INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

ITALBA CORPORATION

Claimant

and

ORIENTAL REPUBLIC OF URUGUAY

Respondent

ICSID Case No. ARB/16/9

AWARD

Members of the Tribunal
Mr. Rodrigo Oreamuno, President
Mr. John Beechey CBE, Arbitrator
Prof. Zachary Douglas, Q.C., Arbitrator

Secretary of the Tribunal
Ms. Marisa Planells-Valero

Date of dispatch to the Parties: 22 March 2019

REPRESENTATION OF THE PARTIES

Representing Italba Corporation:

Mr. Alexander Yanos
Mr. Carlos Ramos-Mrosovsky
Ms. Kristen Bromberek
Mr. Borja Alvarez Sanz
Ms. Leticia Goni
Alston & Bird LLP
90 Park Avenue
New York, NY 10016
United States of America
and
Ms. Fara Tabatabai (until October 2017)
Hughes Hubbard & Reed LLP
One Battery Park Plaza
New York, NY 10004
United States of America

Representing the Oriental Republic of Uruguay:

Mr. Rodolfo Nin Novoa
Ministro de Relaciones Exteriores de Uruguay
Colonia 1206, 6to Piso
Montevideo
Uruguay
and
Dr. Miguel Toma
Secretario de la Presidencia de Uruguay
Secretaria de Presidencia
Torre Ejecutiva, Plaza Independencia 710
CP 11000 Montevideo
Uruguay
and
H.E. Carlos Gianelli Derois
Ambassador of Uruguay to the United States
Embassy of Uruguay, Washington, D.C.
1913 I Street NW
Washington D.C. 20006
United States of America
and
Mr. Paul S. Reichler
Ms. Clara Brillembourg
Ms. Patricia Cruz Trabanino
Ms. Melinda Kuritzky
Mr. Ofilio Mayorga
Mr. José M. García Rebolledo
Foley Hoag LLP
1717 K Street, N.W.
Washington D.C. 20006
United States of America

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TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS

ANTEL	National Telecommunications Administration (*Administración Nacional de Telecomunicaciones*)
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
C- [#]	Claimant's Exhibit
Claimant's Memorial	Claimant's Memorial on the Merits dated 16 September 2016
Claimant's Post Hearing Brief	Claimant's Post Hearing Brief dated 16 March 2018
Claimant's Reply	Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction dated 12 May 2017
CL- [#]	Claimant's Legal Authority
DNC	National Communications Authority (*Dirección Nacional de Comunicaciones*)
Firm	Ramírez, Xavier de Mello & Abal Firm
GIE	Economic Interest Group
Hearing	Hearing on jurisdiction, merits and quantum held from November 13, 2017 to November 20, 2017
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Judgment	Judgment 579/2014 of 23 October 2014 rendered by the "Tribunal de lo Contencioso Administrativo"

MDN	Uruguay Ministry of National Defense (*Ministerio de Defensa Nacional de Uruguay*)
MIEM	Ministry of Industry, Energy and Mining (*Ministerio de Industria, Energía y Minería*)
Request	Request for Arbitration dated 16 February 2016.
R- [#]	Respondent's Exhibit
Respondent's Counter-Memorial	Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction dated 30 January 2017
Respondent's Post Hearing Brief	Respondent's Post Hearing Brief dated 16 March 2018
Respondent's Rejoinder	Respondent's Rejoinder on the Merits and Reply on Jurisdiction dated 11 August 2017
RL- [#]	Respondent's Legal Authority
Tr. Day [#] [Speaker(s)] [page:line]	Transcript of the Hearing
Treaty	Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, signed on 4 November 2005 and in force on 1 November 2006
Tribunal	Arbitral tribunal constituted on 27 May 2016
Trigosul	Trigosul S.A., incorporated on 19 December 1994
URSEC	Regulatory Unit for Communications Services (*Unidad Reguladora de Servicios de Comunicaciones*)

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, signed on 4 November 2005 and in force on 1 November 2006 (the "**Treaty**"), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the "**ICSID Convention**").

2. The Claimant is Italba Corporation ("**Italba**" or the "**Claimant**"), a company incorporated under the laws of the State of Florida, United States of America.

3. The Respondent is the Oriental Republic of Uruguay ("**Uruguay**" or the "**Respondent**").

4. The Claimant and the Respondent are collectively referred to as the "**Parties.**" The Parties' representatives and their addresses are listed above on page (i).

5. This dispute relates to Uruguay's revocation of the Claimant's license to provide wireless data services in Uruguay, through the Uruguayan company Trigosul S.A. ("**Trigosul**"), and which allegedly breached provisions of the Treaty.

II. PROCEDURAL HISTORY

A. Registration of the Request for Arbitration and Constitution of the Tribunal

6. On 16 February 2016, ICSID received a Request for Arbitration of that same date from Italba against Uruguay (the "**Request**"). The Request was supplemented by the Claimant's letters dated 10 and 20 March 2016.

7. On 24 March 2016, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute

an arbitral tribunal as soon as possible, in accordance with Rule 7(d) of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

8. In accordance with Article 37(2)(a) of the ICSID Convention, and pursuant to the provisions of the Treaty, the Tribunal was to be constituted by three arbitrators to be appointed as follows: one by each Party and the third, the presiding arbitrator, by agreement of the Parties.

9. The Tribunal was composed of Mr. Rodrigo Oreamuno, a national of Costa Rica, President, appointed by agreement of the Parties; Mr. John Beechey, a national of the United Kingdom, appointed by the Claimant; and Professor Zachary Douglas, a national of Australia, appointed by the Respondent.

10. On 27 May 2016, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**ICSID Arbitration Rules**"), notified the Parties that the three arbitrators had accepted their appointments and that the Tribunal was deemed constituted on that date. Ms. Marisa Planells-Valero, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

B. The First Session

11. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 26 July 2016, by teleconference.

12. Following the first session, on 29 July 2016, the President of the Tribunal issued Procedural Order No. 1, recording the agreement of the Parties on procedural matters and the decision of the Tribunal on disputed issues. Procedural Order No. 1 provided, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006; that the procedural languages would be English and Spanish; and that the place of the proceeding would be Washington, DC. Procedural Order No. 1 also set out a schedule for the proceeding. Ms. Maria Jose Rojas was appointed as assistant to the President of the Tribunal.

13. On 28 July 2016, the Tribunal and the Parties were informed that the Secretary of the Tribunal would be taking temporary leave, and that Ms. Luisa Fernanda Torres would serve as Secretary of the Tribunal during her absence.

C. The Parties Written Submissions and Procedural Applications

14. In accordance with Procedural Order No. 1, on 16 September 2016, the Claimant filed a Memorial on the Merits, together with witness statements by Dr. Gustavo Alberelli[1] and Mr. Luis Herbón;[2] an expert report by Mr. Santiago Dellepiane Avellaneda of Compass Lexecon; Exhibits C-001 to C-136 and Legal Authorities CL-001 to CL-085.

15. On 14 October 2016, the Respondent advised that it did not intend to request the bifurcation of the proceeding, and that it would file its objections to jurisdiction with its Counter-Memorial.

16. On 31 October 2016, the Claimant informed the Tribunal that, one of its witnesses, Mr. Herbón, had received a notice to appear before a criminal court in Montevideo, Uruguay, in connection with an investigation associated with his and Dr. Alberelli's testimony in this arbitration (the "**Investigation**").

17. On 8 November 2016, the Respondent replied to the Claimant's communication of 31 October 2016.

18. On 10 November 2016, the Claimant filed an Application for Provisional Measures and Temporary Relief pursuant to Article 47 of the ICSID Convention and Rule 39(1) of the ICSID Arbitration Rules. The Claimant's Application sought, *inter alia*, to enjoin the criminal prosecution in Uruguay of Dr. Alberelli and Mr. Herbón pending the resolution of this arbitration. In addition, the Claimant requested temporary relief to preserve the *status quo* while the Claimant's Application was pending, noting that Mr. Herbón was scheduled to appear for a hearing before the Uruguayan Criminal Court on 1 December 2016.

[1] President and Chief Executive Financial Officer of Italba.

[2] Current Legal Representative and previous Director of Trigosul.

19. On 14 November 2016, the Tribunal invited the Respondent to provide its observations on the Claimant's Application by 17 November 2016.

20. On that same day, the Tribunal issued Procedural Order No. 2, amending certain requirements of Procedural Order No. 1 relating to the submission of hard copies of pleadings and accompanying documents.

21. On 15 November 2016, the Respondent applied to the Tribunal for an extension of time until 21 November 2016 to provide its observations on the Claimant's Application.

22. On 16 November 2016, the Tribunal granted the extension requested by the Respondent.

23. On that same day, the Claimant wrote to the Tribunal advising that, while it did not oppose the extension granted to the Respondent, it relied on that extension in order to renew its request for temporary relief.

24. On 17 November 2016, the Respondent replied to the Claimant's communication of 16 November 2016. It requested the Tribunal to decline the Claimant's request for temporary relief, arguing that there was no urgency, as the next event in the Investigation was not scheduled until 1 December 2016.

25. On 21 November 2016, the Respondent submitted its Response to the Claimant's Application for Provisional Measures and Temporary Relief in which, *inter alia*, it stated that Uruguay was prepared to guarantee that the Investigation would not prevent either Dr. Alberelli or Mr. Herbón from participating in the preparation or presentation of the remainder of the Claimant's case (the "**Guarantee**").

26. On 24 November 2016, the Claimant submitted its Reply in Further Support of Its Application for Provisional Measures and Temporary Relief.

27. On 25 November 2016, the President of the Tribunal invited the Respondent to confirm the Guarantee. On 28 November 2016, the Respondent confirmed the Guarantee.

28. On 30 November 2016, the Tribunal wrote to the Parties inviting the Claimant to confirm whether the Guarantee was sufficient to protect its ability to present witness evidence from Mr. Herbón and Dr. Alberelli in these proceedings.

29. On 5 December 2016, the Claimant filed observations in response to the Tribunal's communication of 30 November 2016.

30. On 6 December 2016, the Respondent filed a communication addressing certain allegations in the Claimant's communication of 5 December 2016. On that same day, the Claimant sent a further communication in response.

31. On 9 December 2016, the President of the Tribunal, on behalf of the Tribunal, invited the Parties to provide an update on whether "Mr. Herbón had, in fact, appeared before the Uruguayan Criminal Court [on 1 December 2016] and, if so, what were the circumstances of his appearance."

32. On 13 December 2016, the Respondent informed the Tribunal that "Mr. Herbón did not appear in court on 1 December 2016, as required by his summons", adding that "[n]o reason for his failure to appear was given to the Court or the Prosecutor by Mr. Herbón or his counsel." Uruguay added, however, that "the guarantee that Uruguay has given — in its Response to the Claimant's Request for Provisional Measures (filed on 21 November 2016) and its correspondence with the Tribunal of 28 November 2016 — remains in place."

33. Also on 13 December 2016, the Claimant reported that Mr. Herbón's counsel had been able to reschedule his court appearance for a date in February 2017, but that "Mr. Herbón and Dr. Alberelli remain unable to return to Uruguay to gather evidence and conduct business without the threat of pretrial incarceration." The Claimant reiterated its request for provisional measures.

34. On 5 January 2017, the Tribunal and the Parties were informed that Ms. Marisa Planells-Valero was reassuming her functions as Secretary of the Tribunal in this proceeding.

35. On 30 January 2017, in accordance with Procedural Order No. 1 as modified by Procedural Order No. 2, the Respondent filed a Counter-Memorial on the Merits and Memorial on

Jurisdiction, together with witness statements by Mr. Nicolás Cendoya, Ms. Elena Grauert, Ms. Alicia Fernández, Mr. Fernando García Piriz, Mr. Fernando Pérez Tabó, Mr. Gabriel Lombide, Mr. Juan Piaggio, and Mr. León Lev; expert reports by Prof. Santiago Pereira Campos and by Daniel Flores and Ettore Comi of Econ One Research; Exhibits R-008 to R-080 and Legal Authorities RL-024 to RL-119.

36. On 9 February 2017, the Claimant filed a further communication informing the Tribunal that Mr. Herbón's hearing before the Uruguayan Criminal Court was now scheduled for 15 February 2017 and reiterating its request for provisional measures. On 14 February 2017, the Respondent filed observations in response to this communication, confirming again the Guarantee.

37. On 15 February 2017, the Tribunal issued its Decision denying the Claimant's Application for Provisional Measures and Temporary Relief. In doing so, the Tribunal concluded that the Claimant's Application was based on the anticipated consequences of the Investigation, and that the Claimant had failed to file evidence that Dr. Alberelli's and Mr. Herbón's participation in this proceeding had been affected to date by their involvement in the Investigation. Furthermore, the Tribunal accepted that Uruguay's commitment to respect the Claimant's rights in this arbitration had been made in good faith and would be adhered to.

38. On 14 February 2017, the Parties filed their requests for production of documents. On 15 March 2017, each Party filed observations on the other Party's requests. On 23 March 2017, the Claimant filed a reply to its request for production of documents. On 29 March 2017, the Respondent filed a reply to its request for production of documents. On 4 April 2017, the Tribunal issued Procedural Order No. 3 concerning its decision on the Claimant's requests for production of documents.

39. On 25 April 2017, the Claimant requested an eleven-day extension to the deadline to submit its Reply Memorial originally due on 1 May 2017 and to shift the deadline for the Respondent's Rejoinder from 31 July 2017 to 11 August 2017. On 26 April 2017, the Tribunal invited the Respondent to comment on the extension. On the same date, the Respondent agreed to the extension. On 28 April 2017, the Tribunal granted the extension.

40. On 13 May 2017, the Claimant filed a Reply Memorial, together with witness statements by Ms. Beatriz Alberelli, Mr. Alejandro Amaro, Mr. Alan Cherp, Mr. Christopher G. Hall, and Mr. Johnathan Alexander Van Arem; Second Witness Statements of Mr. Alejandro Amaro, Dr. Gustavo Alberelli and Mr. Luis Herbón; an expert report by Mr. John Hargett, Mr. Luis Lapique, Mr. Luis Valle, and a second expert Report by Mr. Santiago Dellepiane Avellaneda of Compass Lexecon; Exhibits C-154 to C-275 and Legal Authorities CL-102 to CL-155.

41. On 31 May 2017, the United States of America, the non-disputing Party pursuant to the terms of the Treaty (the "**Non-Disputing Party**"), notified the Tribunal that it would decide whether to file a Non-Disputing Party submission once it had received and reviewed the Respondent's Rejoinder due on 11 August 2017.

42. After further submissions from the Parties, on 31 May 2017, the Tribunal issued Procedural Order No. 4 concerning its decision on the Respondent's requests for production of documents and setting up a framework for the protection of certain confidential documents to be produced by the Claimant pursuant to that Order.

43. On 5 June 2017, the Tribunal proposed a calendar to the Parties for the scenario in which the Non-Disputing Party decided to file a submission in this proceeding. On 13 June 2017, the Parties confirmed that they had no objection to the Tribunal's proposed calendar. On 22 June 2017, the Tribunal invited the Non-Disputing Party to file a submission, if any, by 12 September 2017.

44. On 5 July 2017, the Parties informed the Tribunal that they had agreed on a Hearing of eight days.

45. On 6 July 2017, the President of the Tribunal informed the Parties that Ms. Maria Jose Rojas would no longer be serving as Assistant to the President of the Tribunal in this case.

46. On 11 August 2017, the Respondent filed a Rejoinder Memorial, together with second witness statements of Mr. Nicolás Cendoya; Ms. Alicia Fernández; Mr. Fernando García Piriz; second expert reports of Prof. Santiago Pereira Campos; Dr. Daniel Flores and Mr. Ettore Comi of Econ One Research, Inc.; expert reports of Mr. Louis T.M. Conti, Esq.; Mr.

Néstor Alejandro Paz Portela; Dr. Eugenio Xavier de Mello Ferrand of Ramírez, Xavier de Mello & Abal Abogados; Exhibits R-081 to R-125 and Legal Authorities RL-120 to RL-155.

47. On 22 August 2017, the Tribunal invited the Parties to reach an agreement on certain organizational and logistical details of the Hearing by 29 August 2017. On 24 August 2017, the Parties requested an extension. On 25 August 2017, the Tribunal granted the extension requested by the Parties. On 8 September 2017, the Parties submitted a joint statement on the organization of the Hearing.

48. On 11 September 2017, the Non-Disputing Party filed a submission (the "**Non-Disputing Party Submission**"). On 25 September 2017, the Respondent submitted its observations on the Non-Disputing Party Submission. On 27 September 2017, the Claimant informed the Tribunal that it had no comments on the Non-Disputing Party Submission.

49. On 11 September 2017, the Respondent submitted a list of the Claimant's witnesses and experts whom it wished to cross-examine during the Hearing. On 12 September 2017, the Claimant submitted a list of the Respondent's witnesses and experts whom it wished to cross-examine during the Hearing. On 15 September 2017, the Respondent proposed that it be allowed to produce six (6) of its witnesses for examination by the Claimant via video-conference or, in the alternative, that the Claimant be required to pay in advance for their transport, food and lodging. On 27 September 2017, the Claimant objected to the Respondent's proposal.

50. On 12 September 2017, the Respondent requested leave from the Tribunal to submit certain missing pages from the Claimant's Exhibit C-116. On 19 September 2017, the Claimant informed the Tribunal that it had no objection to the Respondent's request. On 20 September 2017, the Tribunal granted the Respondent leave to introduce the missing pages from the Claimant's Exhibit C-116 into the record.

51. By that same letter, the Tribunal requested the Parties' permission to allow Mr. Joao Valerio, Mr. Beechey's colleague and administrative secretary, to attend the Hearing. On 20 September 2017, the Respondent confirmed that they had no objection to Mr. Valerio

attending the Hearing. On 21 September 2017, the Claimant confirmed that they had no objection to Mr. Valerio attending the Hearing.

52. On 26 September 2017, and pursuant to the Tribunal's invitation of 20 September 2017, the Respondent introduced the missing pages from the Claimant's Exhibit C-116 into the record as Exhibit R-126.

53. On 27 September 2017, and pursuant to Procedural Order No. 4, Mr. Valerio submitted a signed declaration of confidentiality.

54. On 5 October 2017, the Claimant informed the Tribunal that it no longer intended to call Uruguay's technical expert, Dr. Alejandro Paz, for cross-examination during the Hearing.

55. On that same date, the Tribunal rejected the Respondent's proposal of 15 September 2017 that it be allowed to produce six (6) of its witnesses for examination by the Claimant during the Hearing via video-conference or, in the alternative, that the Claimant be required to pay in advance for their transport, food and lodging. In doing so, the Tribunal invited the Claimant to carefully consider the need to cross-examine all of the Respondent's witnesses, and to confirm the list of witnesses for cross-examination by 11 October 2017. On that date, the Claimant provided the Tribunal with a revised list of witnesses and experts for cross-examination during the Hearing.

56. On 24 October 2017, the Claimant notified the Tribunal that it had terminated its engagement with Hughes Hubbard & Reed LLP as its counsel in this proceeding and that it had retained the law firm of Alston & Bird LLP.

57. On 25 October 2017, the Respondent requested leave from the Tribunal to introduce a new legal authority into the record. On that same date, the Claimant indicated that it had no objection to the Respondent's request. On 27 October 2017, in view of the Parties' agreement, the Tribunal granted the Respondent leave to introduce this new legal authority into the record as RL-159.

58. On 26 October 2017, the Claimant requested a postponement of the Hearing on the basis of the sudden deterioration of Dr. Alberelli's health, which would "preclude [him] from

participat[ing] in the hearing at this time, while also making it impossible for Italba to prepare effectively for the hearing," and suggested that the Tribunal advise the Parties as to possible alternative Hearing dates. On 31 October 2017, Uruguay opposed the Claimant's request arguing, *inter alia*, that a postponement of the Hearing at so late a stage in the proceedings would cause serious prejudice to the Respondent. It informed the Tribunal that, in view of the circumstances, it was willing to "sacrifice its right to cross-examine Dr. Alberelli." On that same date, the Claimant reiterated its request for a postponement of the Hearing. On 2 November 2017, the Respondent reiterated its willingness to forego cross-examination of Dr. Alberelli to avoid a postponement of the Hearing.

