumes liability. This means, among other things, that I assume the Claimant succeeds on its claim that, but for Uruguay’s breaches, Trigosul would have been granted, or would have had rights equivalent to, a “Class B” conforming license after new telecommunication licensing regulations were issued in 2003, and that this license would have authorized Trigosul to provide wireless data services both for fixed points (i.e., fixed wireless broadband) as well as mobile devices (i.e., mobile broadband).” Therefore, Compass Lexecon has not submitted a valuation of the FMV of Trigosul in the scenario in which Trigosul was only authorized to provide wireless services for fixed points. Uruguay’s position is that this is the only valuation scenario in this case because Trigosul’s authorization was, is, and has always been the PTP/PTMP authorization that it received in 1997. In this single valuation scenario, as will be explained in this section, the value of Trigosul’s authorization is zero considering its historical performance.

<sup>688</sup> Reply, ¶ 303.

Uruguay's refusal to issue it a Class B license.<sup>689</sup> Second, the Claimant and Compass Lexecon now assume that Trigosul should be valued as a company with a Class B license and not as what it actually was—a company with a PTP/PTMP authorization.<sup>690</sup> Thus, the Claimant and Compass Lexecon have abandoned their original position of valuing Trigosul based on the actual technical capacities of the frequencies that had been assigned to Trigosul.<sup>691</sup>

369. Claimant's new position means that its claim for business opportunities that were not realized before the revocation of its authorization and its claim for the total value of Trigosul depend exclusively on Trigosul's alleged right to receive a Class B license.<sup>692</sup> Thus, nearly all of the damages claimed by Trigosul are contingent on a right it did not have.<sup>693</sup>

370. Consequently, the but-for scenario adhered to by the Claimant cannot serve as a basis for quantifying the alleged damages. Not only is there no jurisdiction over the claim for the non-issuance of a license between 2003 and 2011 because, *inter alia*, it was already barred by the limitations period;<sup>694</sup> but also Uruguay was never required to issue a Class B license to Trigosul, much less did it violate the Treaty by not doing so.<sup>695</sup> Thus, the only valuation scenario is the one

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<sup>689</sup> Reply, ¶ 303.

<sup>690</sup> Second Compass Lexecon Report, ¶ 9.

<sup>691</sup> First Expert's Report of Santiago Dellepiane Avellaneda, Compass Lexecon (16 September 2016) ("First Compass Lexecon Report"), ¶¶ 7, 50; First Expert Report of Econ One, ¶¶ 10-12.

<sup>692</sup> Second Compass Lexecon Report, Table I, ¶ 9.

<sup>693</sup> The claims of historical damages related to the alleged business lost as a result of the revocation of Trigosul's authorization in January 2011 are independent of this but-for scenario in which Trigosul would have had a Class B license. These damages refer specifically to the alleged deal with the clinic of Dr. García, Canal 7 and Grupo Afinidad Mary. *See* Reply, ¶¶ 50, 55, 64.

<sup>694</sup> *See* Section II.C, *supra*.

<sup>695</sup> *See* Section III.A, *supra*.

in which Trigosul was nothing more than a company lacking customers and employees, exclusively authorized to offer fixed data wireless transmission services—a type of service that was declining in Uruguay.<sup>696</sup>

371. This part of Uruguay’s Rejoinder reaffirms that Italba did not suffer any damages as a result of Uruguay’s conduct.<sup>697</sup> It is divided into six sections.

372. **Section A** will show that, in the only valid valuation scenario in this case, the Fair Market Value (FMV) of Trigosul was *zero* based on the valuation standard laid down in the Treaty—not the full reparation standard advocated by the Claimant. The Claimant refuses to value Trigosul’s business as a fixed wireless data transmission (PTP/PTMP) company under the pretext that, in a but-for scenario, Trigosul would have had a Class B license.<sup>698</sup> However, if the Tribunal decides that Italba’s claim concerning the updated license is prescribed or that it simply lacks merit, the only valuation of Trigosul that exists in the record is the valuation proposed by ECON ONE based on its capacity to generate income in the future. According to

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<sup>696</sup> Counter-Memorial, ¶¶ 313-319.

<sup>697</sup> The fact that the Claimant did not suffer any loss also means that the Treaty was not violated. In the case *Waste Management v. Mexico* ("Number 2"), for example, the Tribunal ruled that, in order to find that the FET clause had been breached, the challenged behavior must be “conduct attributable to the State and *harmful* to the claimant [...]” (emphasis added). Thus, if there was no harm, the Treaty was not violated. See *Waste Management v. United Mexican States*, ICSID Case no. ARB(AF)/00/3, Award (30 April 2004) (Crawford, Civiletti, Magallón), ¶ 98 (CL-033) (emphasis added). The tribunal in the case *Merrill & Ring Forestry v. Canada* reached the same conclusion and stated, “Liability has thus become inextricably associated with the occurrence of damages.” See *Merrill & Ring Forestry LP v. Government of Canada*, UNCITRAL, case administered by ICSID, Award (31 March 2010) (Vicuña, Dam, Rowley), ¶¶ 243-266 (RL-139).

<sup>698</sup> Reply, ¶ 312.

this valuation, the FMV of Trigosul and of its PTP/PTMP authorization is zero on any of the valuation dates proposed by the Parties.<sup>699</sup>

373. According to the Claimant, the DCF method is not applicable as a valuation approach in this case because Uruguay was at fault for the fact that Trigosul did not generate income. Section A will show that Uruguay's conduct was not the reason why Trigosul failed to realize or exploit its alleged business opportunities.

374. **Section B** explains that the FMV would be the same even in the but-for scenario in which Trigosul had received a Class B license. This section shows that the relative (or comparable) valuation approach put forth by the Claimant and Compass Lexecon is inappropriate in this case, and therefore its results cannot serve as the basis for calculating the FMV of Trigosul's "license."

375. The Claimant insists that the alleged "inherent" value of Trigosul's rights may be inferred based on the value at which other frequencies were auctioned in Uruguay and Argentina, even though these frequencies were auctioned for the purpose of offering mobile telecommunications or *International Mobile Telecommunications* (IMT) services.<sup>700</sup> Whereas, in its first report, Compass Lexecon based the comparability between Trigosul's frequencies and the frequencies auctioned by arguing that they had the same applications and technical capacity, the Claimant now relies on the opinion of Dr. Luis Valle to allege that a Class B license would

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<sup>699</sup> Counter-Memorial, ¶¶ 319-320.

<sup>700</sup> Reply, ¶¶ 302; Ministry of Industry, Energy and Mining, Decree no. 390/012 (13 December 2012), p. 3 (CLEX-032).

have enabled Trigosul to provide the same services authorized under the auctioned licenses.<sup>701</sup> But that is incorrect. The Claimant has failed to show that the rights granted under the licenses auctioned in Uruguay are comparable to the rights that Trigosul would have had even with a Class B license.

376. The second component of the Claimant's claim for damages in a but-for scenario is the lost profits resulting from the alleged loss of opportunities arising, first of all, from the non-issuance of a Class B license and, second, from the revocation of Trigosul's rights in January 2011. **Section C** will show that, in its Reply, the Claimant failed to rebut the reasons why the claim of US\$ 12 million for historical lost profits is speculative, even if the reason for the lost profits were attributable to Uruguay, which is not the case. Given the weak evidence submitted by Italba in support of the claim for lost business opportunities, it is not surprising that, in its Reply, the Claimant only devoted three pages to attempting to redeem that claim. Thus, the Tribunal will have no trouble rejecting the claim for historical lost profits because the evidence submitted by the Claimant does not show that Uruguay deprived Trigosul of a certain source of income, as required by the relevant case law.

377. In **Section D**, Uruguay reaffirms its position<sup>702</sup> that the Claimant hindered URSEC's compliance with the TCA's Judgment by rejecting Uruguay's offers to reassign

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<sup>701</sup> Expert Report of Eng. Valle, ¶¶ 38, 41.

<sup>702</sup> See Counter-Memorial, part IV.B.

alternative frequencies, or even the original frequencies, to Trigosl. Therefore, the Claimant refused to be compensated in this arbitration.

378. **Section E** shows that the Claimant's intention to obtain interest based on Italba's capital cost or on Uruguay's borrowing rate is not supported in the Treaty. At most, the Claimant would have the right to a risk-free rate. Furthermore, the Claimant has not shown that the circumstances of this case require that the interest rate be compounded.

379. Finally, in **Section F**, Uruguay explains why, in this case in particular, the Claimant must pay the arbitration costs.