59. On 3 November 2017, the Tribunal informed the Parties that the Tribunal did not wish to question Dr. Alberelli during the Hearing and that, after due consideration, it had decided to deny the Claimant's request for a postponement of the Hearing. On that same date, the Claimant requested the Tribunal to reconsider its decision to deny a postponement of the Hearing. After due consideration, the Tribunal confirmed its decision to deny the Claimant's request. In doing so, the Tribunal reiterated that Italba had failed to provide reasons to justify its claim that Dr. Alberelli's health concerns and the absence in the hearing room of an officer or shareholder of Italba during the Hearing would preclude counsel for the Claimant from being able to present its case during the Hearing.

60. On 5 November 2017, the Tribunal proposed, *inter alia*, the adoption of a Protocol for Protection of Confidential Information, aimed at ensuring both the maximum transparency of the Hearing under the transparency regime established by Article 29.2 of the Treaty and the protection of confidential information pursuant to Procedural Order No. 4. On 7 and 8 November 2017, respectively, the Respondent and the Claimant confirmed their agreement with the Tribunal's proposal.

61. Also on 7 November 2017, the Non-Disputing Party informed the Tribunal of its intention to attend the Hearing, in accordance with Article 29 of the Treaty. In doing so, the Non-Disputing Party made a proposal to the Parties in connection with the procedure envisaged by Procedural Order No. 4 for the protection of confidential information from disclosure

during the Hearing. On that same date, the Parties indicated that they had no objection to the proposal made by the Non-Disputing Party.

62. On 9 November 2017, the Tribunal informed the Non–Disputing Party that the Tribunal and the Parties welcomed its attendance at the Hearing. Furthermore, the Tribunal confirmed that, in accordance with Procedural Order No. 4 and the Protocol for Protection of Confidential Information, the Non-Disputing Party would be invited to leave the hearing room temporarily whenever confidential information was to be brought to the Tribunal's attention at the Hearing. On the same day, the Non-Disputing Party acknowledged receipt of the Tribunal's communication and provided a list of its attendees to the Hearing.

63. On that same date, the Claimant sought leave to introduce into the record eight new factual exhibits, and three new legal authorities.

64. On 10 November 2017, the Respondent objected to the Claimant's request, with the exception of the three documents that post-dated the Claimant's written pleadings. On that same date, the Claimant reiterated its request of 9 November 2017.

65. On 11 November 2017, the Tribunal informed the Parties that it would be addressing the Claimant's request of 9 November 2017 at the beginning of the Hearing on 13 November 2017 and issuing a decision thereafter.

D. The Oral Procedure

66. On 13 to 20 November 2017, the Hearing on Jurisdiction, Merits and Quantum was held in Washington, D.C.[3] with the following people in attendance:

Tribunal:

Mr. Rodrigo Oreamuno	President
Mr. John Beechey	Arbitrator
Prof. Zachary Douglas QC	Arbitrator

ICSID Secretariat:

Ms. Marisa Planells-Valero	Secretary of the Tribunal

[3] In accordance with Article 29 of the Treaty, and pursuant to the Parties' agreement, the Hearing was broadcast to the public at a room located at the World Bank, in Washington D.C.

Mr. Joao Valerio	Assistant to Mr. John Beechey

For the Claimant:

Counsel:

Mr. Alex Yanos	Alston & Bird LLP
Mr. Carlos Ramos-Mrosovsky	Alston & Bird LLP
Ms. Kristen Bromberek	Alston & Bird LLP
Mr. Borja Alvarez	Alston & Bird LLP
Ms. Leticia Goni	Alston & Bird LLP
Mr. Ryosuke Funakoshi	Alston & Bird LLP

Support Staff:

Mr. Garett Malter	Alston & Bird LLP
Ms. Kerrie Sekine-Pettite	Alston & Bird LLP
Ms. Julia Gewolb	Bentham Capital

Witness:

Mr. Luis Herbón	Witness for Italba Corporation

Experts:

Mr. Santiago Dellepiane Avellaneda	Compass Lexecon
Mr. Ariel Medvedeff	Compass Lexecon
Mr. Federico Gonzalez Loray	Compass Lexecon
Mr. Luis Lapique	Lapique & Santeugini Abogados

For the Respondent:

Counsel:

Mr. Paul Reichler	Foley Hoag LLP
Ms. Clara Brillembourg	Foley Hoag LLP
Ms. Christina Beharry	Foley Hoag LLP
Ms. Patricia Cruz Trabanino	Foley Hoag LLP
Ms. Melinda Kuritzky	Consultant for Foley Hoag LLP
Mr. Ofilio Mayorga	Foley Hoag LLP
Mr. José Rebolledo	Foley Hoag LLP

Support Staff:

Ms. Anna Aviles-Alfaro	Foley Hoag LLP
Ms. Ana Urgiles	Foley Hoag LLP
Ms. Alexandra Coon	Foley Hoag LLP
Ms. Nancy Lopez	Foley Hoag LLP
Mr. Raymond McLeod	DOAR
Mr. Danis Brito	DOAR

Parties:

Dr. Miguel Angel Toma Sanchis	Office of the Secretary of the Presidency
Dr. Carlos Gianelli	Embassy of Uruguay

Dr. Sara Ilha	Office of the Secretary of the Presidency
Dr. Marianela Bruno	Embassy of Uruguay
Ms. Silvana Sena	Office of the Secretary of the Presidency

Witnesses:

Mr. Nicolás Cendoya	Witness for Uruguay
Ms. Alicia Fernandez	Witness for Uruguay
Mr. Leon Lev	Witness for Uruguay
Mr. Juan Piaggio	Witness for Uruguay
Ms. Elena Grauert	Witness for Uruguay
Dr. Fernando García	Witness for Uruguay

Experts:

Mr. Santiago Pereira	Rueda Abadi Pereira
Mr. Alejandro Paz	Ministerio de Industria, Energía y Minería
Mr. Eugenio Xavier de Mello	Estudio Ramírez, Xavier de Mello & Albal
Mr. Louis Conti	Holland & Knight
Dr. Daniel Flores	Econ One Research, Inc.
Mr. Ettore Comi	Econ One Research, Inc.
Mr. Ivan Lopez	Econ One Research, Inc.
Ms. Eleanor Coates	Econ One Research, Inc.

Non-Disputing Party:

Ms. Lisa Grosh	U.S. Department of State
Ms. Nicole Thornton	U.S. Department of State
Ms. Terra Gearhart-Serna	U.S. Department of State
Mr. Matthew Olmsted	U.S. Department of State
Ms. Danielle Polebaum	U.S. Department of State
Mr. Grayson Orsini	U.S. Department of State

Court Reporters:

Ms. Dawn Larson	Worldwide Reporting, LLP
Mr. David Kasdan	Worldwide Reporting, LLP
Mr. Paul Pelissier	DR Esteno
Ms. Luciana Sosa	DR Esteno

Interpreters:

Ms. Silvia Colla	English-Spanish interpreter
Mr. Daniel Giglio	English-Spanish interpreter
Mr. Charles Roberts	English-Spanish interpreter

67. During the Hearing, the following persons were examined:

On behalf of the Claimant:

Mr. Luis Herbón	Witness for Italba Corporation

Mr. Santiago Dellepiane Avellaneda	Compass Lexecon
Mr. Luis Lapique	Lapique & Santeugini Abogados

On behalf of the Respondent:

Mr. Nicolás Cendoya	Witness for Uruguay
Ms. Alicia Fernandez	Witness for Uruguay
Mr. Leon Lev	Witness for Uruguay
Mr. Juan Piaggio	Witness for Uruguay
Ms. Elena Grauert	Witness for Uruguay
Dr. Fernando García	Witness for Uruguay
Mr. Santiago Pereira	Rueda Abadi Pereira
Mr. Alejandro Paz	Ministerio de Industria, Energía y Minería
Mr. Eugenio Xavier de Mello	Estudio Ramírez, Xavier de Mello & Albal
Mr. Louis Conti	Holland & Knight
Dr. Daniel Flores	Econ One Research, Inc.
Mr. Ettore Comi	Econ One Research, Inc.

68. On 13 November 2017, following a further exchange of views at the beginning of the Hearing, the Tribunal decided to grant the Claimant's request of 9 November 2018. On 14 November 2017, the Claimant introduced the eight new exhibits and three new legal authorities into the record with exhibit numbers C-276 through C-286 and CL-156 through CL-158.

69. On 16 November 2017, the Claimant proposed a re-allocation among the Parties of part of the remaining hearing time reserved for the Tribunal's questions during the Hearing. On that same date, the Respondent objected, and the Claimant sent a further communication to the Tribunal on this matter.

70. On 17 November 2017, during the cross-examination of Professor Xavier de Mello, the Claimant objected to the Tribunal's consideration of his evidence for lack of independence. By letters of 21 November and 1 December 2017, the Claimant reiterated its objections as to Prof. de Mello's independence and requested the Tribunal to disregard his expert report and testimony in this proceeding. By communications of 30 November and 8 December 2017, the Respondent objected to the Claimant's request. On 18 December 2017, the Tribunal notified the Parties that it would decide on the Claimant's request at an

appropriate juncture in the proceeding. The Claimant's Application is further discussed at Section V *infra*.

71. On 19 November 2017, during the Hearing, the Claimant requested leave from the Tribunal to introduce a new document into the record and an order from the Tribunal instructing the Respondent to produce an additional document to the Claimant. On that same day, following an exchange of views among the Parties, the Tribunal decided to reject the Claimant's request of 19 November 2017.

72. The Parties filed simultaneous Post-Hearing Briefs on March 16, 2018.

73. The Parties filed their submissions on costs on May 4, 2018. The Respondent submitted a letter updating the submission on costs on 7 November 2018.

74. The proceeding was closed on January 15, 2019.

III. FACTUAL BACKGROUND

75. Italba was incorporated on 10 May 1982, under the laws of the State of Florida, United States of America.[4] It was founded by Dr. Gustavo Alberelli (Italian citizen, permanent resident of the United States of America since 1 August 1977),[5] owner of 50 shares and Ms. Beatriz Alberelli, (who was born in Cuba and who has held American citizenship since 1967),[6] owner of the remaining 50 shares.[7]

76. On 19 December 1994, Mr. Daniel Ángel Pérez Blanco and Ms. Marisa Cristina González Silvestri established the company named Mareland Sociedad Anónima in Uruguay. On 29 December 1994, that corporation changed its name and became Trigosul Sociedad Anónima. On 3 February 1995, the General Tax Authority's Taxpayers Registry of Uruguay approved the Bylaws of that corporation, which are registered in the Public and

[4] Claimant's Memorial, ¶ 12; Italba Articles of Incorporation, C-002.

[5] Claimant's Memorial, ¶ 12.

[6] Statement of Ms. Beatriz Alberelli, 12 May 2017, ¶ 1.

[7] Italba Articles of Incorporation, Article III, C-002.

General Registry of Commerce with number 763 on page 838 of Book 2 of Bylaws, File 11508/95.[8]

77. Article 3 of Trigosul's Bylaws reads as follows:

> *"The capital consisting of one or more registered common shares with a par value of $U1.00 (one Uruguayan peso) each shall be $U 182,500.00 (one hundred eighty-two thousand five hundred Uruguayan pesos). The stock certificates shall contain the formalities established by Article 300 of Law No. 16,060. The Extraordinary Shareholders Meeting may approve an increase up to the sum of $U 912,500.00 (nine hundred twelve thousand five hundred Uruguayan pesos) on one or more occasions, without the need for an amendment or administrative consent. The Meeting may delegate the time of the issue and the payment method, terms and conditions to the Board of Directors or the Administrator, as the case may be. Share transfers shall be notified to the company and documented as provided in Law No. 16,060."* [9]

78. On 6 September 1996, six share certificates of Trigosul were issued. Each one represented 9,125 shares, with a nominal value of one Uruguayan peso each. Three of the certificates were issued in the name of Ms. Carmela Caravetta Durante (Dr. Alberelli's mother), and the other three in the name of Dr. Gustavo Alberelli Caravetta.[10]

79. Dr. Alberelli represented the following with respect to the dates of the certificates and to the acquisition of Trigosul:

> *"Certain of Trigosul's corporate records indicate that the company was acquired in 1996, not 1999. Trigosul's Share Certificates (C-161), at 1-12; Trigosul's Book of Shareholders and Directors Meetings (C-164), at 3-4. The reason for this disparity is that the original owners of Trigosul required, as a condition of the sale of the company, that the corporate records show that the acquisition took place in 1996, and I agreed to that condition."*[11]

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[8] Notarial Certificate issued by the Civil Law Notary Public Bruno Santin Cagnoli on 9 August 1999, C-226; Trigosul Bylaws, C-226.

[9] Trigosul Bylaws, Article 3, C-226.

[10] Trigosul's Share Certificates, C-161.

[11] Statement of Dr. Gustavo Alberelli, 12 May 2017, footnote number 6.

80. In addition to the six certificates mentioned in paragraph 78 above, on 30 June 1999, fourteen share certificates of Trigosul were issued; each one representing 9,125 shares, with a nominal value of one Uruguayan peso each, in the name of Dr. Gustavo Alberelli Caravetta,[12] to complete the aggregate amount of 182,500 Uruguayan pesos that constituted Trigosul's "authorized capital".

81. On 17 January 1997, through Resolution 75-219 of the Ministry of National Defense (hereinafter "**MDN"**, its Spanish acronym), Dr. Alberelli was "granted authorization for the provision, on a commercial basis, of dedicated wireless digital lines, without connection to the public telephone system, for the transmission of data between fixed points."[13]

82. On 4 August 1997, the National Communications Authority, (hereinafter "**DNC**", its Spanish acronym) through Resolution 227-97, allocated Dr. Alberelli, "the terrestrial fixed service radio channels", on an "exclusive, national and secondary basis," of the frequencies 1865 to 1870 MHz. (out) – 1945 to 1950 MHz. (return), 1895 to 1900 MHz. (out) -- 1975 to 1980 MHz. (return).[14]

83. On 9 August 1999, Dr. Alberelli requested the DNC to transfer the authorization granted in his name to Trigosul.[15]

84. At Dr. Alberelli's request, on 8 February 2000, the MDN transferred to Trigosul through Resolution 142/000 the authorization granted to Dr. Alberelli, "…on the same terms and conditions as those stated."[16]

85. On 3 October 2000, the MDN issued Decree 282/000, through which the 1700 to 2200 MHz. frequency band save for those frequencies between 1910 and 1930 MHz., was reserved for the personal communication service called PCS. Through this Decree the DNC

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[12] Trigosul's Share Certificates, C-161.

[13] Claimant's Memorial, ¶ 16; Respondent's Counter-Memorial, ¶ 138; Resolution 75-219 of 17 January 1997, from the Ministry of National Defense, C-003 and R-011.

[14] Claimant's Memorial, ¶ 16; Resolution 227-97 of 4 August 1997, National Communications Authority, R-012.

[15] Respondent's Counter-Memorial, ¶ 56; Letter dated 9 August 1999, R-014.

[16] Claimant's Memorial, ¶ 17; Respondent's Counter-Memorial, ¶ 18; Resolution 142/000, of 8 February 2000, from the Ministry of National Defense, C-005.

was entrusted with the obligation to study the relevant proceedings for migration to other frequencies of those authorized to operate in the reserved frequencies. It was also commissioned to prepare a regulation on the proceeding for the allocation of frequencies.[17]

86. On 4 October 2000, through Resolution 278/2000issued on the basis of Decree 282/000, the DNC revoked the assignment of the frequencies allocated to Dr. Alberelli "… of the sub-blocks 1865 - 1870 MHz paired with 1945 - 1950 MHz. and 1895 - 1900 MHz. paired with 1975 - 1980 MHz." That Resolution also provided for the return to Dr. Alberelli of the fees he had paid. [18]

87. Through that same Resolution 278/2000, the DNC allocated "provisionally and revocable at any time without right to claim and/or compensation of any kind [to Trigosul] the sub-block 'K' corresponding to the sub-frequency band 3425 - 3450 MHz. (out) and 3475 - 3500 MHz. (return), for the installation and operation of the system aimed at commercially providing in national territory, wireless digital dedicated lines, without connection to the public telephone network, for the transmission of point-to-point and point-to-multipoint data."[19] That Resolution established 1 October 2001 as the deadline by which Trigosul was to start commercial operation of the system, and warned that, in the event that Trigosul failed to meet the deadline, its authorization would be rescinded. The Resolution also established the period during which Trigosul should make the corresponding advance payment for allocation of radio spectrum for the first two years, amounting to 632,674.00 Uruguayan Pesos.[20]

88. With the purpose of enforcing Decree 282/000, the DNC, through Resolution 444/000 of 12 December 2000, allocated "to TRIGOSUL S.A., on a provisional and revocable basis, without the right to claim or compensation of any type, the sub-blocks "K" and "M" corresponding to the 3425 - 3450 MHz. and 3525 - 3550 MHz. sub-frequency bands, intended for the installation and operation of the system aimed at the provision in national

[17] Claimant's Memorial, ¶ 20; Respondent' Counter-Memorial, ¶ 139; Decree 282/000 of 3 October 2000, C-10.

[18] Resolution 278/2000 of 4 October 2000, DNC, C-011.

[19] *Id* at 14.

[20] Claimant's Memorial, ¶ 20; Resolution 278/2000 of 4 October 2000, DNC, C-011.

territory, on a commercial basis, of dedicated wireless digital lines, without connection to the public telephone network for the transmission of point-to-point and point-to-multipoint data."[21]

89. On 21 February 2001, Law 17,296 created the Regulatory Unit for Communications Services (hereinafter "**URSEC**", its Spanish acronym), as a decentralized body of the Executive Branch. Under Article 73 of this Law, the URSEC is responsible for regulating and controlling activities relating to telecommunications, "…which are understood as any transmission or reception of signs, signals, written messages, images, sounds, or information of any nature by wire, radio, optical, and other electromagnetic systems, and also those activities that concern the admission, processing, transportation, and distribution of correspondence by postal operators."[22]

90. On 25 March 2003, Decree 114/003 on the Management and Supervision of the Radio Electric Spectrum, was approved for the purpose of, *inter alia*, providing for an efficient use of the radio electric spectrum, promoting the use thereof as a force for economic and social advancement and providing for an equal access to radio electric resources under open, transparent and nondiscriminatory procedures (Article 2).[23]

91. On 25 March 2003, Decree 115/003 on the Telecommunications Licenses Regulation Decree was also approved. Article 9 thereof reads as follows:

> *"1. Class A - Telecommunications License: Grants authorization for the operation of a public telecommunications network and the provision through these means of telecommunications services technically and legally feasible according to laws in force, with the exception of cable TV. The license includes the right and obligation to provide interconnection and negotiate reciprocal compensation for switched telephone network access and terminating access services.*
>
> *2. Class E - Telecommunications License: Grants authorization for the provision of telecommunications services using the network,*

[21] Claimant's Memorial, ¶ 20; Resolution 444/000 of 12 December 2000, DNC, C-012.

[22] Claimant's Memorial, ¶ 21; Respondent's Counter-Memorial, ¶ 214; Law 17,296 of 21 February 2001, C-013.

[23] Claimant's Memorial, ¶ 22; Decree 114/003 of 25 March 2003, C-017.

means or links owned by the holder or third party suppliers as support.

There are three sub-classes within this category:

Class B1 Telecommunications License: Grants authorization for the provision of telecommunications services arising from its technical plan and for the provision of which the licensee needs to access numeration resources, links or other means of the networks of holders of Class A Telecommunications licenses.

Class B2 Telecommunications License: Grants authorization for the provision of telecommunications services arising from its technical plan and for the provision of which the licensee does not need to access numeration resources, links or other means of the networks of holders of Class A Telecommunications licenses.

3. Class C - License for the lease of telecommunications links, media and systems: Grants authorization exclusively for the installation of telecommunications links, media and systems for the provision thereof or to be leased to licensees of telecommunications services.

4. Class D – Cable TV License: Grants authorization for the provision of television services through subscription which require the use of wired or wireless transmission media for the broadcast of contents."[24]

92. On 6 July 2005, Mr. Luis Herbón, Director of Trigosul at that time, sent a letter to Engineer Juan Piaggio, URSEC's General Manager (from 31 March 2005 to 1 December 2008)[25] in which he stated the following: "We are writing to request that you adjust TRIGOSUL S.A.'s data transmission license in accordance with the provisions set forth in Law No. 17,296 dated February 21, 2001 and in Decrees 114/03 and 115/03 dated March 25, 2003."[26]

93. On 15 August 2005, Mr. Herbón sent a further letter to Mr. Piaggio in which he reported the import of equipment by Trigosul and sought its homologation. In addition, he added

[24] Decree 115/003 of 25 March 2003, C-017.

[25] Statement of Mr. Juan Piaggio, 23 December 2016, ¶ 1.

[26] Letter from Mr. Luis Herbón to URSEC, 6 July 2005, C-020; Statement of Mr. Luis Herbón, dated 16 September 2016, ¶ 18.

the following: "… we would appreciate it if you could inform us of the procedure initiated some time ago, by letter dated July 6, 2005, for the adjustment of the allocation of frequencies to TRIGOSUL, S.A., in accordance with the provisions of Act No. 17.296 of February 21, 2001 and the Decrees 114/03 115/03 both dated March 25, 2003."[27]

94. The Treaty was signed on 4 November 2005 and came into force on 1 November 2006.[28]

95. On 26 January 2006, Mr. Herbón sent a letter to Mr. Ricardo Martínez of URSEC in which he referred to a debt payment agreement of Trigosul with the URSEC (by way of usage of the radio spectrum), as per file 2003/1/1419; Mr. Herbón also referred to the request for adjustment of Trigosul's license (as per file 2005/1/1476) and to a negotiation with another company called UTE, which required URSEC's authorization to transport a data signal through dark fiber belonging to UTE. In addition, Mr. Herbón pointed out that the adjustment of the license had delayed another investment in the amount of USD 6,500,000, and that those investors demanded the adjustment as a condition to continue with the project.[29]

96. On 23 March 2006, Mr. Herbón sent another letter, via fax, to Mr. León Lev, President of URSEC (from 15 August 2005 to 2 June 2008),[30] in which reference was made to a meeting they had held on 15 March 2006. Mr. Herbón also referred to a meeting of Trigosul shareholders with potential investors, and he stated that the latter required the "B1 type license", as per Decree 115/2003, to make their investment, for which reason he appealed to Mr. Lev of URSEC "…to define this situation [of the license] favorably."[31]

[27] Claimant's Memorial, ¶ 32; Letter from Mr. Luis Herbón to URSEC, 15 August 2005, C-21.

[28] Request, ¶ 1; Exh-1.

[29] Claimant's Memorial, ¶ 33; Letter from Mr. Luis Herbón to URSEC, 26 January 2006, C-22; Statement of Mr. Luis Herbón, of 16 September 2016, ¶ 20.

[30] Statement of Mr. León Lev, 28 December 2016, ¶ 1.

[31] Claimant's Memorial, ¶ 34; Letter from Mr. Luis Herbón to URSEC, 23 March 2006, C-23; Statement of Mr. Luis Herbón, of 16 September 2016, ¶ 21.

97. On 27 December 2006, Decree 249/006 set forth that URSEC would hold a public bidding process "…to allocate the available spectrum in the band from 3,300 MHz to 3,700 MHz for terrestrial services…"[32]

98. On 8 March 2007, the National Administration of Telecommunications (hereinafter, "**ANTEL**," its Spanish acronym) issued the "Response of the National Telecommunications Administration to the Open Consultation on the 'Public Bidding Process for the Allocation of Radio Spectrum in the Band 3300–3700 MHz.'" In that document, ANTEL expressed its opposition to the public bidding process proposed by URSEC. It concluded in a section under the title "Re-allocation and re-assignation of the Band" that, given the public bidding process project, the 3.3GHz to 3.7GHz band should be re-allocated in its entirety, under non-discriminatory conditions to the different interested telecommunications providers.[33]

99. On 17 February 2009, Article 9 of Decree 115/003 (paragraph 91 above) was amended by Executive Order IE 810 in the following terms:

> *"Article 9 – Classes of license*
>
> *Telecommunications License – Class A: Authorizes the operation of a public telecommunications system and the provision by those means of telecommunications services that are technically and legally viable according to current legislation, with the exception of the subscriber television service. The license includes the right and the obligation to provide interconnection and to negotiate reciprocal compensation for access services or telephone switched termination.*
>
> *Telecommunications License – Class B: Authorizes the provision of all data transmission services that are technically and legally viable according to current legislation, using as support their own network, resources or links or those of another provider, on the conditions freely agreed between the parties.*

[32] Claimant's Memorial, ¶ 40; Decree 249/006 of 27 December 2006, C-024.

[33] Claimant's Memorial, ¶ 40; Response of the National Telecommunications Administration to the Open Consultation on the "Public Bidding Process for the Allocation of Radio Spectrum in the Band 3300–3700 MHz.," dated 8 March 2007, C-025, page 6.

> *License for the hire of links, resources and telecommunications systems – Class C: Authorizes on an exclusive basis the installation of links, resources and telecommunications systems for their provision or hire to telecommunications service licensees.*
>
> *Subscriber Television License – Class D: Authorizes the provision of television services by subscription that require the use of wired or wireless transmission means for broadcast of the contents."*[34]

100. On 30 July 2010, Mr. Herbón sent a letter to URSEC in which he reported the relocation of "…the transmission equipment from its current location to the city of Punta del Este, on the building El Torreón, pent house, District of Maldonado. This relocation involves a change in the service we are providing, as we will begin to [sic] provide [a] data transmission service."[35]

101. On 28 December 2010, Dra. Graciela Coronel, URSEC's General Counsel, issued a report regarding Trigosul in which she stated that on 21 December 2010, URSEC had conducted an inspection at the address reported by Trigosul in December 2006 (at Torre El Gaucho) and that the company was not found at that address. She added that URSEC had no record whatsoever of the relocation or the authorizations for new stations; she concluded that Trigosul was not providing services. Her report also noted that the last affidavit submitted by that company on the Regulatory Framework Control Fee was from the July-September 2009 period. Based on Decree 114/003, Dra. Coronel recommended the revocation of the authorization and release of the frequencies.[36]

102. On 12 January 2011, Mr. Herbón sent a letter to Engineer Gabriel Lombide, President of URSEC (since 23 August 2010)[37] in which he referred to Dr. Coronel's report. He explained that on 30 July 2010, Trigosul had sent a communication to URSEC, via fax, in which he reported Trigosul's relocation to the District of Maldonado (see paragraph 100 above); Mr. Herbón also reported an inspection Trigosul had requested on 6 October 2010, and denied non-compliance with the payment for the use of the spectrum. In addition, Mr.

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[34] Claimant's Memorial, ¶ 50; Executive Order IE 810, Article 1, C-049.

[35] Claimant's Memorial, ¶ 53; Letter from Mr. Luis Herbón to Mr. G. Lombide dated 30 July 2010, C-026.

[36] Claimant's Memorial, ¶ 63; Report dated 28 December 2010, URSEC, C-066.

[37] Statement of Mr. Gabriel Lombide, 21 December 2016, ¶ 1.

Herbón pointed out that since 2005, the company had requested readjustment of the license and he referred to a visit he had made, in March 2006, to Mr. León Lev, President of URSEC, at which he had submitted a Memorandum in which he stated that the lack of adjustment of the license "adds to our authorization a legal instability that made us threaten investments."[38]

103. On 19 January 2011, Dra. Isabel Maassardjian, URSEC's Legal Advisor, issued a "Legal Report" in which, among other things, she pointed out that the arguments invoked by Trigosul (see the preceding paragraph) contributed no new evidence "to contradict what has been duly reported" (referring to Dr. Coronel's report). Therefore, she recommended: (a) releas[ing] the frequencies established in URSEC Resolution No. 444/000 of 12 December 2000 (see paragraph 88 above) and (b) "propos[ing] that the Executive Power revoke the authorisation granted to the company by Resolution No. 142/000 of February 8, 2000, annulling Resolution No. 97-219 of January 17, 1997." (See paragraph 84 above).[39]

104. On 20 January 2011, URSEC issued Resolution 001 by which it released "… sub-blocks K and M, corresponding to the 3425-3450 MHz and 3525-3550 MHz sub-bands of frequencies that were assigned to Trigosul S.A. through the National Department of Communications' Resolution No. 444/000 of December 12, 2000."[40]

105. On 1 March 2011, Trigosul filed "the appeal for revocation and the appeal on a subsidiary basis to the higher administrative authority" against Resolution 001 issued by URSEC on 20 January 2011.[41]

106. On 8 July 2011, through Resolution 335/011, the Ministry of Industry, Energy and Mining (MIEM) revoked "… the authorization transferred to the company TRIGOSUL S.A. through the Executive Power's Resolution No. 142/00 of 8 February 2000 [cited by the

[38] Letter from Mr. Luis Herbón to Mr. G. Lombide, 12 January 2011, C-026.

[39] Claimant's Memorial, ¶ 66; URSEC Report dated 19 January 2011, C-067.

[40] Claimant's Memorial, ¶ 67; Respondent's Counter-Memorial, ¶ 213; Resolution 001 of 20 January 2011, URSEC, C-068.

[41] Claimant's Memorial, ¶¶ 68-69; Letter from Mr. A. Durán Martínez to Mr. G. Lombide, 1 March 2011, C-069.

Tribunal in paragraph 84], for the provision, on a commercial basis within the national territory, of dedicated digital wireless lines, without a connection to the public telephone network for point to point and point to multipoint data transmission, annulling the Executive Power's Resolution No. 75,219 of 17 January 1997."[42]

107. On 28 October 2011, Trigosul submitted a "Petition for Annulment" before the "*Tribunal de lo Contencioso Administrativo*", against URSEC's Resolution 001 of 20 January 2011 (paragraph 104 above).[43]

108. On 22 March 2012, Trigosul submitted a "Petition for Annulment" before the "*Tribunal de lo Contencioso Administrativo*", against Resolution 335/011 issued by the MIEM on 8 July 2011 (paragraph 106 above).[44]

109. On 25 October 2012 the "*Tribunal de lo Contencioso Administrativo*", through interlocutory judgment No. 685/2012, decided the consolidation of the petitions for annulment described in paragraphs 107 and 108 above.[45]

110. On 5 September 2013, URSEC, through Resolution 220/13, ordered the replacement of the allocation of the sub-blocks to the company Dedicado S.A. (Trigosul's competitor), as follows:[46]

Sub-Blocks replaced	Replacement Sub-Blocks
3600-3625 MHz	3425-3450 MHz
3675-3700 MHz	3525-3550 MHz

[42] Claimant's Memorial, ¶ 72; Respondent's Counter-Memorial, ¶ 237; Resolution 335/011 of 8 July 2011, MIEM, C-072.

[43] Claimant's Memorial, ¶ 74; Petition for Annulment, 28 October 2011, C-074.

[44] Claimant's Memorial, ¶ 74; Petition for Annulment, 22 March 2012. C-075.

[45] Claimant's Memorial, ¶ 74; "Prueba Trigosul SA con Poder Ejecutivo - URSEC," 25 October 2012, C-077.

[46] Resolution 220/13 of 5 September 2013, URSEC, C-084.

111. On 23 October 2014, the "*Tribunal de lo Contencioso Administrativo*" rendered Judgment 579/2014 (the "**Judgment**") that decided to annul the administrative acts challenged (URSEC Resolution 001 and MIEM Resolution 335/011).[47]

112. On 23 December 2014, Mr. Herbón sent a letter to URSEC in which he requested the homologation of the equipment to be imported.[48] On 19 January 2015, he repeated his request.[49]

113. On 5 February 2015, Mr. Herbón sent a letter to Engineer Gabriel Lombide (Director of URSEC) (received on 9 February 2015), in which, on the basis of the Judgment, he asked URSEC to "[o]rder that TRIGOSUL S.A. be inscribed in the Register of Data Transmission Service Providers." He also asked URSEC to "[o]rder that the necessary measures be taken to place TRIGOSUL S.A. in the situation that it was in when URSEC Decision No. 001 of January 20, 2011 (now annulled) was issued so that it can once again provide the telecommunications services made possible by the allocated frequencies."[50]

114. On 26 February 2015, Dra. Susana Gianarelli, Clerk of the "*Tribunal de lo Contencioso Administrativo*", sent Engineer Lombide a letter whereby, as provided for in the Judgment, she returned the administrative record of Trigosul.[51]

115. On 5 August 2015, Italba informed the Government of Uruguay that the present dispute had arisen.[52]

116. On 5 April 2016, by means of Executive Order IE 156, the MIEM decided: "[t]o overturn decision No. 335/011 of the Executive Branch, dated July 8, 2011, and to establish the full effectiveness of the authorization granted to Gustavo Alberelli by means of Executive Branch decision No. 75 – 219 of January 17, 1997 and the transfer to TRIGOSUL S.A.

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[47] Claimant's Memorial, ¶ 76; Judgment 579/2014 of the "*Tribunal de lo Contencioso Administrativo*", dated 23 October 2014, C-076.

[48] Claimant's Memorial, ¶ 77; Letter from Mr. Luis Herbón to URSEC, 23 December 2014, C-078.

[49] Letter from Mr. Luis Herbón to URSEC, 19 January 2015, C-079.

[50] Claimant's Memorial, ¶ 78; Letter from Mr. Luis Herbón to URSEC, 5 February 2015, C-082.

[51] Claimant's Memorial, ¶ 78; Letter from Mr. Luis Herbón to URSEC, 26 February 2015, C-083.

[52] Letter from Italba to Uruguay International Economic Affairs Secretariat and President of Uruguay dated 5 August 2015, C-090.

authorized by Executive Branch decision No. 142/000 dated February 8, 2000, indicating that it is authorized under the conditions established in the original decision: to provide in the national territory, commercial, dedicated wireless digital lines, without connection to the public telephone network, for the transmission of point-to-point and point to multipoint data." In addition, such Resolution indicated: "[t]o order the Regulatory Unit of Communication Services to allocate the corresponding frequencies for the provision of the service, in accordance with the above paragraph."[53]

117. On 27 April 2016, Mr. Herbón sent Engineer Lombide a communication referred to as "Conducting of hearing," stating that, according to URSEC Minutes No. 3 of 4 February 2016, the following blocks of frequencies were reserved: 3600-3625 MHz and 2675-3700 MHz [though not expressly stated in Mr. Herbón's communication, the Tribunal understands that reservation was made for Trigosul]. Mr. Herbón added that those were not Trigosul's previous frequencies, but that Trigosul S.A. had sub-blocks 3425-3450 MHz and 3525-3550 MHz. Moreover, he reported that the frequencies reserved by URSEC "are not as useful or valuable as the frequencies that TRIGOSUL S.A. had previously, which were taken from it by the annulled decision." Mr. Herbón stated that that was the reason why he did not accept the frequencies proposed by URSEC.[54]

118. On 6 May 2016, Mr. Yanos, Italba's counsel, sent a letter to the Respondent's counsel, stating that the 3600-3625 MHz and 3675-3700 MHz frequencies were not those previously expropriated by Uruguay from Italba and its subsidiary, Trigosul. He added that those frequencies were worthless and, therefore, did not conform to Uruguay's obligation to provide Italba with "prompt, adequate, and effective" compensation under the Treaty.[55] On the same day, Respondent's counsel stated that Uruguay disagreed with the assertions made in such communication.[56]

119. On 19 May 2016, Uruguay sent Italba a draft URSEC resolution dated 9 May 2016. Uruguay proposed to revoke Decision No. 220/013, leaving without effect the replacement

[53] Claimant's Memorial, ¶ 81, Executive Order IE 156 of 5 April 2016, C-094.

[54] Communication from Mr. Luis Herbón to URSEC, 27 April 2016, R-064.

[55] Letter from Italba, 6 May 2016, C-096.

[56] Letter from Respondent, 6 May 2016, C-097.

of the allocation of sub-blocks established therein to the company, Dedicado S.A., (paragraph 110 above) and to allocate to Trigosul frequency sub-blocks 3425-3450 MHz and 3525-3550 MHz, "of a temporary and revocable nature, for the provision in national territory, of commercial, dedicated wireless digital lines, without connection to the public telephone network, for the transmission of point-to-point to multipoint data."[57]

120. On 31 May 2016, counsel for Italba sent a letter to counsel for the Respondent in connection with the draft Resolution dated 9 May 2016, stating that: "The Draft Resolution purports to comply, almost two years after the fact, with legal obligations that URSEC faced when the Uruguayan courts ordered it in October 2014 to reinstate the investments made by Italba in Uruguay. We write to advise you that Italba categorically rejects the proposal in the Draft Resolution."[58]

IV. THE PARTIES' CLAIMS

121. Italba's position, based on Article 6 of the Treaty, is that Uruguay expropriated its investment.[59] Italba stated that it has 100% ownership and control of Trigosul, its subsidiary enterprise in Uruguay. According to the Claimant, through Trigosul, Italba held a license and had the right to operate in the spectrum and provide wireless data services in Uruguay. Italba contended that such license is a protected investment under Article 1 of the Treaty. It added that part of its investment includes telecommunications equipment, office equipment, commercial leases, and other tangible property held by Trigosul.[60]

122. Regarding its investments, Italba also pointed out that:

> *"Italba began investing in Uruguay twenty years ago. Since that time, Italba has made substantial contributions of capital, amounting to several million dollars, toward the development and operation of a telecommunications company to provide wireless data services within Uruguay. Around 1999, Italba acquired*

[57] Claimant's Memorial, ¶ 83; Respondent's Counter-Memorial, ¶ 26; Draft Resolution of 9 May 2016, C-098.
[58] Letter from Italba, 31 May 2016, C-099.
[59] Claimant's Memorial, ¶¶ 104-121; Claimant's Reply, ¶¶ 172- 218; Claimant's Post-Hearing Brief, ¶¶ 42-58.
[60] Claimant's Memorial, ¶ 93.

> *Trigosul as a subsidiary enterprise. Through Trigosul, Italba purchased equipment, hired personnel, obtained a telecommunications license, and began commercial operation in Uruguay in June 2003. Throughout the period of its development and operation of Trigosul, Italba was exposed to market risks in the telecommunications industry. Therefore, Italba's activities in Uruguay qualify as 'investments.'"*[61]

123. Italba claimed a breach of Article 5 of the Treaty whereby Uruguay had an obligation to accord investors fair and equitable treatment. According to the Claimant, the Respondent failed to accord it due process and also denied it justice.[62]

124. The Claimant added that Uruguay accorded it a treatment less favorable than that accorded, in like circumstances, to other investors, in breach of Articles 3 and 4 of the Treaty.[63] Based on Article 5 of the Treaty, it also contended that Uruguay failed to provide its investment with full protection and security.[64] Furthermore, on the basis of Article 4 of the Treaty, which contains the Most Favored Nation clause, Italba relied on the Agreement between the Government of the Oriental Republic of Uruguay and the Government of the Republic of Venezuela for the Encouragement and Reciprocal Protection of Investments, which is not limited to police protection like the Treaty.[65]

125. The Respondent considered that there was no expropriation in this case, as Uruguayan authorities complied with the Judgment.[66] In addition, neither the revocation of the frequencies, nor their allocation to Dedicado S.A. may be deemed an expropriation, as the allocations of frequencies in the spectrum "…are provisional and revocable in nature, and do not confer rights recognized or protected by law in Uruguay."[67]

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[61] Claimant's Memorial, ¶ 94.

[62] Claimant's Memorial, ¶¶ 122-150; Claimant's Reply, ¶¶ 219-241 and 242-280; Claimant's Post-Hearing Brief, ¶¶58-64.

[63] Claimant's Memorial, ¶¶ 151-166.

[64] Claimant's Memorial, ¶¶ 167-175; Claimant's Reply, ¶¶ 281-291.

[65] Claimant's Memorial, ¶¶ 168-174.

[66] Respondent's Counter-Memorial, ¶ 30; Respondent's Rejoinder, ¶¶ 226-249.

[67] Respondent's Counter-Memorial, ¶ 248; Respondent's Rejoinder, ¶¶ 269-272.