**A. THE CLAIMANT DID NOT SUFFER DAMAGES BECAUSE TRIGOSUL HAD NO MARKET VALUE**

380. In the Counter-Memorial, Uruguay showed that Trigosl never had a FMV as a fixed wireless data transmission company.<sup>703</sup> Uruguay arrived at this conclusion based on an analysis of Trigosl's historical performance. Trigosl never generated income and never managed to have more than eight customers in a single year.<sup>704</sup> In spite of the Claimant's attempt to suppress financial documents pertaining to Trigosl, Uruguay's damages experts, ECON ONE, concluded in their first report that, based on the meager financial information available, a valuation of Trigosl using the DCF method would show that its FMV is zero.<sup>705</sup>

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<sup>703</sup> *Id.*, ¶¶ 319-320.

<sup>704</sup> This was an extremely poor performance compared to Dedicado, which had the same type of authorization as Trigosl and never received a Class B license. Counter-Memorial, ¶ 317.

<sup>705</sup> First Expert Report of Econ One, ¶¶ 42-43.

381. In the first round of pleadings, the Claimant and Compass Lexecon acknowledged that the DCF method is a useful approach for determining the FMV of a company or business.<sup>706</sup> However, they did not use it supposedly because this method could generate uncertainty since it is based on future projections.<sup>707</sup> The Claimant and Compass Lexecon have changed their position concerning the DCF method in this second round of pleadings. Indeed, they do not dispute the fact that Trigosul was not “historically profitable,”<sup>708</sup> let alone that the valuation of Trigosul based on the DCF method yields a value of zero. The Claimant simply limits itself to stating that Trigosul’s historical performance, and thus the DCF method, are irrelevant for two reasons: 1) That Uruguay is responsible for the fact that Trigosul failed to generate profits;<sup>709</sup> and 2) That Trigosul’s “license” in itself has an inherent value independent of the company’s historical performance.<sup>710</sup>

382. Uruguay will show that Trigosul’s historical performance is indeed relevant for purposes of determining its value because: 1) Uruguay’s allegedly unlawful conduct did not prevent Trigosul from undertaking business operations; and 2) the Claimant has not shown that Trigosul’s PTP/PTMP authorization had any inherent value.<sup>711</sup>

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<sup>706</sup> First Compass Lexecon Report, ¶ 39.

<sup>707</sup> Memorial, ¶ 187.

<sup>708</sup> Reply, ¶ 303.

<sup>709</sup> *Id.*

<sup>710</sup> *Id.*

<sup>711</sup> Second Expert Report of Econ One, ¶ 32, note 37.



**1. Trigosul's Lack of Business Operations and its Inability to Generate Income Is Not Attributable to Uruguay**

383. The Claimant opposes Trigosul being valued based on its historical performance and its ability to generate income under the pretext that, if Trigosul did not have business operations or income for more than 10 years, it was Uruguay's allegedly illegal conduct that was to blame for this.<sup>712</sup> This objection is without merit. Uruguay already demonstrated in its Counter-Memorial that neither the lack of a Class B license nor the revocation of its authorization in January 2011 prevented Trigosul from generating income. Uruguay reaffirms its position also by relying on new evidence provided by the Claimant in the document production stage and in its Reply.

**a. Trigosul Did Not Lose a Single Business Opportunity for Lack of an Updated License**

384. The Claimant states that it lost the opportunity to carry out the following four business projects because it had not been issued a Class B license: 1) EPIC; 2) Starborn; 3) Phinder/Zupintra; and 4) Télmex.<sup>713</sup> But the Claimant has not proven the existence of a causal nexus between the failure of these alleged business opportunities and Uruguay's conduct.

385. On the contrary, Trigosul always knew it did not need a new or "updated" license in order to offer its services. Dr. Alberelli admitted this in an e-mail to Dr. Marcela Téllez on

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<sup>712</sup> Italba even dares to label as "circular" Uruguay's argument that Trigosul's FMV is zero, alleging that Uruguay is supposedly attempting "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 ..." See Reply, ¶ 294 (d). The only calamitous thing in this case is the inability of Trigosul's owners and executives to develop a telecommunications business.

<sup>713</sup> Reply, ¶ 27 (d).

February 10, 2011. The Claimant submitted this and other e-mails to prove the alleged business relationship between Trigosul and Dr. García. In this e-mail, Dr. Alberelli says the following to Dr. Téllez: “MARCELLA [*sic*]: Trigosul has a license granted by URSEC inside the national territory with a frequency of 3.4 GHz for data transmission. I give them free service for the first 90 days.”<sup>714</sup> At no time does Dr. Alberelli tell Dr. Téllez that it is expected that URSEC will grant a Class B license to Trigosul in order to start providing the service.

386. The same was also confirmed by URSEC in a report dated March 30, 2006. This report is devastating to the Claimant’s claims because it shows that Trigosul did not need a Class B license in order to operate, and that even with an updated license, Trigosul would always need to have obtained an authorization from URSEC to provide a service other than the one for which it had been originally authorized.<sup>715</sup> The report reads as follows in its relevant part:

whether or not a telecommunications license is obtained, the corresponding authorizations for the provision of services must be obtained. What does this mean? *If TRIGOSUL S.A. wishes to provide a telecommunication service different from the one it currently performs once an updated license is granted, it shall obtain the authorization from this Regulatory Agency. We therefore understand that the fact that the license has not been updated to date, by no means invalidates the project of TRIGOSUL S.A.*<sup>716</sup>

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<sup>714</sup> Letters from G. Alberelli (Italba) to M. Téllez (Sole Proprietorship [Empresa Unipersonal] Fernando Garcia) (10 February 2011) (C-196) (emphasis omitted).

<sup>715</sup> URSEC report (30 March 2006), p. 3 (R-100).

<sup>716</sup> *Id.* (emphasis added). The Agency also stated that, at that time, no license had been upgraded: “to date no authorization has been updated for data transmission service operators in the bands of 3.5 GHz, 10 GHz, 27 GHz, and 38 GHz to the telecommunications license system.” *Id.*

387. Dr. Alberelli's words and URSEC's report make it clear that the non-issuance of a license did not thwart Trigosul's alleged business projects. Trigosul's authorization was in full force and active until it was revoked in January 2011. The evidence concerning each of these alleged business projects confirms that Uruguay had nothing to do with Trigosul's non-existent business performance. Therefore, the directors and owners of Trigosul are the only persons responsible for this company's abysmal economic performance.

(i) *EPIC*

388. On January 8, 2003, two months *before* Uruguay issued the new regulations on telecommunications licenses,<sup>717</sup> Mr. Alan Cherp, an intermediary between Trigosul and EPIC, was already requesting a certified copy of the "actual License to be issued by URSEC" to Trigosul in order to formalize the business alliance between the two companies.<sup>718</sup>

389. Since the new telecommunications regulations were issued two months after this communication, it makes no sense for Mr. Cherp to have been requesting a copy of a new license to which Trigosul was not yet entitled. At that time, i.e., January 2003, EPIC could not expect Trigosul to have a "certified copy" of a new license if the regulations had not been issued.<sup>719</sup>

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<sup>717</sup> Reply, ¶ 25 (o).

<sup>718</sup> Letter from A. Cherp (Eastern Communications Group) to A. Jansenson, G. Alberelli and L. Herbón (Italba Communication Group and Trigosul S.A.) (8 January 2003) (C-016) ("...our investment group, Eastern Pacific Trust, cannot move forward with concluding our agreements with Tigosul [sic] until we receive the certified copy of the actual License to be issued by URSEC. Please provide ASAP so that we may proceed with the next steps associated with concluding our agreements.").

<sup>719</sup> In his witness statement, Mr. Cherp also admits that just two weeks after the new regulations had been issued, he was already threatening that it would not be possible to move ahead with the deal for lack of an effective license—just two weeks. *See* Witness Statement of Mr. Alan Cherp (9 May 2017) ("Mr. Cherp's Witness Statement"), ¶ 13.

390. Indeed, EPIC was not expecting a new license in accordance with the March 2003 regulations. All the evidence regarding the failed joint venture between EPIC and Trigosul indicates that what EPIC expected was a “Wireless Local Loop” license. The letter of intent signed by EPIC and Italba in 2002 states that its business in Uruguay depended on this type of license and not on an adjusted license in accordance with regulations that had not yet been issued.<sup>720</sup> ECON ONE showed this in their first report.<sup>721</sup> Neither Alan Cherp in his witness statement nor Compass Lexecon in its second report denied this.

(ii) *Starborn*

391. In its Counter-Memorial, Uruguay stated that there was no evidence that Trigosul had informed URSEC that Trigosul’s business opportunity with Starborn would fall through if URSEC failed to update its license. Uruguay insists: The two letters that Mr. Herbón sent to URSEC, allegedly in relation to this project, never mention Starborn.<sup>722</sup> For this reason, in the document production stage, Uruguay requested Italba to provide any document regarding this transaction.<sup>723</sup>

392. Uruguay expected the Claimant to take advantage of this opportunity to show that Trigosul actually referred to Starborn in its letters. But the Claimant failed to produce a single

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And as early as May 12, 2003, EPIC decided to cancel the project because, about two months after the new regulations had been issued, Trigosul did not have a new license.

<sup>720</sup> Letter from Rossi (Eastern Pacific Trust) to A. Jansenson and G. Alberelli (Italba Communications Group) (3 February 2002) (C-014).

<sup>721</sup> First Expert Report of Econ One, ¶ 132.

<sup>722</sup> Counter-Memorial, ¶ 374.

<sup>723</sup> Procedural Order no. 4, Annex B, request 15.

document concerning its transaction with Starborn that showed that it lost this business opportunity for lack of a new license. The excuse it gave was that it did not have in its possession any documents regarding this alleged deal.<sup>724</sup> In its Reply, the Claimant did not even attempt to contradict Uruguay's statement that these letters had nothing to do with Starborn.<sup>725</sup> Therefore, the Claimant has not proven that it lost this alleged business opportunity as a result of Uruguay's conduct.

(iii) *Phinder/Zupintra*

393. In its first report, ECON ONE clearly showed, by relying on statements made by Phinder before the U.S. Securities and Exchange Commission, that the real reason why the alliance between Trigoslul and Phinder did not succeed was because of Phinder's economic failure.<sup>726</sup> Neither the Claimant nor Compass Lexecon refuted this fact in the Reply.<sup>727</sup>

394. Curiously, the Claimant included in its Reply the witness statements of two representatives of Phinder/Zupintra. Both allege that Phinder/Zupintra's business alliance with Italba fell through because URSEC did not grant a new license to Trigoslul.<sup>728</sup> However, neither of them denies the serious economic trouble that Phinder faced in 2008.<sup>729</sup> Much less do they

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<sup>724</sup> *Id.*

<sup>725</sup> *See* Reply, ¶ 46.

<sup>726</sup> First Expert Report of Econ One, ¶¶ 60-69.

<sup>727</sup> *See* Reply, ¶ 45.

<sup>728</sup> Witness Statement of John Alexander van Arem (10 May 2017) ("Mr. van Arem's Witness Statement"), ¶ 4; Mr. van Arem's Witness Statement, ¶ 4.

<sup>729</sup> The fact that these financial problems were what led to the cancellation of the business relationship between Phinder and Italba has also been confirmed in several communications between Dr. Alberelli and the representatives

deny that these economic problems led Phinder to cancel its alliance with Italba and other companies in other countries during the same period.<sup>730</sup>

(iv) *Telmex*

395. Based on Uruguay's request for documents, the Claimant produced more than 100 e-mails related to the alleged deal between Trigosl and Telmex.<sup>731</sup> According to these and other documents in the file, the negotiations between the two companies took place over almost three years, from June 2007<sup>732</sup> to October 2010.<sup>733</sup> Not a single e-mail mentions that the project was contingent on Trigosl obtaining a new license. The negotiations lasted three years, but the parties never spoke of the requirement of a new license in accordance with the 2003 regulations. As ECON ONE already demonstrated in their first report, the evidence indicates that the Parties were unable to agree on the terms of the project.<sup>734</sup> In no way was the lack of a new license the reason why this project failed. On the contrary, the parties negotiated throughout that period on the basis that Trigosl had a valid service authorization.<sup>735</sup>

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of Zupintra. *See* Second Expert Report of Econ One, ¶¶ 64-70. As explained by ECON ONE, these communications in the years 2007 and 2008 suggest that Zupintra lacked the funds to finance the projects with Italba.

<sup>730</sup> As ECON ONE indicated in their first report, Phinder's poor performance not only led it to cancel its business plans with Italba prematurely, but Phinder also terminated a joint venture between its subsidiary Zupintra Ghana Inc. and other company by the name of Networks Technologies International, Inc. *See* First Expert Report of Econ One, ¶¶ 63-66.

<sup>731</sup> Procedural Order no. 4, Annex B, request 48; Index of Documents Responsive to Respondent's Document Requests (8 June 2017) (R-125) (documents provided in response to request 48).

<sup>732</sup> Letter from L. Herbón (Trigosl) to G. Alberelli (18 June 2007) (R-104).

<sup>733</sup> E-mail from G. Alberelli to R. Bartesaghi (Telmex) (6 October 2010) (R-113).

<sup>734</sup> First Expert Report of Econ One, ¶¶ 74-77; *see also* Letters from V. Cortés (Telmex) to G. Alberelli (January 2010) (R-111).

<sup>735</sup> First Expert Report of Econ One, ¶ 74; Letter from G. Alberelli to V. Cortés (Telmex) (8 October 2009) (R-109).

396. Apart from the fact that the lack of a Class B license did not render Trigosul unable to secure any of the deals described above, nothing kept Trigosul from carrying out its business with its original PTP/PTMP authorization. That is what Dedicado did, a competitor of Trigosul and a company whose original authorization for fixed data transmission was never updated. Unlike Trigosul, Dedicado operated, generated profits and invested in its fixed data wireless transmission business—the same business for which Trigosul was authorized. Dedicado, for example, reported between 12,000 and 16,000 customers in the 2005-2011 period.<sup>736</sup> Trigosul did not manage to have more than eight customers per year in the same period.<sup>737</sup> And none of them appear to have paid for Trigosul’s alleged services.<sup>738</sup> The Claimant dares to blame Uruguay for its failure to carry out a deal for which the Claimant was never authorized (mobile data transmission). But it remains silent as to the lack of activity in the business for which it was authorized (fixed data wireless transmission). Italba definitely cannot blame Uruguay for its inability to generate business for the service for which it was authorized.

**b. Trigosul Did Not Lose a Single Business Opportunity Because of the Revocation of Its Permits**

397. The Claimant also insists that it lost three potential additional sources of profit when Uruguay revoked Trigosul’s service authorization in January 2011. Two of them were allegedly already underway (Canal 7<sup>739</sup> and Dr. García<sup>740</sup>), and the third was allegedly a business

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<sup>736</sup> See statistical table of Dedicado S.A. (2016) (R-52).

<sup>737</sup> Counter-Memorial, ¶ 317; Statistical table of Trigosul S.A. (2016) (R-54).

<sup>738</sup> Statistical table of Trigosul S.A. (2016) (R-54).

<sup>739</sup> Reply, ¶ 27 (e).

<sup>740</sup> *Id.*, ¶ 27 (f).

opportunity in gestation (“Grupo Afinidad Mary”).<sup>741</sup> But the revocation of Trigosul’s authorization could not have interrupted these sources of profit because they simply never existed.

(i) *Canal 7*

398. As the Claimant correctly points out in its Reply, Canal 7 confirmed to Uruguay, in a letter, that it had authorized Trigosul to install wireless data transmission equipment in a building owned by Canal 7.<sup>742</sup> The letter also states that this authorization was only intended for conducting tests and that Canal 7 never entered into a business relationship with Trigosul.<sup>743</sup> Despite the fact that, in the document production phase, Uruguay requested all the documentation regarding the negotiations between Canal 7 and Trigosul, the Claimant has only produced internal documents from Trigosul. None of the more than 30 documents concerning the alleged deal with Canal 7 consists of a note from any of its officers expressing interest in Trigosul’s services upon completion of the tests.<sup>744</sup>

399. ECON ONE had already pointed this out in their first report.<sup>745</sup> But the Claimant clearly has no proof of either Canal 7’s interest in Trigosul’s service or the terms of its alleged

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<sup>741</sup> *Id.*, ¶ 27 (g).

<sup>742</sup> Letter from D. Bobre (Canal 7) to M. Toma (Office of the President of the Republic) (9 November 2016) (R-72).

<sup>743</sup> Counter-Memorial, ¶ 389; Letter from M. Toma (Office of the President of the Republic) to D. Bobre (Canal 7) (7 November 2016) (R-078).

<sup>744</sup> Procedural Order no. 4, Annex B, request 17; Index of Documents Responsive to Claimant’s Document Requests (R-125) (documents provided in response to request 17).

<sup>745</sup> First Expert Report of Econ One, ¶ 95.



agreement once the tests proved successful.<sup>746</sup> The only evidence in the file relates to the installation of equipment for conducting technical tests.<sup>747</sup> And the only additional proof offered in the Reply consists of the statements of Mr. Amaro, a business partner of Trigosul.<sup>748</sup> But Mr. Amaro does not add anything new or important in support of Trigosul’s case. Mr. Amaro simply confirms what Canal 7 said in response to the Office of the President of Uruguay’s letter of November 9, 2016: Trigosul only conducted tests with the equipment installed in Canal 7’s towers, but that relationship was never formalized in a fee-based service contract.<sup>749</sup> The revocation of Trigosul’s authorization could not have interrupted a business relationship that did not exist.

(ii) *Dr. García*

400. In his second witness statement, Dr. García reaffirms his position that he never signed a service contract with Trigosul.<sup>750</sup> Claimant’s own expert acknowledges that it cannot be proven that the signature in the alleged Data Transmission Contract with Trigosul is that of Dr. García.<sup>751</sup> In response to a series of e-mails—between Mr. Alberelli, Mr. Daniel Téllez and his daughter, Marcela Téllez, and two alleged “assistants” of Dr. García—that the Claimant included

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<sup>746</sup> Second Expert Report of Econ One, ¶¶ 98-100.