126. Furthermore, the Respondent stated that Article 5 of the Treaty enshrines a minimum standard of treatment, which Italba purports to extend in its claim, although it has failed to show grounds for such a broad interpretation.[68] Uruguay asserted that Trigosul was not treated less favorably than any other company in like circumstances,[69] and stated: "[n]one of the alleged adjusted or adapted licenses was issued to any of the companies mentioned by the Claimant."[70]

127. In connection with full protection and security, Uruguay asserted that the protection set forth in the Treaty is limited to "…police protection of the investment against any action of a criminal nature."[71] It added that "[t]he clear intention of the States Parties regarding the definition of this obligation, which was a fundamental condition of their agreement to the BIT, cannot be annulled by importing a contrary definition in another treaty by mere operation of a most favored nation clause."[72]

128. The positions of the Parties having been summarized, the Tribunal notes that, by reason of its decision on the jurisdictional objections, it will not elaborate further on the arguments on the merits of the dispute.

129. Before it addresses the jurisdictional issues, the Tribunal will proceed, in the following section, to analyze the Claimant's challenges to one of the experts for Uruguay.

V. EXPERT REPORT OF PROFESSOR DE MELLO

A. The Parties' Positions

130. At the Hearing, the Claimant questioned the independence of one of the experts for the Respondent, Professor Eugenio Xavier de Mello Ferrand, a member of the law firm Ramírez, Xavier de Mello & Abal (the "**Firm**"). The Claimant pointed out that members

[68] Respondent's Counter-Memorial, ¶¶ 182-196; Respondent's Rejoinder, ¶¶ 286-296.
[69] Respondent's Counter-Memorial, ¶ 261; Respondent's Rejoinder, ¶¶ 331-334.
[70] Respondent's Counter-Memorial, ¶ 171.
[71] Respondent's Counter-Memorial, ¶ 197; Respondent's Rejoinder, ¶¶ 351, 355-358.
[72] Respondent's Counter-Memorial, ¶ 203; Respondent's Rejoinder, ¶¶ 359-366.

of the Firm are currently representing the Republic of Uruguay in another arbitration proceeding. In its communications of 21 November and 1 December 2017, the Claimant reiterated its objections and questioned the expert's independence.[73]

131. In the course of the Hearing, Professor de Mello answered the questions posed by the Claimant's counsel, confirmed that he is a member of the Firm, and indicated that he had recently learned that attorneys at the Firm were representing Uruguay in another case. He explained that the Firm is based on a model called an "economic interest group," (hereinafter "**GIE**", its Spanish acronym) a French concept, where there is a central services unit, but the relationship between the attorneys and their clients is individual, as each attorney works independently and autonomously from the others.[74]

132. Professor de Mello stated:

> *"Now, I'd like to add that the economic interest group is a contract which is entered in the national commercial registry. This economic interest group that I'm part of is entered in the national commercial registry, and the text expressly states that each attorney works separately and that we are not partners. We have no joint and several responsibility. We are not responsible or liable for what the other lawyers do. Therefore, I don't think that I need to be involved in any conflict of interest because of any action that my colleagues in the economic interest group may be involved in."*[75]

133. Professor de Mello reported at the hearing that he had not consulted the other attorneys at the Firm about potential conflicts of interest when Uruguay retained him to issue the report in question, because the said attorneys enjoy autonomy in their professional work, and such GIE is regulated by the Uruguayan Commercial Companies Act (Articles 469 *et seq*).[76]

[73] Transcript of the Hearing of 17 November 2017 (Day 5), 1179-1205; Italba's Letters dated 21 November 2017 and 1 December 2017.

[74] Transcript of the Hearing of 17 November 2017 (Day 5), 1179: 20-1180: 11; 1181: 17-1182: 3; 1183: 12-1184: 4.

[75] Transcript of the Hearing of 17 November 2017 (Day 5), 1184: 12-1185: 1.

[76] Transcript of the Hearing of 17 November 2017 (Day 5), 1185: 12-22.

134. At the Hearing, counsel for Italba questioned Professor de Mello's independence by stating that he was a "partner" of some attorneys at the Firm who are currently representing Uruguay in another case.[77]

135. On 21 November 2017, Italba questioned Professor de Mello's independence once again, on the basis of Article 5(2) (a) of the IBA Rules on the Taking of Evidence in International Arbitration (the "**IBA Rules**"). Italba pointed out that Professor de Mello had breached the provisions of such Article by failing to disclose in his report that the Firm was representing Uruguay in another proceeding. Italba questioned Professor de Mello's alleged lack of awareness of the mandate of his "partners", it being public and common knowledge that "[m]ore importantly economic relationships similar to the one described by Prof. Xavier de Mello have been held to be insufficient to overcome the conflict created when one member of a law firm or law firm-like entity acts for a client and another member of the same firm proclaims independence from that client. On this point, the tribunal's decision in *Hrvatska v. Republic of Slovenia*[78] ("*Hrvatska*") is instructive."[79] For these reasons, by its letter of 21 November 2017, Italba invited the Tribunal to disregard Professor de Mello's report.

136. On 30 November 2017, Uruguay stated that Article 490 of the Commercial Companies Act (Law No. 16,060) (the "**Commercial Companies Act**"), enacted on 4 September 1989, draws a distinction between a GIE and a traditional law firm. According to the Respondent, the members of a GIE are independent from each other; it is a group of people who share facilities and administrative services for convenience. Each member has her/his own clients and receives her/his own fees.[80]

137. Regarding the IBA Rules and experts' independence, Uruguay cited to the "Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International

[77] Transcript of the Hearing of 17 November 2017 (Day 5), 1195: 7-11.

[78] *Hrvatska Elecktroprivreda, d.d. v. Republic of Slovenia*. Tribunal's Ruling regarding the participation of David Mildon QC in further stages of the proceedings, 6 May 2008, ICSID Case No. ARB/05/24, CL-159 ("Hrvatska*")*.

[79] Italba's Letter, 21 November 2017, page 2.

[80] Uruguay's Letter, 30 November 2017, page 2.

Arbitration" as follows: "… the rules' references to the independence of party-appointed experts is understood 'in the sense that he or she has no financial interest in the outcome or otherwise has relationships that would prevent the expert from providing his or her honest and frank opinion.'"[81]

138. In connection with the reference to "partners" on the Firm's website, Uruguay indicated that, in the instant case, such term does not have the same meaning as that attributed to "partners" in the context of the members of an American law firm. Uruguay pointed out that another member of the Firm was one of the main experts in another case against Uruguay. It also stated that the *Hrvatska* case cited by Italba does not apply to this case, as it concerned a member of the arbitral tribunal itself rather than an expert.[82]

139. On 1 December 2017, Italba repeated its request that the Tribunal decline to consider the evidence of Professor de Mello. It pointed out that the Firm's agreement to serve as counsel for Uruguay in a separate arbitration was in force when Professor de Mello issued his report in this arbitration proceeding and was still effective at the time of his testimony. It indicated that these facts disqualify Professor de Mello as an independent expert in accordance with Article 5 (2) (c) of the IBA Rules.

140. Italba pointed out that on its website, the Firm describes itself as "... (a) a single law firm that (b) shares associates, (c) describes its clients as jointly held, and (d) seeks to share the prestige of each individual member for the benefit of the group and each of its members."[83] According to the Claimant, such website refers to the Firm's "partners" and to the provision of a comprehensive professional service; it also stated that the members of the Firm share a team of associates and offer full legal assistance.[84]

141. For Italba, the Firm owes loyalty to Uruguay, and, when referring to the case in which a member of the Firm acted as an expert against Uruguay in another arbitration proceeding,

[81] Uruguay's Letter, 30 November 2017, page 2; IBA. Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration (2010), p. 19.

[82] Uruguay's Letter, 30 November 2017, pages 3 and 4.

[83] Italba's Letter, 1 December 2017, page 2.

[84] Id.

the Respondent forgets that such proceeding, and, thus, the potential conflict for this case, have concluded. In Italba's opinion, *Hrvatska* is relevant in its analysis of the failure of the persons challenged to disclose their professional relationships.

142. Italba considered that "…Mello's undisclosed relationship disqualifies him as an independent expert in this case."[85]

143. On 8 December 2017, Uruguay stated that Italba had taken no account of the fact that Professor de Mello obtained no economic benefit from the professional work of the other members of the Firm representing Uruguay or the colleague who issued a report in another case against Uruguay.[86]

144. Uruguay considered that the fact that the Firm's website uses the word "partners" is irrelevant, as the GIE structure in Uruguay means an entity the members of which are both professionally and financially independent. The reference to "their clients" on the website does not support Italba's statement that the members of the Firm share their fees. It also stressed that the members of the firm do not share clients or income or associate attorneys with one another. It asserted that the statement whereby the members of the Firm seek "… to benefit from their association with one another beyond the need to share costs" does not show how Professor de Mello's independence is compromised. Uruguay disputed the application of the *Hrvatska* case to this proceeding and pointed out that, in response to the Tribunal's questions at the hearing, Professor de Mello answered that he did not, and will not, receive any of the fees to be collected by his Firm colleagues.[87]

B. The Tribunal's Decision

145. As stated above, in the course of the Hearing and in their Post-Hearing Briefs on the matter, counsel for Italba questioned Professor de Mello's independence on the ground that he is a "partner" of other attorneys at his Firm representing Uruguay in another case. The Tribunal adds that the word *socio* is often translated into English as "partner". However,

[85] Italba's Letter, 1 December 2017, page 3.

[86] Uruguay's Letter, 8 December 2017, page 2.

[87] Uruguay's Letter, 8 December 2017, pages 3 and 4.

this translation is not always accurate. According to "*Diccionario de la Lengua Española de la Real Academia Española*," the first entry of the word "*socio*" is "a person associated with another or others for a purpose." In turn, the word "*asociar*" has several meanings. The one relevant to the issue in dispute is "to get together or gather for a purpose." That is why there is not necessarily a complete correspondence between the English word "partner" and the Spanish word "*socio.*"

146. The Tribunal considers that, in order to decide this issue, it should examine the rules that lay down the structure of GIE in Uruguay. Article 489 of the Commercial Companies Act provides:

> *"(Concept). Two or more natural or legal persons may form an economic interest group for the purpose of promoting or developing the economic activity of its members, or else improving or increasing the results thereof. By itself, it shall entitle its associates neither to derive nor to be distributed profits, and it may be organized without a capital. It shall be a legal person."* [Tribunal's Translation][88]

147. Pursuant to the foregoing Article, such an entity may be formed by natural or legal persons in order to promote or develop the economic activity of its members. In the case at issue, the economic activity of the members of the Firm is to offer professional legal services. The rule quoted above also provides that a further purpose of GIEs is to improve or increase the results of such activity. That does not necessarily mean that its members work jointly or seek to derive shared profits. Such Article is crystal clear when stating that the GIE itself entitles its associates neither to derive, nor to be distributed, profits and adds that it may even be formed without any capital contributions, which is not the case of other legal entities, such as corporations.

148. Professor de Mello stated at the Hearing:

> *"This economic interest group that I'm part of is entered in the national commercial registry, and the text expressly states that each attorney works separately and that we are not partners. We have no*

[88] Commercial Companies Act of 4 September 1989, Article 489, EXM-006.

joint and several responsibility. We are not responsible or liable for what the other lawyers do."[89]

149. Italba questioned neither such registration nor the statements made by Professor de Mello; it particularly referred to the contents of the Firm's website, which describes the Firm as a result of the merger of two firms, able to draw on the experience of its individual members to provide a full range of legal services to its clients. The website also refers to the Firm's "clients" and describes its members as "partners".[90]

150. The Tribunal is aware that there are various ways in which legal professionals collaborate to render their services. The most commonly adopted model has been that in which a group of legal professionals owns a law firm, which hires other attorneys to provide services as "associates", "assistants" or in other capacities which vary depending on the country and the structure of the law firm. Nevertheless, the Tribunal is also aware that, in different countries, and especially in Latin America, it is often the case that attorneys work individually, or a group of legal professionals share expenses, facilities and other services, each of them being completely independent from the others as far as her/his professional work is concerned and obtaining no benefit from the work of her/his colleagues.

151. The Tribunal considers that the GIE of which Professor de Mello is a member cannot be equated as a law firm in which the members are in partnership and share profits. An GIE in Uruguay is more akin to a barristers' chambers in England and it has long been recognized that there is no automatic disqualification, for example, where a member of a barristers' chambers acts as an arbitrator in a case where another member is acting as counsel. *A fortiori*, there cannot be an automatic disqualification in circumstances where a member acts as an expert either.

152. The Claimant places particular emphasis upon the fact that Professor de Mello did not disclose, in his report or otherwise, that other colleagues of the GIE of which he is a member, are currently advising Uruguay in another arbitration. Professor de Mello acknowledged at the Hearing that he failed to disclose that Uruguay had retained other

[89] Transcript of the Hearing of 17 November 2017 (Day 5), 1184: 12-1185: 1.

[90] Website of Ramírez Xavier de Mello Abal, C-287.

members of the Firm in those proceedings; he stated that he failed to make such disclosure because he was not aware of such circumstance when preparing his report for this arbitration proceeding. Italba questions this assertion as hard to believe.

153. Once again, the nature of the GIE structure must inform the extent and content of any disclosure obligation upon Professor de Mello. If the members of a GIE do not share profits and are not considered to be in conflict of interest situation when they act on different sides in the same case under Uruguayan law, then there would be no reason for Professor de Mello to disclose that other members of the GIE of which he is part were advising Uruguay in another arbitration. Again, an analogy might be drawn with a barristers' chamber in England where one member has no right to information about the activities of another member and it would be a breach of that member's duty of confidentiality to his/her client to disclose such information. In those circumstances it cannot be appropriate to require the member to disclose information about the activities of other members within the same barristers' chambers. There is no doubt that similar considerations apply to members of a GIE under Uruguayan law.

154. In respect of the Claimant's reliance on how the members of the Firm are characterized on the internet, the Tribunal considers that what is important is the legal structure of the Firm rather than how it is described on a website. In this case, the Firm is entered as a GIE in the National Commercial Registry. The contents of a website cannot alter the legal structure or registration of the Firm.

155. Therefore, the Tribunal considers that the contents of the Firm's website neither warrant Italba's challenge to Professor de Mello's independence nor prove that the professional service he rendered to Uruguay had been affected by the work currently or previously performed by other colleagues for or against Uruguay.

156. Article 5 (2) (a) and (c) of the IBA Rules does not require an expert to submit a statement concerning the present or past relationship with the Parties of all the members of her/his law firm, office, corporation or any other legal structure of which the expert is part. Such rule is very specific and refers to the expert's present or past relationship with any of the Parties and other actors in the proceeding (legal advisors and members of the Tribunal).

157. An expert's objectivity and independence may be impaired, *inter alia*, by economic and personal factors. From the economic standpoint, it is crystal clear that merely receiving fees for the preparation of a report does not interfere with the expert's independence;[91] an expert could not be expected to work *pro bono* as a prerequisite to her/his independence. Objectivity could be impaired if an expert participated in an arbitration proceeding and it was shown that she/he would obtain an economic benefit if the outcome of the proceeding were favorable to the retaining party.

158. Professor de Mello made it very clear at the Hearing that he was not aware of the fact that other members of the Firm serve as counsel for Uruguay in a separate arbitration proceeding. He was adamant that neither he nor the GIE of which he is a member obtains any direct economic benefit from the fees that his colleagues will receive in consideration for their work in such case.[92]

159. An expert's independence should be assessed on a case-by-case basis. In the instant case, Professor de Mello was not proved to have obtained from Uruguay, either directly or otherwise, an economic benefit which may affect his independence.

160. The case cited by Italba, *Hrvatska*, does not assist the Tribunal's analysis, because it addressed a fundamentally different issue; namely, the power to exclude a new member of a counsel team in circumstances where the independence and impartiality of an arbitrator could have been brought into question if that new member were permitted to continue to act.

161. Based on the foregoing analysis, the Tribunal rejects Italba's request that the report prepared by Professor de Mello be excluded from the record of this arbitration proceeding.

[91] International Bar Association. Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration (2010), page 19.

[92] Transcript of the Hearing of 17 November 2017 (Day 5), 1269: 11-1270: 3.

VI. JURISDICTION

162. Uruguay raised jurisdictional objections and defenses on the merits. It considers that the Tribunal has no jurisdiction because Italba neither owns nor controls Trigosul and therefore cannot rely on the protection of the Treaty or the ICSID Convention; in addition, Italba has no substantial economic and business activities in the United States and, moreover, it is controlled by a national of a country that is not a Party to the Treaty, as Dr. Alberelli is Italian. Uruguay also contends that Italba's claims are time-barred, since Italba learned about Uruguay's purported breach and the damage allegedly caused thereby on 29 March 2011, not 2015, as Italba maintains. The Respondent also asserts that the rights arising from Trigosul's authorization to provide services and its allocation of frequencies are not rights protected under domestic law, as required by Article 1 of the Treaty.[93]

163. The Tribunal will summarize and analyze the Parties' arguments, and set out its own analysis and conclusions, in the following Section.

A. Ownership of the investment and control over Trigosul

(1) The Parties' Positions

a. Respondent's Counter-Memorial

164. Uruguay submitted that, although Italba bore the burden of proof, it had failed to prove its ownership of Trigosul's shares. Uruguay also indicated that the Claimant's evidence, so far as those matters were concerned, consisted of the statements of Messrs. Alberelli and Herbón, both of whom have direct interest in this proceeding, and an Advocacy Questionnaire submitted by Mr. Herbón to the Embassy of the United States in Uruguay, in which he indicated that Italba owned Trigosul.[94]

165. According to the Respondent, on 9 August 1999, when Dr. Alberelli requested the DNC to transfer to Trigosul the authorization that had been granted to him (see paragraph 83

[93] Respondent's Counter-Memorial, ¶¶ 45-49; Respondent's Rejoinder, ¶ 3.

[94] Respondent's Counter-Memorial, ¶ 52; Advocacy Questionnaire sent by Trigosul to the U.S. Embassy in Uruguay, 11 June 2001, C-102 and R-8.

above), Italba did not own or control Trigosul. On 4 November 1999, Mr. Herbón sent the DNC a communication in which he indicated that Trigosul's owners were Mr. Alberelli, with 95% of the shares, and his mother, Ms. Carmela Caravetta Durante, with the remaining 5%.[95]

166. Uruguay also submitted that, according to Article 15 of Decree 115/003, Trigosul, as a license holder, should have obtained prior authorization from the Executive or from URSEC to conduct any shareholding change[96] and there is no evidence whatsoever that Trigosul had requested any such authorization.

167. In addition, Uruguay adduced a report by the Director General of Public Registries and another by the Internal Revenue Services, in which those agencies indicated that there was no evidence in their records that Trigosul was a subsidiary of Italba.[97]

b. Claimant's Reply Memorial

168. Italba asserted that "at all relevant times," it owned Trigosul and, in any event, controlled the company. Furthermore, it submitted that, according to Florida law and Uruguayan law, Italba owns Trigosul.[98]

169. Italba submitted the following: "…in 2002, when the Alberellis realized that they had not formally transferred Trigosul's shares to Italba, they took action. First, in May 2002, they asked Dr. Alberelli's mother to transfer her shares in Trigosul to Dr. Alberelli, which she did. Second, in August 2002, the shares were transferred to Italba and moved to Miami, Florida and placed in a safety deposit box that Dr. Alberelli and his wife owned for the purpose of maintaining important documentation belonging to Italba. To indicate that the

[95] Respondent's Counter-Memorial, ¶ 56; Letter from Mr. Luis Herbón to DNC, 4 November 1999, R-19; Notarial Certificate No. 603627 of 5 November 1999, R-020.

[96] Respondent's Counter-Memorial, ¶ 57.

[97] Respondent's Counter-Memorial, ¶¶ 59-60; Letter by Lic. Joaquín Serra, Director General of Revenue, Internal Revenue Services to the Office of the President of the Republic, dated 16 December 2016, R-74; Report by the Civil Law Notary Public, Adolfo Orellano Cancela, Director General of Public Registries, dated 19 December 2016, p. 1, R-076.