<sup>747</sup> First Compass Lexecon Report, ¶ 86; Letter from M. Toma (Office of the President of the Republic) to D. Bobre (Canal 7) (7 November 2016) (R-72).

<sup>748</sup> Second Witness Statement of Mr. Alejandro Amaro (11 May 2017) (“Mr. Amaro’s Second Witness Statement”), ¶ 5.

<sup>749</sup> First Witness Statement of Mr. Alejandro Amaro (26 December 2016) (“Mr. Amaro’s First Witness Statement”), Answer to question nos. 17 and 22.

<sup>750</sup> Second Witness Statement of Dr. Fernando García Piriz (25 June 2017) (“Dr. Garcia’s Second Witness Statement”), ¶ 4.

<sup>751</sup> First Expert Report of Mr. John Hargett (13 February 2017) (“First Expert Report of Mr. Hargett”), p. 1.

in its Reply, and which supposedly prove the business relationship between Trigosl and his clinic, Dr. García denies having knowledge of these contacts or correspondence, let alone that they were authorized by him.<sup>752</sup> The e-mails themselves confirm that none of them was sent to Dr. García. Neither did Dr. García send any of these e-mails to Dr. Alberelli.<sup>753</sup> Worse still, none of Dr. García's alleged "assistants"—Ms. Paula Gutiérrez and Mr. Cicatiello—was his assistant. Mr. Cicatiello, for instance, is a complete stranger.<sup>754</sup> Even Dr. Alberelli's business partner testified in Uruguay that Dr. Alberelli was a "*chanta*,"<sup>755</sup> a term used in South America to label someone as a "fraudster" or a "swindler."<sup>756</sup> Therefore, just as with Canal 7, the revocation of Trigosl's authorization could not have affected a business relationship that did not exist.

401. After two rounds of pleadings and all the documentary evidence, it has been firmly established that both the "contract" between Dr. García and Trigosl and the letter allegedly sent by him are forged documents. Dr. García's "signatures" on both documents are fraudulent. Neither Dr. Alberelli nor Mr. Herbón has succeeded in explaining the fabrication of these fictitious "pieces of evidence" or their submission in this arbitration.

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<sup>752</sup> Dr. Garcia's Second Witness Statement, ¶¶ 5-7.

<sup>753</sup> See, e.g., Letter from G. Alberelli to M. Téllez (7 February 2011) (C-192), Letter from G. Alberelli to Paula Gutierrez (8 February 2011) (C-193), Letter from G. Alberelli to Paula Gutierrez (9 February 2011) (C-194), Letters from M. Tellez to G. Alberelli (10 February 2011) (C-195), Letter from G. Alberelli to M. Téllez (10 February 2011) (C-196), Letter from M. Tellez to G. Alberelli (12 February 2011) (C-197), Letter from M. Téllez to G. Alberelli (12 February 2011) (C-198), Letter from M. Téllez to G. Alberelli (12 February 2011) (C-199), Letter from M. Téllez to G. Alberelli (12 February 2011) (C-200).

<sup>754</sup> Dr. Garcia's Second Witness Statement, ¶ 5.

<sup>755</sup> Testimony of Dr. Daniel Angel Téllez before the CCU, p. 1 (C-153).

<sup>756</sup> Letter from P. Reichler (on behalf of the Oriental Republic of Uruguay) to the Tribunal (14 February 2014).

(iii) *Grupo Afinidad Mary*

402. The Claimant now admits that there is no “Grupo Afinidad Mary.” According to the Claimant, “Grupo Afinidad Mary” was just an internal name that Trigosul made up to refer to 2,100 U.S. retirees residing in the city of Maldonado, Uruguay.<sup>757</sup> The Claimant invented this name and the deal with these residents by relying on the letter of a single individual, Richard Weber, who did not even reside in Uruguay at that time. As Uruguay explained in the Counter-Memorial, Mr. Weber merely expressed an interest in the telemedicine plans that Trigosul hoped to offer. There is no evidence that Mr. Weber had the authority or the capacity to speak, let alone contract, on behalf of his 2,100 future neighbors whom he did not even know.<sup>758</sup>

403. Uruguay attempted to obtain more evidence from Trigosul regarding this business opportunity, during the document production phase,<sup>759</sup> but the Claimant failed to produce any document that might demonstrate contacts with even one of the more than 2,000 “potential customers” of telemedicine services.<sup>760</sup>

**c. The Fair Market Value (FMV) of Trigosul Is Zero**

404. Trigosul generated no income in the entire period in which its authorization was in force. Its owners’ inability to operate a telecommunications business, coupled with the fact that the type of service for which it was authorized has been losing commercial appeal, doomed

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<sup>757</sup> Reply, ¶ 64.

<sup>758</sup> Counter-Memorial, ¶ 380, note 722.

<sup>759</sup> Procedural Order no. 4, Annex B, request 60.

<sup>760</sup> See Index of Documents Responsive to Claimant's Document Requests (R-125).

Trigosul to failure. Trigosul's historic performance is relevant for the purposes of determining its FMV because it tells a hypothetical buyer the company's prospects for generating income in the future.<sup>761</sup>

405. Despite the fact that the Claimant did not provide any financial documentation regarding Trigosul in its Memorial, ECON ONE's experts managed to determine in their first report that the FMV of Trigosul would be zero if the DCF valuation method was applied.<sup>762</sup> ECON ONE reached this conclusion based on the periodic reports that Trigosul filed with URSEC concerning Trigosul's clients and income.<sup>763</sup> Another significant fact in terms of calculating the FMV of Trigosul is that its most direct competitor, Dedicado, began losing a large number of customers as of 2011.<sup>764</sup> As explained by Dr. Cendoya, Dedicado's client base decreased in the last few years because of the arrival of new forms of technology, particularly fiber optics.<sup>765</sup>

406. In the document production phase, Uruguay requested all of Trigosul's financial statements, including its accounting books.<sup>766</sup> This documentation was necessary in order to corroborate the preliminary conclusion reached by ECON ONE in their first report that Trigosul's FMV based on the DCF method is zero. Despite the fact that Trigosul had a service

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<sup>761</sup> Second Expert Report of Econ One, ¶¶ 25-30, 40.

<sup>762</sup> First Expert Report of Econ One, ¶ 9-15.

<sup>763</sup> *Id.*, ¶ 10-15.

<sup>764</sup> Counter-Memorial, ¶ 318.

<sup>765</sup> First Statement of Dr. Cendoya, ¶ 47.

<sup>766</sup> Procedural Order no. 4, Annex B, request 20, 60.

authorization in force for a decade, the Claimant produced only one relevant financial document corresponding to a single year of operation: the unaudited financial statements of Trigosl for the year 2007.<sup>767</sup> As explained by ECON ONE in their second report, this document shows that, from January to November 2007, Trigosl showed losses of [[REDACTED]] and that Trigosl had more liabilities than assets on that date (*i.e.*, it had a negative book value).<sup>768</sup>

407. The fact that the Claimant has not submitted all of Trigosl's audited financial statements in the 2003-2016 period (except 2007)<sup>769</sup> means it is safe to conclude that, during that entire period, the company's results were at least equal to those for the year 2007.<sup>770</sup> By drawing an adverse inference against the party who did not fulfill its duty to produce documents, the Tribunal can presume that, if the documents had been produced, they would have been favorable to the other party.<sup>771</sup>

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<sup>767</sup> Trigosl S.A., *Balance Sheet* (30 November 2007) (R-106); Second Expert Report of Econ One, ¶¶ 20, 24.

<sup>768</sup> Second Expert Report of Econ One, ¶¶ 20, 24.

<sup>769</sup> The Claimant also failed to submit Trigosl's books on the ground that it does not have them in its possession. This is a violation of Uruguayan law. Articles 54, 55 and 80 of the Commercial Code of Uruguay require merchants to maintain their books for up to 20 years after the date of cessation of operations. MERCHANTS IN GENERAL AND COMMERCIAL ACTS [*COMMERCIAL CODE*] (2014), Arts. 54, 55 and 80 (RL-148).

<sup>770</sup> Of course, the Claimant has the burden to prove that Trigosl had value, and, if the financial statements had shown some value, the Claimant would have submitted them. The fact that the Claimant did not submit the financial statements and books of Trigosl (except the financial statements for 2007) allows an adverse inference to be made against it pursuant to Rule 17.7 of Procedural Order no. 1. *See also* ICSID Convention, Regulations and Rules (2006), Rule 34(3) ("The parties shall cooperate with the Tribunal in the production of the evidence and in the other measures provided for in paragraph (2). The Tribunal shall take formal note of the failure of a party to comply with its obligations under this paragraph and of any reasons given for such failure.") Rules of the IBA (International Bar Association) on the Taking of Evidence in International Arbitration (29 May 2010), Rule 9(5) (RL-140) ("If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.").

<sup>771</sup> Thus, for example, the tribunal in the case *Metal-Tech Ltd v. Republic of Uzbekistan* held that: "While the Tribunal does not believe that the Claimant sought to conceal evidence, the inference that inexorably emerges from this dearth of evidence is that the Claimant can provide no evidence of services, because no services, or at least no

408. Moreover, the statements Trigosl filed with URSEC confirm that, for more than 10 years, it had no more than eight customers and that it never generated any income.

409. This evidence, coupled with Italba's failure to produce all of Trigosl's financial documents, confirms that, based on its capacity to generate income, the company had no market value on either of the two valuation dates proposed by the Parties.

410. In view of the foregoing, and in accordance with the compensation standard established in Article 6 of the Treaty, Uruguay must not pay compensation to Italba since, prior to the valuation date, Trigosl had no value.<sup>772</sup>

**d. The Claimant Has Not Proven That Trigosl's Original PTP/PTMP Authorization Had an Inherent FMV**

411. According to the Claimant, another reason why Trigosl's historical performance is irrelevant in this case is that Trigosl's FMV was intrinsically incorporated into its rights to use the Spectrum.<sup>773</sup> In this regard, Compass Lexecon alleges that ECON ONE has

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legitimate services at the time of the establishment of the Claimant's investment, were in fact performed. The Tribunal will bear this inference in mind when further assessing the facts." *Metal-Tech Ltd. v. Republic of Uzbekistan*, CIADI Case No. ARB/10/3, Award (4 February 2013) (Kauffman-Kohler, Townsend, von Wobeser), ¶ 265 (RL-146).

<sup>772</sup> Counter-Memorial, ¶¶ 327-334. The Claimant denies that the applicable standard in this case is provided by Article 6 of the Treaty. According to the Claimant, the applicable standard is that of full compensation under customary law, and it cites the case *Crystallex v. Venezuela*, in which the Tribunal held that the compensation standard specified in the Treaty does not apply in cases of illegal expropriations. Reply, ¶ 299. Nevertheless, this case is irrelevant because it was adjudicated on a BIT containing terms different from the Treaty applicable to the present case. Thus, the Claimant completely disregarded the arguments based on the text of the Treaty made by Uruguay in its Counter-Memorial, arguments which show that the standard laid down in Article 6 is *lex specialis* both in cases of legal expropriation and illegal expropriation. The Claimant also disregarded the fact that, in *Rurelec v. Bolivia*—a case as recent as the *Crystallex* case—the Tribunal refused to apply the full reparation standard despite the fact that it had found an illegal expropriation. See Counter-Memorial, ¶ 329 (note 630).

<sup>773</sup> Reply, ¶ 303.

acknowledged the potential value of Trigosul's authorization when it states that "Trigosul's direct competitors have successfully provided data transmission services in Uruguay."<sup>774</sup>

412. Compass Lexecon forgets that it is the Claimant who is responsible for proving its damages.<sup>775</sup> Neither Italba nor Compass Lexecon has submitted a valuation of Trigosul based on its PTP/PTMP authorization. It does not suffice to say that Trigosul's value cannot be zero simply because there are other operators that have been somewhat more successful in their operations.<sup>776</sup> Compass Lexecon also omits the fact that the market for the PTP and PTMP services is clearly on the decline.<sup>777</sup> Consequently, the Claimant has not proven that Trigosul had an inherent or implicit FMV in its original authorization.<sup>778</sup>

413. The Claimant also suggests that, even if it was not entitled to receive a Class B license, Trigosul could have provided valuable services to mobile operators, such as "backhaul":

The value of the services Trigosul was authorized to provide under its original 1997 authorization would nevertheless be far greater than zero, because, as Mr. Valle explains in his Report, there is still a market for fixed wireless services.... Thus, even if Trigosul were assumed to be limited to PTP and PTMP services, it would still be

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<sup>774</sup> Second Compass Lexecon Report, ¶ 40 (emphasis omitted). Nonetheless, the fact that Trigosul's competitors offered fixed data transmission services does not mean that they did so profitably. *See* Second Expert Report of Econ One, note 37.

<sup>775</sup> Counter-Memorial, ¶ 300.

<sup>776</sup> Second Expert Report of Econ One, ¶ 32, note 37.

<sup>777</sup> First Statement of Dr. Cendoya, ¶ 47.

<sup>778</sup> As explained by Uruguay in its Counter-Memorial, in this scenario, and considering that Italba failed to submit a valuation of Trigosul as a fixed data transmission company, the transfer that the URSEC made in 2013 to Dedicado of the frequencies originally assigned to Trigosul also shows that Trigosul's authorization has no value. *See* Counter-Memorial, ¶ 364.

able to provide valuable services, including “backhaul” support to other mobile operators.<sup>779</sup>

414. “Backhauling” consists of providing mobile service operators point-to-point links so that they can expand their network.<sup>780</sup> However, as explained by Dr. Cendoya, in order to provide backhaul services to other mobile operators, Trigosul was required to obtain a Class C license.<sup>781</sup> Trigosul never held this type of license. Even prior to the 2003 regulations, Trigosul required a special authorization from URSEC or the National Communications Directorate in order to provide this “backhauling” service.<sup>782</sup> Therefore, the argument that Trigosul had the capacity to offer “backhauling” services to other mobile operators under its original authorization is untenable.

415. For the Claimant, the fact that its alleged rights in the Uruguayan Spectrum were revocable without a right to compensation does not mean that they had no intrinsic value. The Claimant specifically alleges that: (i) URSEC had no discretion to revoke Trigosul’s rights without compensation, as supposedly shown by the fact that the TCA invalidated the revocation in its Judgment; (ii) Dedicado did pay an exchange value in order to acquire the frequencies originally assigned to Trigosul; and (iii) Trigosul’s rights would not have been provisional and

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<sup>779</sup> Second Compass Lexecon Report, note 11.

<sup>780</sup> Expert Report of Eng. Paz, ¶ 41. According to Mr. Paz, this type of business is unfeasible in Uruguay. Expert Report of Eng. Paz, ¶ 40.

<sup>781</sup> Second Statement of Mr. Cendoya, ¶ 28.

<sup>782</sup> *Id.*



revocable “at will without compensation” if Uruguay had granted it a Class B license.<sup>783</sup> The Claimant is mistaken on all three points.

416. First, as explained in paragraph 244 (note 403) above,<sup>784</sup> the only situation in which the State must pay compensation for revoking a “provisional and revocable” permit “without right to compensation” is if the revocation is made for reasons other than the public interest. And even in those cases in which the revocation is made for reasons other than the public interest, the State must pay the compensation not because the authorization had an intrinsic value, but rather because the permit was revoked without any justification.<sup>785</sup>

417. Second, contrary to the Claimant’s allegation,<sup>786</sup> Dedicado did not pay a single cent to exchange its frequencies for Trigosul’s. Although it is true that Dedicado had a greater interest in Trigosul’s frequencies, this was not because they had an intrinsic value greater than Dedicado’s frequencies (which, incidentally, Dedicado did not pay for either).<sup>787</sup> Dedicado requested Trigosul’s frequencies because it wished to consolidate its rights in contiguous bands, a circumstance specific to Dedicado and inapplicable to Trigosul. Even if Trigosul’s frequencies had a value greater than that of Dedicado’s original frequencies, Dedicado would have paid an additional amount in order to obtain those rights. Nevertheless, Dedicado received Trigosul’s

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<sup>783</sup> Reply, ¶ 294 (c).

<sup>784</sup> See also Second Expert Opinion of Dr. Pereira, ¶ 5(g)(iii) and 17.

<sup>785</sup> See, e.g., *id.*, ¶ 25.

<sup>786</sup> Reply, ¶ 320.

<sup>787</sup> Counter-Memorial, ¶ 364.

original frequencies without paying a cent, as in all cases in which provisional and revocable frequencies are granted.<sup>788</sup>

418. Third, and as explained in Section III.A *supra*, Trigosul never had the right to receive a Class B license. Therefore, its rights in the Uruguayan Spectrum were always “provisional and revocable without a right to compensation.” The inherent value of its alleged rights is therefore zero.

**e. The Relative Valuation Method Does Not Apply in this Case**

419. The Claimant insists on valuing Trigosul based on the relative or comparable valuation method. According to the Claimant and Compass Lexecon, the FMV of Trigosul can be inferred based on the value at which certain frequencies were auctioned in Uruguay and Argentina in 2013 and 2015.<sup>789</sup>

420. There are two fundamental reasons why this relative valuation method cannot be applied in this case.

*(i) The Auctions Occurred After the Valuation Date*

421. First of all, the auctions occurred after the valuation date. In its Counter-Memorial, Uruguay showed that the appropriate valuation date in this case is January 19, 2011 and not March 1, 2015 as alleged by the Claimant.<sup>790</sup> Since the auctions occurred several years

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<sup>788</sup> *Id.*

<sup>789</sup> Second Compass Lexecon Report, ¶ 9.