[98] Claimant's Reply, ¶¶ 70-71.

shares now belonged to Italba, Dr. Alberelli noted on the back of the bundle of shares that he was transferring them to Italba."[99]

170. In addition to the statements in the preceding paragraph, the Claimant asserted that, since the acquisition of Trigosul, Italba made the investments necessary to provide the company with all of its funds. Italba also pointed out that, on 11 June 2001, it registered with the Embassy of the United States of America as the owner of Trigosul, and that by letter of 9 July 2001 it advised the Uruguayan government that Trigosul was owned by Italba.[100] It added that Italba negotiated with different companies, both in the United States and elsewhere, and that in those negotiations it held itself out as the owner of Trigosul.[101]

171. Based on Articles 30 (1) of the Treaty and Article 2,398 of the Uruguayan Civil Code, Italba added that, considering that Dr. Alberelli was in Florida at the moment of transferring Trigosul's shares to Italba (see paragraph 169 above), that transaction is governed by Florida law.[102] It also submitted that, according to that legislation, the transfer of shares is completed with the act of delivery, which in this case occurred when, after endorsing Trigosul's stock certificates with a notation indicating the transfer of his ownership interest to Italba, Dr. Alberelli placed them in a safety box in his and his wife's name.[103]

172. As to Italba's ownership rights under Uruguayan law, Italba stated:

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[99] Claimant's Reply, ¶ 72; Statement of Dr. Gustavo Alberelli, 12 May 2017, ¶ 17; Statement of Ms. Beatriz Alberelli,12 May 2017, ¶ 6; Share Certificates of Trigosul, C-161.

[100] Claimant's Reply, ¶ 73; Advocacy Questionnaire sent by Trigosul to the Embassy of the United States in Uruguay, 11 June 2011, C-102; Letter from Albert Jansenson, Vice President and CFO of Italba Telecommunications Group to Raúl J. Lago, Chief of Staff of the Office of the President of the Eastern Republic of Uruguay, 9 July 2001, C-182.

[101] Claimant's Reply, ¶ 73; Letter from S. Rossi to A. Jansenson and G. Alberelli, 3 February 2002, C-014; Co-investment Agreement among Eastern Pacific Trust and Italba Corporation, dated 14 June 2002, C-015; Letter from A. Cherp to A. Jansenson, G. Alberelli and L. Herbón, dated 8 January 2003, C-016; Joint Venture Terms Sheet between Phinder Technologies Inc. and Italba Corporation, of February 2007, C-030; Fax from D. Los Santos to A. Jansenson, dated 8 May 2001, C-168; Quotation No. 2501 of Wavelynx International, Inc., of 11 January 2000, C-159; Seller's Agreement between Italba Corporation and Wavelynx International, Inc., of 27 February 2000, C-160; Quotation No. 2501 of Wavelynx International, Inc. of 18 February 2000, C-009; Invoice from StarMesh Technologies No. 107 to Italba, dated 12 June 2007, C-169.

[102] Claimant's Reply, ¶¶ 75-78.

[103] Claimant's Reply, ¶ 79.

> *"Under Uruguayan domestic corporate law, a party can demonstrate ownership [the text of Article 305 of the Commercial Companies Act refers to the transmission of shares] in one of three ways: (a) by endorsing a stock certificate with a notation of the transfer, delivering the certificates to the transferee, and/or registering the transfer in the company's stock ledger; (b) in the absence of a formal transfer of shares, by demonstrating that, as a matter of "economic reality," the party owned and acted as the owner of the company; and (c) by making capital contributions to the company."*[104]

173. On the basis of its expert report, Italba submitted that:

> *"In the case of Trigosul, Dr. Luis Lapique, an expert in Uruguayan corporate law, concluded that the corporate records are so mutually inconsistent and error-filled that they cannot be relied upon to represent the reality of how Trigosul functioned. Thus, '[i]t is imperative to resort to the economic reality behind Trigosul' in determining its ownership and to consider evidence of how the company actually operated, including whether the parent company understood itself to be the owner of the subsidiary, acted in a manner consistent with ownership, and held itself out to third parties as the owner."*[105]

174. Based on that theory of economic reality, the Claimant submitted that: (a) Italba made Trigosul's business decisions, developed its business plan, commissioned studies in 1999 for that plan, and sought out, negotiated and contracted with potential partners on behalf of Trigosul;[106] (b) Italba contributed to the "overwhelming majority" of Trigosul's share capital as follows: "[i]n early 2001, Italba made a capital contribution to Trigosul of 632,674 Uruguayan pesos"[107] of which a capital increase from 182,500 to 690,000 Uruguayan pesos was subsequently approved; therefore, Italba contributed 92,04% of Trigosul's share capital;[108] (c) Italba funded Trigosul's operations and purchased equipment for Trigosul; Mr. Herbón informed the DNC in October 2000 that Italba had

[104] Claimant's Reply, ¶ 80.

[105] Claimant's Reply, ¶ 81; Dr. Luis Lapique's Report, 12 May 2017, page 17.

[106] Claimant's Reply, ¶ 82; Statement of Mr. Luis Herbón, 12 May 2017, ¶ 10; Statement of Dr. Gustavo Alberelli, 12 May 2017, ¶ 11.

[107] Claimant's Reply, ¶ 83; Trigosul's Book of Shareholders and Directors Meetings, C-164, pages 5-6.

[108] Claimant's Reply, ¶ 83; Dr. Luis Lapique's Report, 12 May 2017, page 11.

purchased equipment for Trigosul, and a resolution by the President of Uruguay in September 2002 recognized Italba's purchase of equipment for Trigosul; issued checks for Trigosul's expenses and used a USD 25,000 bond for that company's expenses[109]; and (d) Italba routinely held itself out to third parties as the owner of Trigosul.[110]

175. With respect to the communication sent by Mr. Herbón in November 1999, in which he informed the DNC that Trigosul's shareholders were Dr. Alberelli and Ms. Caravetta (see paragraph 165 above), Italba pointed out that, regardless of Mr. Herbón's understanding at that time about who Trigosul's shareholders were, the truth was that Ms. Caravetta transferred her shares to Dr. Alberelli in May 2002 and Dr. Alberelli transferred all of his shares to Italba in August 2002.[111] As regards the obligation outlined in Decree 115/003 (see paragraph 166 above), to ask for authorization for a change in shareholding in a corporate license holder, Italba explained that such rule post-dated the share transfer carried out by Ms. Caravetta and Mr. Alberelli.[112]

176. For the Claimant, even rejecting the economic reality doctrine in favor of a formalistic approach to ownership, Italba would own 93.36% of Trigosul's shares, because it contributed 92.04% of the share capital, and at least one of Trigosul's shares (amounting to an "additional 1.33% of the company") was transferred to Italba via an endorsement on the back of the share certificate.[113]

177. Based on Dr. Lapique's opinion, the Claimant asserted that, under the Uruguayan legislation, the contribution to the share capital suffices to confer shareholder status, regardless of the formalities. The Claimant pointed out that on 31 October 2001, Trigosul's Shareholders' Meeting agreed on a capital increase from 182,500 to 690,000 Uruguayan pesos and recognized Italba's contribution of 632,674 Uruguayan pesos, (92.04% of the share capital). For Italba, the fact that Trigosul did not formally complete the increase in

[109] Claimant's Reply, ¶ 84; Statement of Dr. Gustavo Alberelli, 12 May 2017, ¶¶ 14, 15 and 19; Statement of Mr. Luis Herbón, 12 May 2017, ¶¶ 13 and 15.

[110] Claimant's Reply, ¶ 85.

[111] Claimant's Reply, ¶ 87.

[112] Claimant's Reply, ¶ 88.

[113] Claimant's Reply, ¶ 89; Dr. Luis Lapique's Report, 12 May 2017, page 22.

the authorized capital by recording it with the National Registry of Commerce and failed to issue new shares reflecting Italba's capital contribution does not deprive Italba of its 92.04% ownership of Trigosul.[114]

178. According to Italba, even if the Tribunal were to find that Italba does not own Trigosul, the Tribunal's jurisdiction over the claims brought against Uruguay should still be upheld because Italba controls Trigosul within the meaning of Article 24 of the Treaty.[115] Italba submitted that ICSID's case law has analyzed the concept of control flexibly and broadly and with the intention to expand rather than restrict jurisdiction. Among the criteria used, Italba refers to: "share ownership, decision-making procedures, the exercise of management, and 'other economic criteria.'"[116] In particular, Italba states that in *Perenco v. Ecuador* "…the tribunal found that the claimants' control of the relevant entity was sufficient for jurisdiction, even though the claimants did not hold formal legal title in that entity."[117]

179. Italba also argued the following:

> *"…the Tribunal should not 'pierce any corporate veil' to consider whether control over Trigosul was exercised by Dr. Alberelli in his individual capacity or in his capacity as the President of Italba. The case law does not support looking behind the corporate form of the claimant to its individual shareholders to determine which shareholders control the claimant—indeed, the relevant question for jurisdictional purposes is not who controls the claimant, but whether the claimant controls the subsidiary."*[118]

c. Respondent's Rejoinder Memorial

180. Uruguay submitted that there are "inconsistencies and discrepancies" in Italba's account of the share transfer carried out in August 2002. As per Trigosul's books, as at 10 October

[114] Claimant's Reply, ¶ 90; Trigosul's Book of Shareholders and Directors Meetings C-164, pages 5-6; Statement of Mr. Luis Herbón, 12 May 2017, ¶ 13; Statement of Dr. Gustavo Alberelli, 12 May 2017, ¶ 16; Dr. Luis Lapique's Report, 12 May 2017, pages 11, 13, 15 and 22.

[115] Claimant's Reply, ¶ 93.

[116] Claimant's Reply, ¶ 94.

[117] Claimant's Reply, ¶ 95, referring to *Perenco Ecuador Ltd. v. the Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, 12 September 2014, CL-111.

[118] Claimant's Reply, ¶ 97.

2002 and as at 1 November of that same year, the only shareholders registered were Mr. Alberelli and his mother, Ms. Caravetta. According to Uruguay, the fact that Italba is not mentioned in those books is not an error or oversight, but a reflection of the reality of the company at that time. Uruguay strongly criticizes the Claimant's argument that, as Trigosul's records are not reliable, one should rely upon the statements made by Dr. Alberelli, who is an interested party in the outcome of these proceedings, to prove the alleged ownership of Trigosul's shares.[119]

181. Uruguay submitted that Trigosul's shares were not validly transferred to Italba. Dr. Alberelli only endorsed one share in the name of Italba; the endorsement by Ms. Caravetta, Dr. Alberelli's mother, fails to mention where it was made.[120] Among other reasons, since on the endorsement date (24 May 2002) they were both in Uruguay, Uruguayan law, pursuant to which the transfer should be recorded in the company's books to be valid, must apply.[121] Clearly, Trigosul's corporate records do not contain a record of this alleged transfer, and therefore the transfer was necessarily invalid. On this basis, Uruguay submits that Ms. Caravetta is still a shareholder in Trigosul.[122]

182. With respect to Dr. Alberelli's alleged transfer of Trigosul's shares by way of a donation to Italba, in August 2002, Uruguay submitted that, although not applicable in this case, according to Florida law, donations require the following: donative intent, delivery of possession and acceptance by the recipient. None of these requirements are met in this case.[123]

183. Regarding the intent to donate, Uruguay submitted that Dr. Alberelli only endorsed certificate number 4 out of 20 certificates and, on the basis of the report by his expert, Mr. Louis T.M. Conti, asserted that, "… the endorsement of only one stock certificate cannot serve as an endorsement of the others."[124] According to Uruguay, delivery of the

[119] Respondent's Rejoinder, ¶¶ 49-53.

[120] Respondent's Rejoinder, ¶¶ 57, 59 and 60.

[121] Respondent's Rejoinder, ¶ 61; Immigration movements of Ms. Carmela Caravetta, R-089 and R-091; Immigration movements of Dr. Gustavo Alberelli, R-088.

[122] Respondent's Rejoinder, ¶ 61.

[123] Respondent's Rejoinder, ¶ 62.

[124] Respondent's Rejoinder, ¶ 63; Mr. Louis T.M. Conti's Report, 9 August 2017, page 11.

certificates did not take place either, as Dr. Alberelli retained possession of the shares at all times, without transferring his dominion and control, as required by Florida law. Furthermore, according to Mr. Conti, in Florida delivery can also be considered complete if the recipient exercises dominion and control of the donation. Mr. Conti concluded that Italba never exercised this dominion as there is no evidence on the record of Italba's participation in Trigosul's shareholders' meetings.[125]

184. As regards the acceptance requirement, Uruguay submitted that it was not met, given that what Dr. Alberelli did was to deposit Trigosul's shares in a safety box in the name of himself and his wife, not in the name of Italba. In addition, Italba's records from 2002 to the present date do not show any revenues, losses or contributions related to Trigosul.[126]

185. Uruguay submitted that Italba recognized that, pursuant to Uruguayan law, it had no ownership of Trigosul's shares through endorsement or delivery of the certificates. Instead, Italba argued that it owned Trigosul by virtue of the theory of economic reality. Uruguay notes that, even Dr. Lapique, Italba's expert, recognizes that this theory is based on the concept of piercing the corporate veil, enshrined in Article 189 of the Commercial Companies Act, for cases of fraudulent evasion of the law and violation of public order and, as such, would not be applicable to the instant case.[127] Uruguay pointed out that its expert, Professor de Mello, agree that "this theory does not apply to the present case." [128]

186. Uruguay submitted that, even if the economic reality theory were applicable to the present case, the documents adduced as evidence by the Claimant fail to support its assertion that Italba acted at all times as a shareholder of Trigosul. Some predate Trigosul's license or refer to Trigosul as a strategic partner, but they failed to prove Italba's assertion that it was negotiating business plans on behalf of Trigosul.[129] Uruguay also criticized the evidence

[125] Respondent's Rejoinder, ¶¶ 65-66.

[126] Respondent's Rejoinder, ¶ 67. Mr. Louis T.M. Conti's Report, page 14.

[127] Respondent's Rejoinder, ¶¶ 72-73; Dr. Luis Lapique' Report, 12 May 2017, page 18.

[128] Respondent's Rejoinder, ¶ 74; Dr. Eugenio Xavier de Mello Ferrand's Report, 31 July 2017, ¶ 55.

[129] Respondent's Rejoinder, ¶¶ 76-77; Proposal for a Banking Communication Network, dated 6 January 1999, C-006; Site Survey Report: Uruguay, of 15 October 2001, C-165; joint venture agreement for the telecommunications project in Uruguay, dated July 1999, C-007; Shareholders' Agreement, of October 1998, C-008; Co-Investment Agreement of 14 June 2002, C-015; Joint Venture Terms Sheet, of February 2007, C-030.

which Italba relied upon to prove that it was funding Trigosul: these are preliminary or draft documents that make reference to the shipment of equipment to Italba, not to Trigosul. Uruguay also denied Italba's assertion that the President of Uruguay recognized that Italba had paid for Trigosul's equipment (see paragraph 174 above); it argued that the document with which the Claimant seeks to prove this assertion is a claim by Trigosul for the purchase of radios from Italba, which was entitled "ITALBA invoice: USD 25,964," and which would refute the theory that Italba was paying for Trigosul's equipment.[130] Uruguay also criticized Italba's attempt to prove its alleged funding of Trigosul during 15 years with nothing more than two checks and a bond purchase.[131] Moreover, according to Uruguay, the documents relied upon to prove that Italba held itself out as the owner of Trigosul fail to prove any such assertion: only two of them postdate the alleged transfer of shares to Italba, and none of them refers to the relationship between Italba and Trigosul.[132]

187. Uruguay also submitted that the letter dated 9 July 2001 from Mr. Albert Jansenson to the Secretary of the Presidency (quoted at the footnote 100 of paragraph 170) predates the alleged share transfer of 2002 and, thus, contradicts Italba's argument that it owned Trigosul; moreover, the sender of that letter was not Italba, and the signer thereof is a person who Italba has never mentioned as a director or shareholder of Italba. Finally, in the letter, reference was made to "majority shareholders" of Trigosul and, in these proceedings, Italba has claimed to be the sole shareholder of Trigosul.[133]

188. With respect to Italba's alleged contributions to Trigosul's share capital, Uruguay submitted that there are no documents on the record supporting this allegation. Additionally, in an attempt to prove those alleged contributions, Italba and its expert witness, Dr. Lapique, relied on Trigosul's books, which they criticized as being "filed with errors" and unreliable.[134] Uruguay also highlighted the inconsistencies between the date of the alleged transfer and the date of entry in the corporate and statutory books, on which

[130] Respondent's Rejoinder, ¶ 80.
[131] Respondent's Rejoinder, ¶ 81.
[132] Respondent's Rejoinder, ¶ 82.
[133] Respondent's Rejoinder, ¶ 83.
[134] Respondent's Rejoinder, ¶¶ 85-86.

Italba presumably transferred to Trigosul USD 35,000, "as reimbursement". Similar doubts were raised in respect of other alleged contributions in the amount of 632,674 Uruguayan pesos, paid by Trigosul to the DNC as an advance on the fees for Trigosul's operation in the spectrum.[135] The Respondent also criticized the fact that, according to his own testimony, Dr. Lapique based his report on instructions received from Italba. Uruguay also indicated that Dr. Alberelli recognized that the funds with which he acquired Trigosul in 1999 came partially from his mother and, based on this contribution, 50% of the shares were issued to Mrs. Caravetta, and the other 50% to himself, an acknowledgement that contradicts his assertion that Italba funded Trigosul's acquisition. Uruguay also submitted that 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.[136]

189. Uruguay stated that its expert, Professor de Mello, asserted that Trigosul's accounting records are not clear either regarding the nature and scope of the contributions to Trigosul, or regarding who made them.[137] Uruguay also highlighted the fact that Italba 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, a defect described as fatal to Italba's claim.[138]

190. With respect to the control that Italba alleged to have over Trigosul, Uruguay repeated that the alleged investment in Trigosul was made, and is owned, by Dr. Alberelli, who is Italian; it is Dr. Alberelli who has control over Trigosul, not Italba.[139] According to the corporate records, Dr. Alberelli and his mother are the true shareholders of Trigosul since, according to the Shareholders' Meeting and Board of Directors' Minutes, it was they, who exercised their voting rights (Uruguay cited minutes from 1996 to 2002).[140] Uruguay also submitted

[135] Respondent's Rejoinder, ¶ 88.

[136] Respondent's Rejoinder, ¶ 90; Mr. Louis T.M. Conti's Report, 9 August 2017, pages 7 and 8; Statement of Dr. Gustavo Alberelli, 12 May 2017, ¶ 10.

[137] Respondent's Rejoinder, ¶ 91, Dr. Eugenio Xavier de Mello Ferrand's Report, 31 July 2017, ¶ 59.

[138] Respondent's Rejoinder, ¶ 94.

[139] Respondent's Rejoinder, ¶ 97.

[140] Respondent's Rejoinder, ¶¶ 99-104.Trigosul S.A., Minutes of the Shareholders and Board of Directors Meetings, C-164.

that on 4 February 2011, Dr. Alberelli took the position of President of Trigosul, which proves that he controlled that company in his personal capacity, and not as Italba's representative, and that he was the one who decided Trigosul's business plan and had control over the financing of Trigosul's operations.[141] Uruguay concluded that Italba failed to meet its burden of proof on the alleged control over Trigosul.[142]

(2) The Tribunal's Analysis

191. The Tribunal will consider the rules applicable to a determination of the first objection raised by the Respondent.

192. Article 1 of the Treaty defines the concept of "investor of a Party" as follows:

> *Investor of a Party means a Party or state enterprise thereof, or 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; provided, however, that a natural person who is a dual citizen shall be deemed to be exclusively a citizen of the State of his or her dominant and effective citizenship."*

193. Regarding the definition of "investment," the same Article of the Treaty reads as follows:

> *"Investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:*
>
> *(a) an enterprise;*
>
> *(b) shares, stock, and other forms of equity participation in an enterprise;*
>
> *(c) bonds, debentures, other debt instruments, and loans;*
>
> *(d) futures, options, and other derivatives;*

[141] Respondent's Rejoinder, ¶ 105.

[142] Respondent's Rejoinder, ¶ 107.

(e) turnkey, construction, management, production, concession, revenue sharing, and other similar contracts;

(f) intellectual property rights;

(g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law; and

(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges" (emphasis added).

194. Article 1(g) of the Treaty includes two footnotes:

> *"Whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an 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. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of an investment."*
>
> *"The term "investment" does not include an order or judgment entered in a judicial or administrative action."*

195. In addition, Article 1 of the Treaty defines the concept of a "covered investment" as follows:

> *"with respect to a Party, an investment in its territory of an investor of the other Party in existence as of the date of entry into force of this Treaty or established, acquired, or expanded thereafter."*

196. Article 24 of the Treaty entitled "Submission of a Claim to Arbitration" provides the following:

> *"1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:*

the claimant, on its own behalf, may submit to arbitration under this Section a claim:

that the respondent has breached:

an obligation under Articles 3 through 10;

an investment authorization, or

an investment agreement, and

that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and

the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim

that the respondent has breached:

an obligation under Articles 3 through 10;

an investment authorization, or

an investment agreement; and

that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

provided that a claimant may submit pursuant to subparagraph (a)(i)(C) or (b)(i)(C) a claim for breach of an investment agreement only if the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement.