<sup>790</sup> Counter-Memorial, ¶¶ 325-326. Based on the principle of full reparation, the Claimant insists on reserving its right to update its valuation of Trigosul’s alleged rights at the time of the award in the event that they increase in value. *See* Memorial in Reply, ¶ 300, note 707. In its Memorial, the Claimant cited two cases in support of this

after the valuation date, the values at which the frequencies were auctioned in Uruguay and Argentina cannot be considered for purposes of calculating Trigosul's FMV.<sup>791</sup>

422. According to the Claimant, the valuation date cannot be January 19, 2011 even if that is the day prior to the revocation of Trigosul's rights.<sup>792</sup> For the Claimant, that date is inappropriate because "that revocation is not the expropriation for which Italba seeks relief in this arbitration."<sup>793</sup> The valuation date proposed by the Claimant is March 1, 2015 because "in early March 2015 [...] Italba realized that, even though it had won its case in the TCA, Uruguay would not comply with the TCA Judgment."<sup>794</sup> The Claimant insists that the valuation date must be the date on which the deprivation of its rights allegedly became "irreversible," that is, at the beginning of March 2015.<sup>795</sup> This is incorrect.

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position: 1) *ADC v. Hungary*; 2) *ConocoPhillips v. Venezuela*. In its Counter-Memorial, Uruguay pointed out that Italba could not rely on either of these cases. First of all, the Tribunal in *ADC v. Hungary* agreed to value the investment on the date of the award because it was a "virtually unique" case in which the value of the investment increased considerably after the expropriation date. In Trigosul's case, this is impossible given that, even in the best-case scenario, the fixed wireless data transmission business is in full decline in Uruguay. See Counter-Memorial, ¶ 327, note 626. Second, Italba no longer cites *ConocoPhillips* after Uruguay pointed out that the tribunal has not yet made a decision regarding damages. At any rate, as explained previously, the principle of full reparation does not apply in this case. The only applicable valuation standard is laid down in Article 6 of the Treaty. Therefore, the valuation date can only be the date prior to the alleged expropriation—and never thereafter.

<sup>791</sup> Counter-Memorial, ¶ 355.

<sup>792</sup> Reply, ¶ 301.

<sup>793</sup> *Id.* When the Claimant says that the revocation "is not the *expropriation* for which Italba seeks relief in this arbitration," it acknowledges that its claim for the alleged total value of Trigosul's investment is contingent on the Tribunal deciding that there was an expropriation (emphasis added). Therefore, if the Tribunal were to decide that there was no expropriation in this case, none of Uruguay's other alleged violations of standards other than expropriation (e.g., violations of the standards of Fair and Equitable Treatment, and Full Protection and Security, *inter alia*) resulted in a total loss of value.

<sup>794</sup> Memorial, ¶¶ 181-182. It is worth noting that the only authority cited in support of this statement is the URSEC's ruling of September 5, 2013 granting the assignment.

<sup>795</sup> See Reply, ¶ 301 (footnote 706, citing paragraphs 181-182 of the Memorial).

423. Its “irreversibility” standard has no basis in law. The Claimant failed to cite a single case in which the irrevocability criterion has been used to determine the valuation date. Moreover, it completely ignored Uruguay’s argument, citing *Compañía de Desarrollo Santa Elena v. Costa Rica*, according to which the valuation date is set when the measure “effectively freezes or blights the possibility for the owner reasonably to exploit the economic potential of the property” and that the claimant was no longer in a position to “exploit the economic potential” of its rights.<sup>796</sup> The reality is that since January 20, 2011 Trigosl was no longer in a position in which it could “exploit the economic potential” of its rights. The date on which Dr. Alberelli supposedly became aware of Uruguay’s desire or intentions is completely irrelevant.

424. Even if the criterion were the time of irreversibility, that moment is established on the date of the very act that causes the alleged irreversibility and not on the date when a claimant becomes aware of a fact or when it arrives at its own conclusions regarding the respondent’s intentions.

425. Thus, there is a complete and utter lack of reliable evidence to justify the valuation date chosen by the Claimant.<sup>797</sup>

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<sup>796</sup> See Counter-Memorial, ¶ 326, note 624.

<sup>797</sup> The valuation date of March 1, 2015 selected by the Claimant is unfounded. As previously explained by Uruguay, Italba uses this date for two reasons: 1) to prevent its claims from being barred by the limitations period; and 2) to utilize the auctions held in Uruguay and Argentina in 2013 and 2015 respectively as indicators of the value of Trigosl’s rights. Without citing any specific documentary evidence, Dr. Alberelli claims that, ++ “[I]n early March 2015,” he first became aware of the “deliberate effort to discriminate against Trigosl.” First Statement of Dr. Alberelli, ¶¶ 88-89. ++

(ii) *The Auctioned Licenses Are Not Comparable to Trigosul's Original Authorization*

426. The second reason why the Claimant cannot infer Trigosul's FMV based on the auction prices in Uruguay and Argentina is simply that the auctioned licenses are not comparable to Trigosul's PTP/PTMP authorization, for four reasons.<sup>798</sup>

427. *First* and most importantly, the licenses auctioned in Uruguay and Argentina were intended for offering broadband mobile data transmission services (or IMT services) to mobile devices, whereas Trigosul was only able to transmit data to fixed points.<sup>799</sup>

428. Indeed, Compass Lexecon implicitly acknowledged that the auctioned licenses and Trigosul's original authorization are not comparable because its valuation is based on the premise that Trigosul held a Class B license for transmitting broadband mobile data, not a PTP and PTMP authorization.<sup>800</sup> This fact alone discredits Compass Lexecon's analysis.

429. *Second*, Trigosul's authorization was *provisional and revocable without any right to compensation and was acquired by Trigosul without paying a single cent*.<sup>801</sup> On the other hand, the licenses auctioned in Uruguay and Argentina were granted for a period of 15-20 years after the successful bidders paid millions of dollars.<sup>802</sup> It is specifically because of the greater

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<sup>798</sup> First Expert Report of Econ One, Chapter V.

<sup>799</sup> Second Expert Report of Econ One, ¶¶ 31-32, 149; Counter-Memorial, ¶¶ 343-350; Expert Report of Eng. Paz, ¶ 35.

<sup>800</sup> Second Compass Lexecon Report, ¶ 9.

<sup>801</sup> See also Counter-Memorial, ¶¶ 351-353.

<sup>802</sup> Second Expert Report of Econ One, ¶¶ 150-159.

value of the services awarded by these licenses in the Uruguayan market that they are auctioned and granted for a fixed period, as well as to give more legal certainty to investors.<sup>803</sup> On the other hand, provisional and revocable frequencies are awarded without any payment by their recipients. The two situations are very different and are incomparable.

430. Uruguay maintains its position that the provisional and revocable authorizations have no inherent value because of their “provisional and revocable nature without a right to compensation.” According to the Claimant, this argument was contradicted by the TCA Judgment that invalidated the revocation of Trigosul’s authorization in January 2011.<sup>804</sup> But the fact that the revocation was invalidated does not mean that the authorizations have any value. In that specific case, the TCA corrected what, in its opinion, was a revocation that did not meet the formal requirements of an administrative act. If there are no public interest grounds that would warrant the revocation, the holder of the authorization may request that it be returned to the holder. However, if the revocation is a warranted decision based on the public interest, no compensation is due.<sup>805</sup>

431. *Third, the 700-2200 MHz band that was auctioned is not comparable to the 3400-3600 MHz band.*<sup>806</sup> Unlike the auctioned bands, the band that Trigosul was assigned is not compatible with the technology in the most popular smartphones, including the iPhone 7 and the

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<sup>803</sup> *Id.*, ¶¶168-170.

<sup>804</sup> Reply, ¶ 294 (c).

<sup>805</sup> *See, e.g.*, Second Expert Opinion of Dr. Pereira, ¶ 25.

<sup>806</sup> *See also* Counter-Memorial, ¶¶ 356-358.