2. At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration ('notice of intent'). The notice shall specify:

(a) …

3. Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1:

(a) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the non-disputing Party are parties to the ICSID Convention;

(b) under the ICSID Additional Facility Rules, provided that either the respondent or the non-disputing Party is a party to the ICSID Convention;

(c) under the UNCITRAL Arbitration Rules; or

(d) if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules.

4. A claim shall be deemed submitted to arbitration under this Section when the claimant's notice of or request for arbitration ('notice of arbitration'):

(a) referred to in paragraph 1 of Article 36 of the ICSID Convention is received by the Secretary-General;

(b) referred to in Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary-General;

(c) referred to in Article 3 of the UNCITRAL Arbitration Rules, together with the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules, are received by the respondent; or

(d) referred to under any arbitral institution or arbitral rules selected under paragraph 3(d) is received by the respondent..."

197. The Parties agreed that the Treaty protects an investor who owns or controls the investment.[143] The disagreement between them with respect to this matter is that the Claimant submitted that it owns, and has controlled, Trigosul. On the contrary, the

[143] Claimant's Reply, ¶ 70; Respondent's Rejoinder, ¶ 47.

Respondent submitted that Italba does not own or control Trigosul, since, in fact, it is Dr. Alberelli, who owns and controls Trigosul, in his personal capacity.[144]

198. As stated in the preceding paragraphs, it is crucial to determine whether Italba is indeed a shareholder of Trigosul and, failing that, if Italba controls Trigosul, either directly or indirectly.

199. After resolution of those issues, the Tribunal must next determine whether Italba owned or controlled the investment at the time of the alleged breach of the Treaty by the Respondent.

200. In the following paragraphs, the Tribunal will proceed to address the issue concerning the ownership of Trigosul's shares, and, subsequently, the issue regarding control over them.

a. Does Italba own Trigosul?

201. Article 3 of Trigosul's Bylaws provides that the company's share capital is represented by "registered common shares."[145]

202. On the record, there are six share certificates of Trigosul dated 6 September 1996. Certificates number 1, 2 and 3 are issued in the name of Ms. Carmela Caravetta Durante and number 4, 5 and 6—in the name of Dr. Gustavo Alberelli.

203. Certificates 1 to 3 have on their reverse side an endorsement that reads: "On the date of May 24, 2002, this is transferred to Dr. Gustavo Alberelli"; the three endorsements are signed by "Carmela Caravetta".[146] As already stated, certificates 4 to 6 were issued in the name of Dr. Alberelli, on 6 September 1996. Certificates number 7 to 20 dated 30 June 1999 and also issued in the name of Dr. Alberelli, likewise appear on the record.[147]

204. Additionally, a two-page copy (the cover and folio number 2) of the book of Records of Registered Securities belonging to Trigosul appears on the record.[148] On folio 2 of the

[144] Claimant's Reply, ¶¶ 27, 29-37, 70-98; Respondent's Rejoinder, ¶¶ 3, 38, 46-108.
[145] Trigosul's Bylaws, C-226.
[146] Trigosul's Share Certificates, C-161.
[147] *Id*.
[148] Trigosul's Stock Ledger Book, C-163.

book, there is a description of the certificates numbered 1 to 20, with the specification of the "amount" that each of them represents and the certificate's owner's name. As already stated, the first three are in the name of Ms. Caravetta and the rest are in the name of Dr. Alberelli. There is no signature or date of any such entries.

205. On the record there are also copies of thirteen folios of the Shareholders' Meeting and Board of Directors' Minutes Book,[149] that express the following:

(a) minutes numbered 1 are dated 2 October 1996; on it, there appears a call for an Extraordinary General Shareholders' Meeting, with an illegible signature;

(b) on the following folio, there appear other minutes (unnumbered) of a Shareholders' Meeting held on 10 October in that same year, which was chaired by Mr. Daniel Pérez (a founding partner of the company, see paragraph 76 above). In those minutes, Mr. Luis Herbón was appointed Chairman of the first "Board of Directors of the Company" [Tribunal's Translation]; at the end of the minutes, it is stated that shareholders Ms. Caravetta and Dr. Alberelli were in attendance;

(c) on folio 4 of the aforementioned Shareholders' Meeting and Board of Directors' Minutes Book, there appear other minutes dated 10 October 1996, likewise not numbered, in which Mr. Herbón accepted his appointment;

(d) on folio 5 there appears a text, handwritten and partially illegible, that apparently refers to the Board of Directors' Minutes of 2001; at the end, it states the authorized share capital and, once again, it mentions Ms. Caravetta and Dr. Alberelli as shareholders of the company;

(e) on folios 5 and 6, there appear the minutes of the Extraordinary Shareholders' Meeting held on 31 October 2001, which refers to a capital increase. They also cite Dr. Alberelli and Ms. Caravetta as shareholders of the company;

[149] Trigosul's Book of Shareholders and Directors Meetings, C-164.

(f) on folio 7, there appear the Board of Directors' Minutes dated 30 September 2002, which refer to a call for an extraordinary shareholders' meeting. On that folio, there also appear the Minutes of the Extraordinary Shareholders' Meeting held on 10 October 2002; once again it is mentioned that the shareholders are Dr. Alberelli and Ms. Caravetta;

(g) on folio 8, there appear the Board of Directors' Minutes dated 11 October 2002 in which a new Chairman was appointed (in the minutes, his name is illegible). On that folio, there also appears the Board of Directors' Minutes dated 30 October 2002 that refer to a call for a shareholders' meeting;

(h) on folio 9, there appear the Minutes of the Extraordinary Shareholders' Meeting held on 1 November 2002, in which shareholders Dr. Alberelli and Ms. Caravetta once again appoint Mr. Herbón as Chairman;

(i) on folio 10, there appear the minutes of a session of the Board of Directors held on 2 November 2002 in which Mr. Herbón's acceptance of his appointment is included;

(j) on folio 11, there appear the minutes of a Board of Directors' meeting held on 4 February 2011 to call for a Shareholders' Meeting;

(k) on folio 12, there appear the Minutes of the Extraordinary Shareholders' Meeting held on 4 February 2011, in which Dr. Alberelli was appointed as the Board of Directors' Chairman; and

(l) on folio 13, there appear the Minutes of a Board of Directors' meeting of 4 February 2011, in which Mr. Herbón resigned his office and Dr. Alberelli accepted appointment in his place.

206. Following a careful review of the aforementioned minutes, the Tribunal notes that there are only three folios on which shareholders of Trigosul are mentioned, (at letters (b), (d), and (f) of the preceding paragraph) and Dr. Alberelli and Ms. Caravetta are the shareholders so mentioned. Conversely, there is no mention of Italba as a shareholder; no reference to

share endorsements or capital increases made by Italba, nor is there any suggestion that Italba made any decisions on the different appointments of the Chairman of the Board of Directors.

207. Having analyzed the first three share certificates endorsed to Dr. Alberelli, cited in paragraph 203 above, the Tribunal confirms that none of them states the place of the endorsement. On the date of the endorsement indicated therein (24 May 2002), Ms. Caravetta and her son, Dr. Alberelli, were in Uruguay.[150] It follows that the law of Uruguay should apply to determine the validity of the endorsement of shares in this Uruguayan company.

208. Additionally, the only certificate containing an endorsement in favor of Italba is number 4. It relates to 9,125 shares out of an aggregate amount of 182,500 and it reads: "On the date of August 15, 2002, this is transferred to Italba Corp. (Miami FL. 33183 8540 Sw 132 court)" and below it reads: "Gustavo Alberelli Caravetta."

209. During the Hearing, the Claimant's counsel stressed that Mr. and Mrs. Alberelli are not attorneys, and, for that reason, they failed to keep Italba and Trigosul's documents in the "best order."[151] In the Tribunal's view, the fact that these persons were not experienced in managing corporate books does not justify the apparent inconsistencies in Trigosul's certificates and books. Dr. Alberelli is an experienced businessman who established Italba in 1982;[152] Mr. Herbón presided over Trigosul during several years, he is a Uruguayan national, a holder of a degree in accountancy and he has vast experience in business administration.[153] It is not conceivable for this Tribunal to conclude that the lack of legal knowledge on the part of Trigosul's officers was the cause of their failure to record the endorsement allegedly made in May and August 2002 in Trigosul's books. Both Dr.

[150] Immigration movements of Ms. Carmela Caravetta, R-89 and R-91; Immigration movements of Mr. Gustavo Alberelli, R-88.

[151] Transcript of the Hearing of 13 November 2017 (Day 1), 18:22- 19:10 and 114:8-11.

[152] Statement of Dr. Gustavo Alberelli, 16 September 2016, ¶¶ 8-10.

[153] Statement of Mr. Luis Herbón, dated 16 September 2016, ¶¶ 4-6.

Alberelli and Mr. Herbón had enough experience and knowledge to handle the corporate documents appropriately.

210. Article 305 of the Uruguayan Commercial Companies Act provides as follows:

> *"(Transferability). Shares shall be freely transferable.*
>
> *Articles of incorporation may set restrictions to the transferability of registered shares, or book entry shares, provided that no such restriction may amount to a prohibition on transfer. Any restriction shall be stated in the certificate or in the Book-Entry Stock Register, as applicable*
>
> ***The corporation shall be given written notice of the transfer of a registered share** or a book entry share or of the creation or transfer of rights in rem over any such shares, **and an entry shall be made in the relevant stock register. These actions shall be enforceable against the corporation and third parties from the time of said registration.***
>
> *Endorsable shares shall be transferred by an uninterrupted chain of endorsements, and endorsees shall request the register to exercise their rights."*[154] (Emphasis added).

211. Based on Article 305 as set out above, the Tribunal concludes that for Dr. Alberelli to be able to exercise the rights relating to Trigosul's shares represented by certificates number 1, 2 and 3, he should have notified the endorsement to Trigosul and recorded it in the book called the Registered Securities Ledger. Article 305 explicitly provides that "[t]he transfer of registered shares … shall be enforceable against the corporation and third parties from the time of said registration."

212. Considering the facts described and the content of the Commercial Companies Act, the Tribunal concludes that, in Trigosul's case, the legal requirements applicable to the endorsement of Trigosul's share certificates number 1, 2 and 3 carried out by Ms. Caravetta in favor of Dr. Alberelli, in May 2002, were not respected. For this reason, the endorsement fails to produce effects concerning Trigosul or third parties.

[154] Commercial Companies Act of 4 September 1989, Article 305, C-222 and EXM-006.

213. The Tribunal now turns to the endorsement of certificate number 4, representing 9,125 registered shares out of an aggregate amount of 182,500 of Trigosul's shares, carried out on 15 August 2002 by Dr. Alberelli. In that endorsement, there is no indication whatsoever concerning the place where it was carried out; it was only stated, between parenthesis, the registered address of Italba Corporation, which, as per its Articles of Incorporation, is: "8540 S.W. 132th Court, Miami, Florida, 33183."[155] The Tribunal considers that there is no sufficient evidential basis to assert that the endorsement was actually made in Florida, and that, as a consequence, the applicable law is that of the endorser's domicile. The only evidence on record on this matter are the statements made by Dr. Alberelli and his wife. There being no reliable proof of the place in which that endorsement was carried out, the laws of Uruguay, the country in which Trigosul was established and registered and where it operates should apply to the validity of the endorsement. Nonetheless, the Tribunal will also assess the validity of the endorsement by reference to the law of Florida, which is the law that the Claimant maintained is applicable.[156]

214. As previously stated, Article 3 of the Trigosul Bylaws reads as follows: "Share transfers shall be notified to the company and documented as provided in Law No. 16,060 " [157] (it refers to Article 305 of the Commercial Companies Act transcribed at paragraph 210 above).

215. Under Article 316 of the Commercial Companies Act, the same rules applicable to securities apply to share certificates (as Trigosul's certificates), "…to the extent not amended herein."[158]

216. Law No. 14,701, which governs securities ("*títulos valores*") in Uruguay (the "**Securities Law**"), sets forth in Article 1 that "*títulos valores*" are "the documents necessary to exercise the literal and autonomous right contained in them." [Tribunal's Translation][159]

[155] Articles of Incorporation of Italba Corporation, 10 May 1982, C-002.
[156] Claimant's Reply, ¶ 80.
[157] Trigosul's Bylaws, C-226.
[158] Commercial Companies Act, of 4 September 1989, Article 316, EXM-006.
[159] Decree-Law No. 14701 on Securities, enacted on 12 September 1977, EXM-007.

In addition, Article 32 of the aforementioned law provides the following for registered securities:

> *"Registered securities shall be issued in the name of an ascertained person, whose name shall be stated both in the body of the document* ***and in the entry made in the name of the securities issuer****. Only a person* ***whose name appears both in the document and in the register shall be recognized as a lawful holder****.*
>
> *The obligation to keep a non-bearer securities register shall not apply in the case of bills of exchange, registered promissory notes and checks.*
>
> *The securities shall be presumed transferable unless the certificate itself or the law provides that they must be recorded in the register entry of issuance."* (Emphasis added)

217. The quoted rule is very clear: the legitimate holder of a registered certificate is the person whose name appears in the certificate (principle of literalness) and on the records. The register of shares is required to be kept by Article 305 of the Commercial Companies Act, Article 32 of the Securities Law, and Article 3 of Trigosul's Bylaws cited hereinabove.

218. As stated in paragraph 216 above, Article 1 of the Securities Law establishes that "*títulos valores*" are "the documents necessary to exercise the literal and autonomous right contained in them". [Tribunal's Translation] "Literalness" refers to the securities' characteristic, according to which the content, scope and rules applicable to the exercise of the right incorporated in the document are governed by what the document states.

219. On the basis of this principle, the Tribunal considers that the only endorsement Dr. Alberelli made to Italba was that of Trigosul's share certificate number 4. The other certificates contain no endorsement whatsoever; consequently, the exercise of the rights alleged by Italba is contrary to the principle of literalness and, therefore non-existent.

220. The Claimant's assertion that endorsement of a certificate implicitly entails endorsement of the remaining share certificates cannot be accepted. It is evident that each certificate may be transferred individually; Dr. Alberelli himself understood as much when in May

2002 he asked his mother, Ms. Caravetta, to endorse in favor of Dr. Alberelli each of the three certificates issued in her name.[160]

221. The Claimant stated that there was a transfer of Trigosul's bundle of shares to Italba. That statement is contrary to the provisions in the Uruguayan laws on securities and to the basic principles regarding "*títulos valores*".

222. The Tribunal also notes that, on the basis of the aforementioned rules, under Uruguayan law, the endorsement in favor of Italba made by Dr. Gustavo Alberelli on 15 August 2002 of Trigosul's share certificate number 4 was not perfected, since it was not recorded in the book of Records of Registered Securities belonging to Trigosul. Therefore, it is not possible to assert that Italba is the "lawful holder" of Trigosul share certificate number 4, either. Much less is it the legitimate holder of Trigosul's remaining share certificates, none of which was endorsed in favor of Italba.

223. The Claimant sought to substantiate its position in the following terms: "Under Uruguayan domestic corporate law, a party can demonstrate ownership in one of three ways: (a) by endorsing a stock certificate with a transfer note, 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. Here, pursuant to the 'economic reality' theory, Italba is the sole owner of Trigosul."[161]

224. The Tribunal considers that the first way to demonstrate ownership under Uruguayan law mentioned in the above paragraph is not applicable to this case. It is not a matter of endorsing "a share certificate" with a "transfer note" [Tribunal's Translation]. As was stated above, Article 305 of the Commercial Companies Act is very clear: "The transfer of registered shares…shall be notified to the company in writing **and recorded** in the corresponding stock ledgers. They shall produce effects concerning the company and third

[160] Statement of Dr. Gustavo Alberelli, 12 May 2017, ¶ 17.
[161] Claimant's Reply, ¶ 80.

parties at the time when so recorded" (emphasis added). Under Uruguayan law, to transfer a certificate it is imperative to endorse it, hand it over to the acquirer, notify the company in writing **and record** the endorsement in the company's stock ledger.

225. When explaining its position in respect of the second criterion (see paragraph 223 above) Italba stated: "in the absence of a formal transfer of shares, [a party may demonstrate] that, as a matter of 'economic reality,' the party owned and acted as the owner of the company." In paragraphs 226 to 235, the Tribunal considers this second criterion; in paragraph 236, it addresses the third.

226. Italba asserted, on the basis of the opinion of its expert, Dr. Lapique, that formalities in closely held corporations may be more "relaxed" and, because of this, the reality should be considered: "… whether the parent company understood itself to be the owner of the subsidiary, acted in a manner consistent with ownership, and held itself out to third parties as the owner."[162] According to the Claimant, Italba made all of Trigosul's business decisions, developed its business plan, commissioned studies on potential negotiations, sought out partners, "contributed the overwhelming majority of Trigosul's share capital," funded Trigosul's operations, issued checks on a regular basis to cover Trigosul's expenses and, in addition, routinely represented to third parties that it owned Trigosul.[163]

227. Italba's expert, Dr. Lapique further asserted:

> *"Application of the predominance of reality over form is expressly provided for in corporate matters in Article 189 of the LSC, which enshrines the theory of disregard. Although that 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. which would not be applicable in this case, it establishes that reality prevails over form."*[164]

228. Uruguay's expert, Professor de Mello, stated: "… this principle [referring to the theory of disregard mentioned by Dr. Lapique] governs in commercial law, Lapique cites the

[162] Claimant's Reply, ¶ 81; Dr. Luis Lapique's Report, 12 May 2017, pages 4, 14, 17 and 18.

[163] Claimant's Reply, ¶¶ 82-85.

[164] Dr. Luis Lapique's Report, 12 May 2017, page 18.

provisions of the [Commercial Companies Act] on the principle of the 'disregard of the legal personality' of commercial companies, without taking into account that it is applied only to reject the legal personality of corporations (not to recognize the status of shareholder), in cases of fraud committed through said personality, and that it has limited scope."[165]

229. Article 189 of the Commercial Companies Act, found in section XV entitled "On the Unenforceability of the Legal Personality", sets forth the following:

> *"(Admissibility). A company's status as a legal person may be rendered unenforceable where it is used in evasion of the law to violate public order, or to defraud and to the detriment of the rights of members, shareholders or third parties.*
>
> *Reliable proof of the actual use of the business company as a legal instrument to achieve said purposes shall be required.*
>
> *Where the unenforceability of the company's legal status is sought through a legal action, ordinary proceedings shall be followed."*[166]

230. It is obvious that Article 189 regulates situations that are completely different from those discussed in connection with the ownership of Trigosul's shares. None of the assumptions of fact contained therein arises in this case, which is why this Article may not be relied upon in support of Italba's position that, as Trigosul's shares were neither endorsed nor delivered, the "predominance of reality" over form should apply in order to conclude that Italba is the owner of those shares.

231. Italba adduced judgment 90/2009[167] issued by the "*Tribunal de Apelaciones en lo Civil, Primer Turno*" into the record of the case. In the explanation in footnote 289 of its Reply, it asserted that the *Tribunal de Apelaciones* "appl[ies] economic reality doctrine to find standing to sue in plaintiffs' favor, because minutes of meetings established that plaintiffs had participated in shareholders' meetings, despite the fact that plaintiffs were not

[165] Professor Eugenio Xavier de Mello's Report, 31 July 2017, ¶ 48.

[166] Commercial Companies Act of 4 September 1989, Article 189, EXM-006.

[167] Decision 90/2009 of the "*Tribunal de Apelaciones en lo Civil, Primer Turno*", available at Base de Jurisprudencia Nacional, C-225.

registered as shareholders in the bank's books and records."[168] The Tribunal disagrees with this commentary on the judgment.

232. The judgment analyses neither Article 189 nor the "disregard" or "economic reality" theory. It includes none of the criteria upon which Italba purports to rely as a basis for its position in the instant case.

233. Article 319 of the Commercial Companies Act sets out the "fundamental" and "essential" rights of shareholders:

> *"(1) To participate in and vote at shareholders' meetings.*
>
> *(2) To share in corporate profits and the balance of liquidation, in the event of dissolution of the company.*
>
> *(3) To oversee the management of corporate business.*
>
> *(4) To have a preemptive right to subscribe for shares of stock, convertible profit shares, and convertible debentures.*
>
> *(5) To reassign as provided by law.*
>
> *These rights may only be qualified, limited or rendered of no effect when expressly authorized by law."* [Tribunal's Translation]

234. Italba participated in none of the shareholders' meetings held, and, thus, did not exercise its right to vote, as recorded in Trigosul's corporate documents. There is no evidence that it shared in Trigosul's profits or losses. There is no reference to Italba somehow overseeing the management of Trigosul's business.

235. Therefore, the Tribunal finds that there is no evidence that Italba exercised the rights that would have been available to it if it had actually been a shareholder of Trigosul. Nor can the Tribunal apply the principle of disregard of the legal personality set forth in Article 189

[168] Claimant's Reply, ¶ 82, footnote 289.

of the Commercial Companies Act to completely different situations such as to support Italba's alleged ownership of Trigosul's shares.

236. The third criterion mentioned by the Claimant (at paragraph 223 above) is the capital contribution it claims to have made to Trigosul. As evidence of such contribution, Italba submitted that, in early 2001, it contributed to Trigosul the amount of 632,674 Uruguayan pesos.[169] Italba stated: "In recognition of Italba's capital contribution, an extraordinary meeting of Trigosul's shareholders later that year accordingly increased the authorized capital of the company from 182,500 to 690,000 Uruguayan pesos. Thus, Italba contributed 92.04% of Trigosul's share capital."[170] In its Post-Hearing Brief, Italba relied upon the opinion of Dr. Lapique, who also "found that Italba contributed 92.04% of Trigosul's share capital."[171]

237. There is no evidence on the record that such contribution was made by Italba. The only conclusion available to the Tribunal is that the capital contribution mentioned in the Book of Shareholders and Directors Meetings was made by Dr. Alberelli and his mother, Ms. Caravetta, as recorded in the books. Nor does the company's accounting book referred to as a "Diary" indicate that Italba made capital contributions to Trigosul.

238. At the Hearing, Uruguay asserted: "…the answer to the question who contributed significant capital to Trigosul is no one. Further, these payments to Trigosul were recorded, all of them, as having been made in cash. Thus, there is no documentary record of the source of the funds."[172] Uruguay also stated that Dr. Lapique had admitted that he had acted on Italba's instructions in connection with its alleged contribution to Trigosul.[173]

239. Indeed, Dr. Lapique admitted acting on the basis of the information provided by Italba relating to the contributions it claimed to have made to Trigosul. He stated:

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[169] Claimant's Reply, ¶¶ 80 and 83. Trigosul's Book of Shareholders and Directors Meetings, pages 5-6, C-164; Trigosul's Diary, pp. 8, 10, C-167; Report of Dr. Lapique, 12 May 2017, pages 7, 11, 12, 14 to 18.

[170] Claimant's Reply, ¶ 83.

[171] Claimant's Post-Hearing Brief, ¶ 36.

[172] Transcript of the Hearing of 13 November 2017 (Day 1), 274: 10-13.

[173] Transcript of the Hearing of 13 November 2017 (Day 1), 281: 11-18.

"According to the instructions received:

a) All funds received by Trigosul were contributed by Italba Corp.

b) Italba Corp. delivered funds to Trigosul's directors so that the directors would deliver them to Trigosul.

c) The Company and its directors recognize Italba Corp. as shareholder.

***According to the instructions received,** the Contributions for future paid-in capital were made by Italba Corp., who is the one that has financed Trigosul's operations from its inception to date."*[174] (Emphasis added)

240. The foregoing was confirmed by the Claimant itself in its Post-Hearing Brief. When commenting on Uruguay's criticism of Dr. Lapique's report, it stated that "[t]his is a bizarre criticism to make of an expert witness who, by definition, *ought not* to have firsthand knowledge of the facts" (italics in the original).[175]

241. Nor is there any evidence on record (a check, a wire transfer or another commercial instrument) in support of the assertion that Italba contributed the "overwhelming majority" of Trigosul's share capital. The truth is that there is no record of any capital contribution from Italba to Trigosul.

242. The Tribunal finds that, on the basis of the capital contribution criterion, Italba cannot be said to be a shareholder of Trigosul.

243. As indicated in paragraph 213, the Tribunal shall now proceed to analyze Italba's arguments on the ownership of the share certificates of Trigosul, in accordance with the laws of the State of Florida.

244. The Claimant alleged that, since Dr. Alberelli was in Florida when he endorsed Trigosul's shares on 15 August 2002, such transfer is governed by Florida law.[176] As stated in

[174] Report of Dr. Luis Lapique, 12 May 2017, pages 2 and 7.

[175] Claimant's Post-Hearing Brief, page 16, footnote 60.

[176] Claimant's Reply, ¶ 75; Claimant's Post-Hearing Brief, ¶ 27.

paragraph 213, the Tribunal considers that there is no sufficient evidential basis to assert that the endorsement was actually made in Florida, and that, as a consequence, the applicable law is that of the endorser's domicile. The only evidence on record on this matter are the statements made by Dr. Alberelli and his wife.[177]

245. The second criterion put forward by the Claimant in support of its argument that Florida law should apply to this case is based on Article 30 of the Treaty, which refers to the applicable rules of international law. In relation to this criterion, Italba cited Article 2398 of the Civil Code of Uruguay, which provides that "[a]ssets, whatever their nature, are exclusively governed by the law of the place where they are, in terms of their quality, their possession, their absolute or relative transfer, and all *in rem* relationships to which they may be subject."[178] [Tribunal's Translation]

246. The Claimant submitted: "Here, the share certificates of Trigosul were located in Florida and the act that transferred ownership of those shares from Dr. Alberelli to Italba occurred in Florida. Thus, Florida law governs Trigosul's ownership."[179] In addition, based on the law of that State, Italba reiterated that Dr. Alberelli endorsed the bundle of all of Trigosul's stock certificates and deposited them in a safety deposit box, where he typically kept key documents belonging to Italba, in his and his wife's name;[180] according to Italba and Dr. Alberelli, the certificates were delivered to Italba, and, thus, the transfer was completed.

247. Italba concluded that, "[u]nder Florida law, a transfer of shares is complete when shares are 'delivered' to the transferee, *i.e.*, the transferee acquires possession of the stock certificates." In the footnote, it cited "Fla. Stat. § 678.3011(1)(a) (1997) (C-220) ("Delivery of a certificated security to a purchaser occurs when . . . the purchaser acquires possession of the security certificate."); *see also, e.g., Tanner v. Robinson*, 411 So. 2d 240, 242 (Fla.

[177] Statement of Dr. Gustavo Alberelli, 12 May 2017, ¶ 17; Statement of Ms. Beatriz Alberelli, 12 May 2017, ¶ 6.
[178] Claimant's Reply, ¶¶ 76-78.
[179] Claimant's Reply, ¶ 78.
[180] Claimant's Reply, ¶ 79; Claimant's Post-Hearing Brief, ¶ 27.

Dist. Ct. App. 1982) (C-221) ("transfer of a gift of stock effective upon actual or constructive delivery of the shares)."[181]

248. In *Tanner v. Robinson*, the District Court of Appeal of Florida stated: "As such, we hold that an *inter vivos* transfer by gift of any interest in securities is accomplished by either actual or constructive delivery of the same, where donative intent is also present, and where acceptance by the donee may be presumed or is proven directly…."[182]

249. Mr. Conti, expert for Uruguay, also made reference in his report to the requirements laid down by *Tanner v. Robinson* (delivery, intent and acceptance) although, to him, that case is governed by Florida case law rather than by Florida statute law[183]; furthermore, according to Mr. Conti, the requirements are "simultaneous."[184]

250. In the Tribunal's opinion, no intent to endorse all the share certificates from Trigosul to Italba has been shown. Clearly, the existence of such intent may not be assumed, as the only certificate allegedly endorsed is number 4. Such intent is not recorded in the company's books either. There is, furthermore, no evidence of the delivery of the shares and Italba's subsequent exercise of rights as a shareholder on the record; there is also nothing that shows Italba's exercise of its purported rights as a shareholder and owner of the shares represented by certificate 4, let alone those represented by the other certificates. As stated above, Italba was not shown to have participated in any Shareholders' Meeting or to have shared in Trigosul's profits or losses. Nor was the purported acceptance recorded in Trigosul's and Italba's books, it being merely supported by the statements made by Dr. Alberelli.

[181] Claimant's Reply, ¶ 79 and footnote 283.

[182] *Tanner v. Robinson*, 411 So. 2d 240, 242, Fla. Dist. Ct. App. 1982, page 2, C-221.

[183] "Alberelli's purported transfer of the Trigosul stock certificates by gift should not be governed under Chapter 678, which is intended to apply to purchases of stock. In my opinion, Florida common law should govern the validity of Alberelli's purported gift of Trigosul stock certificates to Italba", Report of Mr. Louis T.M. Conti, 9 August 2017, page 12.

[184] "The requirements for an *inter vivos* gift of corporate stock are simultaneous intent, delivery, and acceptance", Report of Mr. Louis T.M. Conti, 9 August 2017, page 10-12. Transcript of the Hearing of 17 November 2017 (Day 5), 1283: 1-8.

251. In its Post-Hearing Brief, Italba referred to a case appended to Mr. Conti's Report (*Estate of Maxcy v. Commissioner of Internal Revenue*), and assert that the U.S. Court of Appeals for the Fifth Circuit "… upheld the validity under Florida law of a gift of shares in a close corporation notwithstanding the U.S. Internal Revenue Service's argument that the gift had not been perfected by physical delivery…Where the government could raise no alternative theory of the donor's intent, the Court dismissed insistence on physical delivery as 'tokenism in which we do not think the courts of Florida would indulge' and found 'constructive' delivery sufficient."[185]

252. In the Tribunal's view, the case cited by Italba refers to circumstances that are totally different from those of the present case. In *Estate of Maxcy*, the donor of the company's shares entered the donation of shares in the corporate records and reported it in its income tax returns; it also issued new share certificates and asked the company secretary to issue such certificates in the name of the donees. One of the certificates was not personally delivered to the donee but kept in a safety deposit box of the company; however, it was shown that the donee had access to the box, both in law and in fact. For these reasons, the Court in that case was able to establish, by reference to cogent evidence, the donor's intent and the acts it performed in order to express it. This Tribunal concludes that there is no such evidence in the present case.

253. As stated above (paragraph 213), the Tribunal is certain that this matter should be resolved in accordance with the laws of Uruguay, the only law applicable to this case. Nonetheless, in order to consider the entirety of the Claimant's arguments the Tribunal also analyzed the laws of the State of Florida and concluded that Italba was not the owner of Trigosul under either system of law. The Tribunal thus analyses in the following section Italba's allegation that it controls Trigosul.

b. Does Italba Corporation control Trigosul?

254. The definition of "investment" in Article 1 of the Treaty refers to "every asset that an investor owns or *controls*, directly or indirectly, that has the characteristics of an

[185] Claimant's Post-Hearing Brief, ¶ 34; *Estate of Maxcy v. Commissioner of Internal Revenue*, 441 F.2d 192, 194 (5th Cir. 1971), LC-14.

investment". (emphasis added) The term "control" is not defined in the Treaty. The omission of a definition for "control" accords with long-standing U.S. practice, reflecting the fact that determinations as to whether an investor controls an enterprise will involve factual situations that must be evaluated on a case-by-case basis.

255. Italba argued, for the purposes of Article 1 of the Treaty, that it controls Trigosul and asserted, based on Messrs. Alberelli's and Herbón's statements and the documents to be cited below, that: (a) it made business decisions for Trigosul; (b) "contributed the vast majority of Trigosul's share capital"; (c) funded Trigosul's operations; and (d) represented to third parties that it was the owner of Trigosul.[186]

256. The Claimant submitted several documents in support of its assertion that it made business decisions for Trigosul. The Tribunal addresses each of them and states its conclusion once it has reviewed them all:

(a) Proposal for a Banking Communication Network of 6 January 1999.[187] This document makes no reference to Trigosul; moreover, it is a proposal made by ETS and Italba Telecom S.A., and not by Italba Corporation.

(b) "Site Survey Report: Uruguay, Prime Wave Communication" of 15 October 2001.[188] The Report makes no reference to Trigosul or Italba.

(c) Agreement with WorldStar Communications Corp. for the purpose of creating a Joint Venture for a Telecommunications Project in Uruguay of July 2009.[189] This document makes no reference to Trigosul; it concerns a company referred to as Sumitel, which appears to have licenses in Uruguay.

[186] Claimant's Reply, ¶¶ 34-37; Statement of Dr. Gustavo Alberelli, 12 May 2017, ¶ 8; Statement of Ms. Beatriz Alberelli, 12 May 2017, ¶ 5; Statement of Mr. Luis Herbón, 12 May 2017, ¶ 10.

[187] Claimant's Reply, ¶ 34; Proposal for a Banking Communication Network, 6 January 1999, C-006; Statement of Dr. Gustavo Alberelli, 12 May 2017, ¶ 11.

[188] Claimant's Reply, ¶ 34; Site Survey Report: Uruguay, 15 October 2001, C-165; Statement of Dr. Gustavo Alberelli, 12 May 2017, ¶ 11.

[189] Claimant's Reply, ¶ 34; Joint Venture Agreement for Telecommunications Project in Uruguay, July 2009, C-007; Statement of Dr. Gustavo Alberelli, 12 May 2017, ¶ 11.

(d) Co-Investment Agreement Among Eastern Pacific Trust and Italba Corporation of 14 June 2002.[190] It refers to Trigosul as a "strategic partner," not as Italba's subsidiary; in addition, it makes reference to a project in Ecuador.

(e) Joint Venture Terms Sheet between Phinder Technologies Inc. and Italba Corporation of 14 February 2007.[191] It is a document concerning Latin America, Europe (Spain and Portugal) and Africa. It makes no reference to Trigosul or Uruguay.

257. Italba also claimed to have sought out potential joint ventures "…that would allow it to realize the full value of its investment in Trigosul"; Italba "… acted as the negotiating and contracting party, and its contribution to the joint venture partnerships included the use of Trigosul's license—which Italba was able to contribute because it owned Trigosul."[192] To such effect, Italba made reference to the following businesses:

(a) Negotiations with Eastern Pacific Trust: letter of intent of 3 February 2002 and Co-Investment Agreement of 14 June 2002 (cited in paragraph 256 (d) above).[193] Regarding the letter of intent, the Tribunal notes that it is not signed and mentions Trigosul only once. Furthermore, it is addressed to Italba Telecommunications Group, not Italba Corporation. The Claimant also submitted the statement of Mr. Alan Cherp, director of InterAmerican Telco Systems. He told the Tribunal that he had met Dr. Alberelli in 2002, at a telecommunications event where they discussed business in Uruguay through Trigosul, Italba's subsidiary.[194]

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[190] Claimant's Reply, ¶ 34; Co-Investment Agreement Among Eastern Pacific Trust and Italba Corporation, 14 June 2002, C-015.

[191] Claimant's Reply, ¶ 34; Joint Venture Terms Sheet Between Phinder Technologies Inc. and Italba Corporation, 14 February 2007, C-030; Statement of Dr. Gustavo Alberelli, 12 May 2017, ¶ 20.

[192] Claimant's Reply, ¶ 34; Statement of Dr. Gustavo Alberelli, 12 May 2017, ¶¶ 11-20.

[193] Claimant's Memorial, ¶¶ 22-29; Letter from de A. Cherp to A. Jansenson and G. Alberelli, 3 February 2002, C-014.

[194] Statement of Mr. Alan Cherp, 9 May 2017, ¶ 8.

(b) Negotiations with a representative of Brasil Telecom on the possibility of creating a joint venture involving a U.S.-based investment group named Starborn.[195] There is no evidence of this negotiation in the case record.

(c) Potential deal with ANTEL (Uruguay's state-owned telecommunications company). The only evidence of this "potential deal" is to be found in the statements of Messrs. Alberelli and Herbón.[196] The Tribunal cannot, based on these statements alone, deem the alleged control of Italba over Trigosul to be proven.

(d) Negotiations with Phinder Technologies Inc. (a Canadian telecommunications company), in order to execute a Joint Venture for the creation of Zupintra Panamá S.A.[197] Italba submitted several documents: (i) Italba Corporation's "Project Structure" of 21 January 2007,[198] whereby the scope of the project includes Central America, South America, and parts of Europe and Africa. The Tribunal finds no reference to Trigosul's license in Uruguay there; (ii) "Joint Venture Terms Sheet between Phinder Technologies Inc. and Italba Corporation" of February 2007.[199] The document indicates that Italba shall contribute the telecom licenses in the target countries (located in Latin America, Europe (Spain and Portugal) and Africa); based on the contents of the document, the Tribunal cannot conclude that it would include Trigosul's license; (iii) "Shareholders' Agreement" between Phinder Technologies Inc. and Italba Corporation of March 2007.[200] The document is a draft with handwritten notes, which is not signed and makes no reference to Trigosul; (iv)

[195] Claimant's Memorial, ¶ 33; Statement of Dr. Gustavo Alberelli, 16 September 2016, ¶ 36; Statement of Mr. Luis Herbón, 16 September 2016, ¶ 19.

[196] Claimant's Memorial, ¶¶ 38-40; Statement of Dr. Gustavo Alberelli, 16 September 2016, ¶¶ 40-41 and 43; Statement of Mr. Luis Herbón, 16 September 2016, ¶¶ 23-24.

[197] Claimant's Memorial, ¶¶ 42-47.

[198] Project Structure, 21 January 2017, C-027.

[199] Joint Venture Terms Sheet Between Phinder Technologies Inc. and Italba Corporation, 14 February 2007, C-028 (also submitted as C-030).

[200] Shareholders' Agreement, March 2007, C-029.

"Joint Venture Terms Sheet between Phinder Technologies Inc. and Italba Corporation" dated 14 February 2007[201] (discussed in paragraph 256 (e) above); (v) Certificate of Incorporation of Zupintra dated 8 March 2007.[202] This document indicates that Dr. Alberelli appeared before a public notary in order to constitute such corporation in his individual capacity; the document makes no reference to Italba or Trigosul; (vi) Press release entitled "Zupintra Communications Inc. forms Joint Venture with Italba Corporation" of 19 March (year not specified).[203] It refers to telecommunications opportunities in Latin America and the Caribbean, but says nothing about Trigosul; (vii) News report entitled "Zupintra, Italba create telecoms JV" of 19 March 2007.[204] This news report deals with the association of the two companies mentioned to do business in Latin America and the Caribbean; it makes no reference to Trigosul; (viii) E-mails of 3, 4, 5, 8, 9 and 10 May 2007, and 6, 7, 11 and 12 June 2007.[205] Such communications mostly refer to business in Argentina, while some of them deal with the expansion to Uruguay; nonetheless, they make no reference to Trigosul. In their statements, Mr. Christopher G. Hall, Chief Operating Officer of Phinder Technologies Inc., and Mr. John Alexander van Arem, President and Chief Executive Officer thereof, asserted that Trigosul was Italba's subsidiary.[206] The Tribunal considers that such statements do not correspond to the contents of the documents submitted and analyzed in this paragraph.

[201] Joint Venture Terms Sheet Between Phinder Technologies Inc. and Italba Corporation, 14 February 2007, C-030 (also submitted as C-028).

[202] Public document 3,320 for the constitution of Zupintra Panamá S.A., C-032.

[203] Zupintra Communications Inc. forms Joint Venture with Italba Corporation, 19 March (year unknown), C-033.

[204] Zupintra, Italba create telecoms JV, 19 March 2007, C-034.

[205] Juan Pedro Tomas, Zupintra Panama completes first phase of LatAm network, 8 May 2007, C-036; Emails from R. Miranda to A. Goldstein et al., 4 May 2007, C-037; Email from G. Alberelli to M. Kisiel et al., 8 May 2007, C-038; Email from C. Hall to G. Alberelli, 12 June 2007, C-039 and Email from M. Kisiel to C. Hall et al., 10 May 2007, C-040.

[206] Statement of Mr. Christopher G. Hall, 12 May 2017, ¶ 3. Statement of Mr. John Alexander van Arem, 10 May 2017, ¶ 3.