Samsung Galaxy 8. Therefore, the 3400-3600 MHz band is much less attractive from a commercial standpoint.<sup>807</sup> The Claimant's experts reply that, "in the future," these smart mobile phones will be compatible with the 3400-3600 MHz band based on technological changes.<sup>808</sup> But an uncertain "future" is irrelevant for purposes of valuation. As ECON ONE points out, "[w]hat we have to establish is whether a potential investor as of the valuation date (2011 or 2015) would be willing to pay the same amount for the lower frequencies auctioned in Uruguay and Argentina and the higher frequencies assigned to Trigosul."<sup>809</sup>

432. A hypothetical investor would not invest because there is no certainty as to either the time at which the technological changes will occur or the technological infrastructure that would have to be deployed in order to launch the IMT services and the 5G technology on those bands.<sup>810</sup> As explained by ECON ONE, the uncertain future of these technologies would compel a potential investor to "discount the value of the frequencies and the cash flows that could come from a 5G network using those frequencies. This discounting would lower the present value of the frequencies below those that could be used right away with a fully developed ecosystem."<sup>811</sup>

433. *Fourth*, the Argentine telecommunications market for mobile broadband services is very different from the Uruguayan market, primarily because, in terms of Spectrum use, public auctions, and per-use rates of the Spectrum, URSEC and the Argentine regulatory body,

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<sup>807</sup> Expert Report of Eng. Paz, ¶¶ 46-48.

<sup>808</sup> Second Compass Lexecon Report, ¶ 52; Expert Report of Eng. Valle, ¶ 74.

<sup>809</sup> Second Expert Report of Econ One, ¶ 201.

<sup>810</sup> *Id.*, ¶ 43, 196-204.

<sup>811</sup> *Id.*, ¶ 207.

ENACOM, have different policies.<sup>812</sup> Moreover, Uruguay has only three operators, one of them being ANTEL, which holds a market share of more than 50%, while in Argentina, there are four mobile communication service operators, none of which has a market share of more than 35%.<sup>813</sup> This means that, for a hypothetical buyer, the business in Uruguay would be less lucrative because there are fewer possibilities of attracting more customers since the Uruguayan market is basically saturated and the population is smaller than that of Argentina. The telecom giant Claro, for instance, has not managed to capture even 15% of the Uruguayan market despite having been present in that market for more than 10 years.<sup>814</sup>

**B. THE CLAIMANT HAS NOT SHOWN THAT TRIGOSUL'S AUTHORIZATION WOULD HAVE AN INHERENT VALUE EVEN IF IT HAD RECEIVED A CLASS B LICENSE**

434. Trigosul's FMV would also be zero even in the but-for situation posed by the Claimant in which Trigosul would have had a right to a Class B license, using March 1, 2015 as the valuation date. The reason for this is that a Class B license in and of itself is not comparable to the IMT services for smartphones for which the licenses that the Claimant uses as comparable were auctioned.<sup>815</sup> Therefore, the valuation method provided by Compass Lexecon cannot be used in order to establish the market value of Trigosul even if it had received a Class B license, which it did not.

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<sup>812</sup> *Id.*, ¶ 191.

<sup>813</sup> *Id.*, ¶ 190.

<sup>814</sup> Expert Report of Eng. Paz, ¶ 20.

<sup>815</sup> Ministry of Industry, Energy, and Mining, Decree no. 390/012 (13 December 2012), p. 3 (CLEX-032); *see also* Counter-Memorial, ¶ 344 note 651.



435. First, even if its PTP/PTMP authorization could be included within the Class B license category, it is simply not true that Trigosul would have been able to offer mobile data transmission services automatically and indefinitely. First of all, as explained by Dr. Cendoya, the fact that the 2003 regulations generically designate Class B licenses as “wireless data transmission” licenses does not mean that a holder of this type of license can offer *all* data transmission services. As explained by Dr. Cendoya, “it is legally impossible in Uruguay to grant a license—as Italba claims—for the provision of all data transmission services.”<sup>816</sup> A party who applies for a Class B license must submit a technical project for a specific service, and this project must be reviewed and approved by URSEC. The company Tecnofren, S.A., for example, applied to URSEC in 2005 for a Class B2 license specifically for purposes of providing wireless alarm services. URSEC approved the application after reviewing the technical operating specifications for the systems of Tecnofren, S.A., and the fact that the “radio alarm service falls under [...] Class B2 as it does not require access to numbering, signaling or other resources[...].”<sup>817</sup>

436. Second, in order to access this market, and considering the evolution of the mobile communications market in Uruguay, Trigosul would have had to pay the same amount that was paid by the successful bidders in the auctions for the right to use the Spectrum for a period of 20 years. As explained by Dr. Cendoya, IMT or mobile data transmission services “involve the allocation of frequencies that, then and now, have been carried out through

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<sup>816</sup> Dr. Cendoya’s Second Witness Statement, ¶ 55 (emphasis in original).

<sup>817</sup> URSEC, Resolution 130, Record 012 (21 April 2005), p. 1 (R-96).

competitive bidding procedures, in which... Trigosul has not participated.”<sup>818</sup> In the but-for and illusory scenario proposed by the Claimant, if Trigosul wanted to access this market, it would have to pay URSEC a fee equivalent to the amount paid at the auctions and for a specific period of time. Thus, the amount that Trigosul had to pay each year for its original authorization (UYU 36,000) would have increased in proportion to the amount paid at the auctions.<sup>819</sup>

437. This situation also would have been considered by a hypothetical buyer of Trigosul in any negotiation. If a purchaser buys Trigosul for USD 38 million, *i.e.*, the alleged FMV of Trigosul according to Compass Lexecon, and the purchaser wishes to enter the mobile data transmission market, it would have to pay URSEC an additional amount equivalent to what it paid the owners of Trigosul as payment for its rights to use the Spectrum. This hypothetical purchaser cannot expect that, without participating in a public auction, it would continue to pay the paltry amount that is paid to URSEC in exchange for providing PTP/PTMP services. It is highly doubtful that a hypothetical buyer would want to pay twice for the right to offer the same service.<sup>820</sup>

438. Third, and more important still, the Claimant has not been able to establish that the rights conferred under the licenses auctioned in Uruguay are comparable to the rights that Trigosul would have held even *with* a Class B license covering “all data transmission services that prove technically and legally feasible.” Even assuming that Trigosul held a Class B license

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<sup>818</sup> Dr. Cendoya’s Second Witness Statement, ¶ 55.

<sup>819</sup> Second Expert Report of Econ One, ¶¶ 150-159.

<sup>820</sup> *Id.*, ¶¶ 153.

that was not limited in any way, which is not the case, in order to be comparable to the licenses auctioned in Uruguay, Trigosul would have also had to hold a Class A telephony license. As explained by Dr. Cendoya, a Class B license that covers all possible data transmission services would not have sufficed because “mobile telecommunications are integrated with mobile telephony through the use of smart phones.”<sup>821</sup> The economic value of IMT services lies in the services provided to mobile telephony and smartphones.<sup>822</sup> Transmitting data to smartphones requires “the installation of a public telecommunications network with numbering, signaling points, interconnection, and all the other elements of Class A licenses.”<sup>823</sup> Trigosul could not offer mobile broadband services to smartphones without numbering blocks or interconnection agreements unless it held a Class A license.<sup>824</sup>

439. Consequently, even with a Class B license, Trigosul would not have been qualified to offer the services that, from its perspective, give an intrinsic value to its alleged rights in the Spectrum.

440. Nor is it true that, just because the International Telecommunication Union designated the bands on which Trigosul originally operated in 2012 for mobile uses, URSEC “in all probability” would have issued an authorization to Trigosul for purposes of offering mobile services.<sup>825</sup> This is completely irrelevant from the standpoint of a valuation exercise. First,

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<sup>821</sup> Dr. Cendoya’s Second Witness Statement, ¶ 52.

<sup>822</sup> *Id.*, ¶ 58.

<sup>823</sup> *Id.*, ¶ 52.

<sup>824</sup> *Id.*; see also Expert Report of Eng. Paz, ¶¶ 36-37.

<sup>825</sup> Reply, ¶ 325.

Uruguay is not considering utilizing these bands for IMT services anytime soon.<sup>826</sup> And if Uruguay did this, this fact would be irrelevant since it would occur after any of the valuation dates selected by the Parties. Second, this argument is speculative since, as stated by Dr. Cendoya, even if Uruguay were to decide to utilize those bands for IMT services, Uruguay would call a public auction and revoke the authorization awarded to the operator operating on those bands (allegedly Trigosul).<sup>827</sup>

**C. EVEN IF *QUOD NON* THE CLAIMANT WERE TO SHOW THAT IT WAS UNABLE TO REALIZE OR EXPLOIT BUSINESS OPPORTUNITIES AS A RESULT OF URUGUAY'S CONDUCT, THE CLAIM FOR HISTORICAL LOST PROFITS IS SPECULATIVE**

441. In its Reply, the Claimant failed to show that the business projects on which it bases its calculation of historical lost profits meet the minimum requirements for awarding it any compensation.<sup>828</sup> As explained in the Counter-Memorial, these requirements are as follow: (i) the business plans must be based on valid and credible documents; and (ii) there must be sufficient evidence that the parties reached an advanced stage in the negotiations. The Claimant did not refute the applicability of these requirements, much less did it attempt to show that its business plans satisfied them.<sup>829</sup> Consequently, the claim for historical lost profits remains just as speculative as when the Claimant filed its Memorial.<sup>830</sup>

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<sup>826</sup> Expert Report of Eng. Paz, ¶ 23.

<sup>827</sup> Dr. Cendoya's Second Witness Statement, ¶ 8; Second Expert Report of Econ One, ¶¶ 7, 37.

<sup>828</sup> Second Expert Report of Econ One, ¶ 36-44.

<sup>829</sup> Counter-Memorial, ¶ 391; Reply, ¶¶ 327-332.

<sup>830</sup> Counter-Memorial, ¶ 391. The Claimant seeks to justify this claim by citing the case *Crystallex v. Venezuela*, in which the court stated that "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." Reply, ¶ 330; *Crystallex v. Venezuela*, ¶ 875 (CL-020). This passage from the *Crystallex* case is completely irrelevant here since, in that case,

442. In this case, the Claimant never managed to have “lucrum” that could be interrupted by Uruguay’s conduct; nor has it shown that it had any significant business relationship that was capable of generating income.

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443. In conclusion, there are two valuation scenarios in the present case.

444. In one scenario (the only real scenario), Trigosul was nothing more than a fixed wireless data transmission company that had no business operations, customers, or income. In this scenario, URSEC’s conduct toward Trigosul did not cause any harm to Italba because its FMV before any of the valuation dates chosen by the Parties is zero. In no way did Uruguay bring about Trigosul’s economic failure.

445. In the second or “but-for” valuation scenario, in which Trigosul held a Class B license, Italba failed to show that the license had any intrinsic value because the only valuation method offered by the Claimant’s expert is inappropriate since a Class B license is not comparable to licenses to provide IMT services.

446. Therefore, Trigosul has no right to receive any compensation even if the Tribunal were to decide that Uruguay deprived Italba of its investment, which is not the case.

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the court was discussing the future profitability of *Crystallex* in the context of an assessment of the total investment value based on its potential to generate income prospectively. The applicable standard for compensating for a historical loss is higher since, for tribunals, it does not suffice to confirm future profitability, but rather that there “is a *lucrum* that comes to an end as a consequence of certain breaches of contract or other forms of liability.” See Counter-Memorial, ¶ 370, note 698.

**D. TRIGOSUL WAIVED ITS COMPENSATION BY REJECTING URUGUAY'S REASSIGNMENT OFFER**

447. In accordance with Article 34(1) of the Treaty, in the event of a violation, the Tribunal may order the host State to pay compensation, and the host State may opt to return the asset in lieu of paying monetary compensation.<sup>831</sup> In the Counter-Memorial, Uruguay showed that, despite there having been no violation of the Treaty, Uruguay offered to return the asset to Trigosul twice: first, when it made the offer to reassign to Trigosul alternative frequencies, and then when it offered to reinstate the same frequencies that once were assigned to it. On both occasions, Italba rejected the potential compensation. These facts are not disputed.

448. According to the Claimant, these offers should be understood as out-of-court settlement offers and not as a form of restitution because the offers were made after the arbitration began.<sup>832</sup> But the timing of the offers is irrelevant. If the Tribunal decides that Uruguay must pay compensation to Italba, which is not the case, Uruguay has the right to re-offer the frequencies as restitution in lieu of providing monetary compensation.

**E. THE CLAIMANT'S CLAIM TO OBTAIN INTEREST BASED ON ITALBA'S COST OF CAPITAL OR, IN THE ALTERNATIVE, URUGUAY'S BORROWING RATE, IS EXAGGERATED AND LACKS MERIT**

449. The Claimant insists on requesting the Tribunal to award it interest based on Italba's cost of capital, or, in the alternative, Uruguay's borrowing rate.<sup>833</sup> The Claimant bases

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<sup>831</sup> Counter-Memorial, ¶¶ 403-404.

<sup>832</sup> Reply, ¶ 296, note 700.

<sup>833</sup> *Id.*, ¶¶ 333-335.

this request on the standard of full reparation under customary international law.<sup>834</sup> However, as explained in the Counter-Memorial, the only compensation standard that applies in this case, including for the award of interest, is the standard expressed in Article 6(3) of the Treaty.<sup>835</sup> According to this provision, the interest must be awarded at a “commercially reasonable” rate.<sup>836</sup> Neither the Cost of Capital of Italba (WACC) nor the borrowing rate is a “commercially reasonable” rate.<sup>837</sup> As explained by ECON ONE, a commercially reasonable rate in this case would be a risk-free rate set on the basis of the performance of six-month or one-year U.S. Treasury bonds.<sup>838</sup>

450. Furthermore, the Claimant has failed to show that the circumstances of this case justify an award of compound interest.<sup>839</sup> Contrary to the Claimant’s argument, an award of compound interest in this case is in no way warranted in order to “avoid under-compensation, which would unjustly enrich Uruguay.”<sup>840</sup> First of all, Uruguay has not benefited economically from the revocation of Trigosl’s authorization. Second, the Claimant itself prevented Uruguay from reversing the same decision contested here by rejecting the offers to reinstate the frequencies. Thus, there is no serious violation warranting compound interest in this case.<sup>841</sup>

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<sup>834</sup> *Id.*

<sup>835</sup> Counter-Memorial, ¶ 410.

<sup>836</sup> Uruguay-U.S. BIT, Art. 6(3) (C-001).

<sup>837</sup> Counter-Memorial, ¶¶ 410-415.

<sup>838</sup> Second Expert Report of Econ One, ¶ 233.

<sup>839</sup> Reply, ¶ 340.

<sup>840</sup> *Id.*, ¶ 342.

<sup>841</sup> Counter-Memorial, ¶ 419.

**F. THE CLAIMANT SHOULD BE DECLARED LIABLE FOR THE COSTS OF THIS ABUSIVE, UNFOUNDED, AND UNNECESSARY ARBITRATION**

451. Uruguay has shown that Italba's request for arbitration has no legitimate or just purpose. This arbitration claim only seeks to harm Uruguay.<sup>842</sup> The Claimant even rejected Uruguay's offer to return the same asset that was allegedly expropriated from it in order to avoid an unnecessary dispute. Instead of accepting Uruguay's offers, Italba initiated an arbitration on behalf of a company which it does not own, concerning acts outside the temporal protection of the Treaty, and in relation to permits that literally state they are "provisional and revocable without a right to compensation."

452. Italba insisted on continuing with the arbitration despite lacking any evidence or basis for each of its claims, by repeatedly filling the void of its arguments with fraudulent documents and false allegations. The circumstances in this case allow for the same conclusion reached by the tribunal in *Europe Cement v. Turkey*, which stated that "the claim to jurisdiction is based on an assertion of ownership which the evidence suggests was fraudulent, an award to the Respondent of full costs will go some way towards compensating the Respondent for having to defend a claim that had no jurisdictional basis and discourage others from pursuing such unmeritorious claims."<sup>843</sup>

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<sup>842</sup> Dr. Cendoya's Second Witness Statement, ¶ 34.

<sup>843</sup> *Europe Cement Investment & Trade S.A. v. Republic of Turkey*, ICSID Case no. ARB(AF)/07/2, Award (13 August 2009) (McRae, Lévy, Lew), ¶ 185 (RL-138).



453. Because of Italba's actions, Uruguay has been forced to defend itself in a frivolous, lengthy and costly proceeding involving a company that did not invest in Uruguay and only generated losses.

454. Therefore, Uruguay reiterates its request that the Tribunal order the Claimant to pay all of the costs of this arbitration, including the fees and expenses incurred by Uruguay.

455. In this regard, in view of the financial problems historically associated with the Claimant, it is known that Italba lacks sufficient assets to cover its share of the arbitration costs, let alone the costs of Uruguay or of ICSID. It has also been confirmed that the "third-party funders" supporting Italba's costs and expenses in this proceeding have no obligation to pay the costs of the arbitration.<sup>844</sup> Consequently, Uruguay faces a serious risk of not recovering the legal costs and expenses it has had to incur in order to defend itself in these proceedings.

456. In light of these circumstances, Uruguay also requests the Tribunal to order that the costs be paid by the real party in this case, Dr. Alberelli, so that he cannot avoid his responsibility by simply moving his funds from one account to another.<sup>845</sup>

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<sup>844</sup> Letter from A. Yanos to P. Reichler (8 June 2017) (R-124).

<sup>845</sup> Uruguay reserves the right to flesh out the arguments concerning this position in its Costs Submission.

**VI. CONCLUSION AND PRAYER FOR RELIEF**

For all of the reasons stated here, the Oriental Republic of Uruguay respectfully requests the Tribunal to issue an Award:

1. Denying all the Claimant's claims for lack of jurisdiction;
2. In the event that the Tribunal decides it has jurisdiction, *quod non*, rejecting all of the Claimant's claims on the merits;
3. Denying that the Claimant has suffered compensable damage based on any act by Uruguay in violation of the Treaty; and
4. Ordering the Claimant to pay all the costs of this arbitration, including the fees and expenses incurred by Uruguay.

Respectfully,

[signature]

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