(e) Negotiations with Telmex Uruguay (Telstar S.A.).[207] Italba submitted the following documents: Intention and Confidentiality Agreement of 21 June 2007;[208] and five e-mails exchanged in December 2007, March 2008, and March and November 2009.[209] Both the Agreement and the communications refer to Trigosul only; none of them mentions Italba, which is why it cannot be inferred that Italba was negotiating for Trigosul.

(f) Negotiations with Dr. Fernando García:[210] Italba submitted a letter from Dr. García to Dr. Alberelli of 4 October 2010, and the Data Transmission and Computer Equipment Trial Loan Contract of December 2010.[211] Regardless of the authenticity of Dr. García's signature, which was questioned, neither of the documents indicates that the negotiation was conducted by Italba or that Italba acted for Trigosul.

(g) Negotiations with DirecTV: The Claimant submitted two e-mails exchanged by Mr. Martín Colombo and Dr. Alberelli on 17 March 2011.[212] These communications make no reference to Italba such that it would permit an inference to be drawn that Dr. Alberelli was acting for Italba or that Italba was owned or controlled Trigosul.

(h) Negotiation with Grupo Afinidad Mary in order to offer various services to the community of 2,100 retirees: The Claimant submitted a document entitled "Projection of Income, Investments, and Costs" (undated and unsigned),[213] and a letter from Mr. Richard G. Weber to Dr. Alberelli of 1 May 2012.[214] These

[207] Claimant's Memorial, ¶¶ 48-52.

[208] Intention and Confidentiality Agreement, 21 June 2007, C-042.

[209] Email from G. Alberelli to Luis Herbón (inquiring as to whether Trigosul would sell its license to Telmex), 19 December 2007, C-043; Email from L. Herbón to G. Alberelli, 4 April 2008, C044; Email from M. Hublitz to G. Alberelli 28 March 2009, C-050; Email from G. Alberelli to M. Hublitz, 25 March 2009, C-051 and Email from M. Hublitz to G. Alberelli (attaching Uruguay Mobile WiMAX Network Presentation), 12 November 2009, C-052.

[210] Claimant's Memorial, ¶¶ 55 and 56.

[211] Letter from Dr. García to Dr. Alberelli dated 4 October 2010, C-056; and Data Transmission and Computer Equipment Trial Loan Contract of 1 December 2010, C-057.

[212] Claimant's Memorial, ¶¶ 59 and 60; E-mails of 17 March 2011, C-061.

[213] Project of Income, Investments, and Costs (undated) C-064.

[214] Letter from Mr. Richard G. Weber to Dr. Gustavo Alberelli, 1 May 2012, C-065.

documents only make reference to Trigosul, not Italba, so that it is impossible to determine who started the alleged negotiation.

258. The documents and statements mentioned above cannot support a conclusion that Italba communicated or represented to the interested parties that it was negotiating contracts for its purported subsidiary, Trigosul, or that it controlled it. Moreover, the Tribunal notes that some of the witness statements submitted by Italba are inconsistent with the contents of the documentary evidence filed by that Party.

259. By virtue of the foregoing reasons, the Tribunal finds that the Claimant has failed to prove that it made business decisions for Trigosul.

260. As to Italba's alleged capital contributions to Trigosul, the Claimant submitted the following documents:

(a) Italba's Commercial Checking Bank Account Statement (from 1 to 28 February 2001).[215] By means of this document, Italba purported to prove that it wired USD 35,000 to Trigosul as a reimbursement of expenses. The Tribunal notes that the transfer was made by the Claimant to Mr. Luis Herbón, and that, in footnote 159 of its Reply Memorial, Italba stated: "The wire transfer was made to Luis Herbón's account at Indumex, a Uruguayan financial services company that facilitates international money transfers." The purpose of such transfer is not mentioned in the case record, and the Claimant has submitted no evidence that it was actually a capital contribution from Italba to Trigosul.

(b) Contribution of 632,674 Uruguayan pesos that Trigosul paid to DNC as an advance on the first two years of fees for Trigosul's operation in the spectrum.[216] The Tribunal has confirmed that Trigosul's accounting book called "Diary" makes reference to such amount, but there is no record

[215] Claimant's Reply, ¶ 35; Italba's Commercial Checking Bank Account Statement, 1 February - 28 February 2001, C-166; Statement of Dr. Gustavo Alberelli, 12 May 2017, ¶ 16; Statement of Mr. Luis Herbón, 12 May 2017, ¶ 14; Trigosul's Diary, C-167.
[216] Claimant's Reply, ¶ 35; Trigosul's Diary, C-167, and Trigosul's Book of Shareholders and Directors Meetings, C-164; Statement of Dr. Gustavo Alberelli, 12 May 2017, ¶ 16; Statement of Mr. Luis Herbón, 12 May 2017, ¶ 14.

whatsoever of the source of the contribution necessary to enable Trigosul to make the relevant payment to DNC.

261. The Tribunal finds that Italba has submitted no evidence that it made capital contributions to Trigosul.

262. Italba's third argument is that it funded Trigosul's operations. Accordingly, Italba submitted the following documents on three issues: purchase of equipment, drawing checks, and purchase of bonds:

(a) Equipment: fax to Italba Group (to the attention of Mr. Albert Jansenson) from Mr. Daniel V. de los Santos of L-3 Communications of 8 May 2001; Quotation No. 2501 from Wavelynx International Inc. of 11 January 2000; "Seller's Agreement" between Italba Corporation and Wavelynx International Inc. of 27 February 2000; and Invoice No. 107 from StarMesh Technologies to Italba of 12 June 2007[217] (according to Italba, the equipment was approved by URSEC).[218] The fax includes a Memorandum of Understanding (MOU) which mentions Trigosul as a subsidiary of Italba, but neither the fax nor the MOU were signed. The quotation refers to equipment for Italba, but it was not shown that Italba purchased such equipment for Trigosul. The "Seller's Agreement" makes no reference to Trigosul. Invoice No. 107 indicates that the equipment would be shipped to Miami; there is no evidence of its subsequent shipping to Trigosul. Although Italba stated that such equipment was later approved by URSEC, the Tribunal reviewed the approval submitted, which includes neither a list, nor a description of the equipment, and, thus, does not confirm that it is the same equipment as that mentioned by the Claimant. Italba also cited UMDN-URSEC Resolution of 10 September 2002, which approved the payment for Trigosul's equipment, purchased by Italba.[219] Such resolution

[217] Claimant's Reply, ¶ 36; Fax from D. Los Santos to A. Jansenson, 8 May 2001, C-168; Quotation No. 2501 from Wavelynx International, Inc., 11 January 2000, C-159; Seller's Agreement between Italba Corporation and Wavelynx International Inc., 27 February 2000, C-160; and Invoice No. 107 from StarMesh Technologies, 12 June 2007, C-169.

[218] Certificate of Approval, 29 June 2007, C-170.

[219] Claimant's Reply, ¶ 36; UMDN-URSEC Resolution, 10 September 2002, C-171.

concerns a settlement agreement reached before the "*Juzgado de Conciliación del 2do Turno*", between Trigosul, the Uruguay Ministry of Defense and URSEC (due to the change of frequencies by means of Decree 282/2000 (see paragraphs 85 and 88 above)). As explained above, Trigosul alleged that, in view of the frequencies it had been allocated prior to such Decree, it purchased equipment it would not be able to use with the new frequencies. A line of the Resolution reads "ITALBA invoice for the purchase of radios: US $25,964." The Tribunal cannot interpret this mere reference to Italba as evidence of a contribution from Italba to Trigosul through delivery of equipment.

(b) Writing of checks: Italba alleges that it regularly drew checks to cover Trigosul's expenses; in support of such assertion, it submitted two checks (dated 7 June 2005 and 13 May 2006 respectively).[220] It also made reference to the accounting books of Trigosul where the cash allegedly contributed by Italba would be recorded as "contribution by directors."[221] One of the checks mentioned by Italba was drawn to "Cash", while the other was drawn in favor of Dr. Alberelli. No relationship between Italba and Trigosul may be derived from such evidence. As to accounting records, the Tribunal cannot construe the expression "contribution by directors" as a contribution made by Italba; that would be an unfounded and forced interpretation of the text.

(c) Bonds: Italba contends that, in April 2004, it gave Mr. Herbón approximately USD 25,000 to purchase Uruguayan bonds,[222] and that, two years later, on Italba's instructions, Mr. Herbón sold those bonds and used the money to cover Trigosul's expenses. The Tribunal notes that the two checks mentioned by Italba were written in favor of persons other than Trigosul, and that the only relevant note in Trigosul's Breakdown of Transactions reads "contribution by

[220] Claimant's Reply, ¶ 36; Check of 7 June 2005, C-173, and Check of 13 May 2006, C-174.

[221] Trigosul's Breakdown of Transactions, from1 December 2001 to 30 November 2006, C-175; and Diary of Accounting Records from 1 December 2007 to 30 November 2015, C-176.

[222] Claimant's Reply, ¶ 36; Check of 27 April 2004, C-177; Check of 27 April 2004, C-178, Receipt for Purchase of Bonds, 29 April 2004, C-179, Receipts for Sale of Bonds, 18 August 2016 and 30 November 2016, C-180, and Trigosul's Breakdown of Transactions from 1 December 2001 to 30 November 2006, C-175; Statement of Mr. Luis Herbón, 12 May 2017, ¶ 15; Statement of Dr. Gustavo Alberelli, 12 May 2017, ¶ 19.

directors" but does not state that the contributions were made by Italba. Therefore, the Tribunal cannot accept that the Claimant has proven that the money related to the checks and bonds was a contribution from Italba to Trigosul. Rather, the evidence mentioned in this paragraph establishes that Dr. Alberelli covered Trigosul's expenses.

263. The evidence submitted by the Claimant having been carefully examined, the Tribunal finds that there is no evidence on the record to conclude that Italba was actually controlling Trigosul.

264. The Claimant cited several ICSID awards in support of its argument that, in order to analyze the jurisdiction of the Tribunal, the notion of control over a company is flexible and broad, rather than strict. The Tribunal considers that, given that there is no evidence of Italba's control over Trigosul in any of the areas mentioned by Italba (negotiation of contracts, capital contributions, and funding of transactions), the discussion and analysis of such awards, though very interesting, would be futile for the purposes of this Award.

265. The Tribunal having thoroughly analyzed the Parties' positions and the evidence on which they relied in support thereof, on the basis of the statements made by the Parties and the evidence on record, the next section contains a summary of the Tribunal's findings.

(3) The Tribunal's Findings

266. In preparation for the investment to be made in Uruguay, Dr. Alberelli acquired a company which had already been incorporated and which was then named Trigosul (according to Dr. Alberelli, although the first six certificates are dated 1996, he actually acquired Trigosul in 1999). Trigosul's new shareholders (Dr. Alberelli and his mother, Ms. Carmela Caravetta) appointed Mr. Luis Herbón as Chairman of the Board of Directors (see paragraphs 76, 78 and 79 of this Award; Book of Shareholders and Directors Meetings, page 3, C-164).

267. In January 1997, the MDN authorized Dr. Alberelli to provide wireless services in Uruguay (see paragraph 81 above).

268. In August 1997, the DNC allocated to Dr. Alberelli the radio channels of some frequencies (see paragraph 82 above).

269. In February 2000, and in response to Dr. Alberelli's request to the DNC, the MDN transferred to Trigosul the authorization granted to Dr. Alberelli (paragraph 84 above).

270. The Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment was entered into on 4 November 2005 and came into force on 1 November 2006 (see paragraph 94 above).

271. On account of Trigosul's various problems with the Uruguayan telecommunications authorities, in February 2016, Italba filed this claim for arbitration against Uruguay before ICSID (see paragraph 6 above).

272. Dr. Alberelli cannot be considered as an investor under the ICSID Convention or this Treaty as he is a national of Italy, not the United States, which is a fundamental requirement to enjoy the protection of the Treaty. Trigosul being a Uruguayan company, could not qualify as an investor either in the circumstances of this case (see paragraphs 75 and 76 above).

273. The Claimant has asserted that Italba Corporation, a company incorporated under the laws of the State of Florida, United States of America, is a qualified investor under the ICSID Convention and the Treaty. However, Trigosul's corporate documents contain no indication that Italba was a shareholder of Trigosul.

274. Italba retained Dr. Luis Lapique, who issued a report admitting that "… a detailed analysis of Trigosul's different corporate books and the content of their records, as well as the shares issued by Trigosul," evidenced that "…[s]ome records have not been kept and certain shares have not been issued," and "…[r]ecords have been kept incorrectly and shares have been issued incorrectly." Nevertheless, Dr. Lapique, in support of the hypothesis that Italba owned Trigosul, contended that, in "…closely held corporations, there are cases in which

the corporate books and records are relegated to second place and formalities are not observed."[223]

275. Unable to find support in Trigosul's accounting books and records, the Claimant purported to show that Italba was the owner of Trigosul by means of Trigosul's share certificates.

276. Given that only one of Trigosul's share certificates (number 4) was endorsed in favor of Italba, the Claimant asserted the theory that the endorsement of one certificate entailed the endorsement of all others (see paragraph 169 above).

277. In order to show that he had delivered the share certificates to Italba, Dr. Alberelli asserted that the transfer occurred when he placed all the certificates of Trigosul in a safety deposit box where, in his own words, he and his wife would keep Italba's documents (see paragraph 169 above). The Claimant thus purported to meet the second fundamental requirement to complete the transfer of Trigosul's share certificates.

278. As the Tribunal has noted at paragraph 226 above, the Claimant sought to explain the failure to record the share transfer on the basis of Dr. Lapique's opinion that, in closely held corporations, corporate records were often relegated to second place, and that, in this particular case, such defects were due to "the lack of knowledge of the legal or accounting advisors of the company."[224]

279. This assertion is difficult to accept, as Dr. Alberelli was an experienced businessman, who, moreover, relied on the services of Mr. Herbón, a national of Uruguay, who was a Certified Public Accountant with experience in running his own and third-party businesses.[225]

280. The transfer of Trigosul's shares (by means of certificate number 4) from Dr. Alberelli to Italba was never made as it did not satisfy the requirements set forth in Article 305 of the

[223] Dr. Luis Lapique' Report, 12 May 2017, page 5.
[224] *Id.*
[225] Statement of Mr. Luis Herbón, 16 September 2016, ¶ 5.

Commercial Companies Act.[226] It follows that this could not have resulted in the transfer of the other share certificates of Trigosul either, which were not even endorsed to Italba.

281. Italba asserted (based on the report of its expert, Dr. Lapique) that what matters is not form (notwithstanding the express provisions of the laws of Uruguay), but "economic reality." In support of this theory, it relied upon Article 189 of the Commercial Companies Act (see paragraph 227 above), which, in cases of fraud and violation of public order (*e.g.*, tax evasion), provides that legal personality may be disregarded (known as "piercing the corporate veil" in other legal systems) so as to determine who actually owns the shares. Pursuant to this Article, the Claimant contended that Italba was the true owner of Trigosul's shares. The Claimant's argument cannot be accepted, as the legal basis on which it relies (Article 189 of the Commercial Companies Act) regulates legal situations other than those of this case, and, thus, does not apply here. Furthermore, this argument is contrary to the Claimant's contention in paragraph 97 of its Reply Memorial that the corporate veil should not be pierced (see paragraph 179 above).

282. No matter how much the corporate veil could be pierced or Trigosul's legal personality be disregarded, the truth is that Dr. Alberelli and his family still appeared as the sole owners of Trigosul's shares.

283. The Claimant then purported to assert that Italba had provided Trigosul with the funds necessary for its operation (see paragraph 226 above). This argument failed because it was unsupported by any cogent evidence. Instead, the evidence submitted by Italba rather confirmed that it was Dr. Alberelli who had made the capital contributions necessary for Trigosul's operation.

284. In the alternative, the Claimant argued that it controlled Trigosul even if the Tribunal were to find that it did not own it. For such purposes, Italba submitted letters and other documents, most of which were inapposite or concerned different situations. This evidence simply confirmed that it was Dr. Alberelli who controlled Trigosul and not Italba.

[226] Commercial Companies Act of 4 September 1989, Article 305, C-222 and EXM-006.

285. Given its finding that Italba neither owns, nor controls Trigosul, for the purposes of Articles 1 and 24 of the Treaty and Article 25 of the ICSID Convention, the Tribunal declares that it has no jurisdiction to settle the dispute between Italba Corporation and the Oriental Republic of Uruguay and it so states in the *dispositif*.

286. As the Tribunal has upheld the Respondent's first objection on jurisdiction, the Tribunal does not deem it necessary to rule upon the other jurisdictional objections raised by the Respondent.

VII. COSTS

A. Claimant's Cost Submissions

287. In its submissions on costs, the Claimant argues that the Respondent should bear all the costs and expenses of these proceedings. The Claimant's total costs and expenses incurred in connection with this arbitration amount to USD 8,923,882.28 [227] and are broken down as follows: (a) USD 7,424,562.89 in respect of Italba's counsel fees and expenses, (b) USD 1,022,151.67 in respect of experts' fees and expenses, (c) USD 2,167.72 in respect of representatives' and witnesses' expenses, (d) the ICSID lodging fee of USD 25,000, and (e) USD 450,000 in respect of advances towards the Tribunal's fees and expenses and ICSID's administrative fees. In addition, the Claimant seeks compound interest on any damages and costs calculated annually at a commercial rate from the date of the Award until the date of payment by Uruguay.[228]

288. The Claimant argues that an award on costs to the Claimant is "uniquely appropriate" in this case because Italba was forced to assert its rights under the Treaty only as a result of Uruguay's failure to comply with the "*Tribunal de lo Contencioso Administrativo*" judgment, destroying the value of Italba's investment in breach of the Treaty.[229] Furthermore, Uruguay's abusive conduct in the context of this dispute "greatly aggravated

[227] Italba's Submission on Costs.
[228] Italba's Submission on Costs, ¶ 31.
[229] Italba's Submission on Costs, ¶ 18.

the harm inflicted by Uruguay's breaches of the Treaty as well as the costs of this arbitration."[230]

B. Respondent's Cost Submissions

289. In its submissions on costs, the Respondent submits that the Claimant should bear all the costs and expenses of these proceedings. The Respondent's total costs and expenses incurred in connection with this arbitration amount to USD 6,002,836.75,[231] and are broken down as follows: (a) USD 4,151,031.90 in respect of Uruguay's counsel's fees, (b) USD 1,401,804.85 in respect of experts' fees and expenses, and administrative expenses, and (d) USD 450,000 in respect of advances toward the Tribunal's fees and expenses, and ICSID's administrative fees. In addition, the Respondent seeks the Tribunal to order the Claimant to pay interest at the LIBOR rate applicable to one-year deposits in U.S. dollars in effect on the date on which the Award is issued, plus 4%, accruing 60 days after the Parties are served notice of the Award, compounded semi-annually.[232]

290. The Respondent argues that an award on costs to Uruguay is justified in this case because (a) Italba claimed the existence of jurisdiction without having legal standing to do so,[233] (b) Italba presented frivolous claims as to jurisdiction, merits and damages,[234] and (c) throughout these proceedings, Italba has acted in bad faith to interfere with the arbitral process, using "forged and suspect documents as supposed evidence in support of its arguments" in a "deliberate attempt to obscure the facts and mislead the Tribunal."[235]

C. The Tribunal's Decision on Costs

291. Both Parties to this arbitration agree that the "loser pays" principle (referred to also as "costs follow the event") should guide the allocation of costs in this arbitration. Each

[230] Italba's Submission on Costs, ¶ 20. Italba's letter dated 10 August 2018.
[231] Uruguay's Letter dated 7 November 2018.
[232] Uruguay's Submission on Costs, ¶¶ 21, 49; and Uruguay's Letter dated 7 November 2018.
[233] Uruguay's Submission on Costs, ¶¶ 21, 26.
[234] Uruguay's Submission on Costs, ¶¶ 28-36.
[235] Uruguay's Submission on Costs, ¶ 40.

Party has requested the Tribunal to order that the unsuccessful party reimburse to the successful party its costs in connection with these proceedings, including the advances made to ICSID for the Centre's charges and the fees and expenses of the arbitrators. [236]

292. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in USD):[237]

Arbitrators' fees and expenses	
Mr. Rodrigo Oreamuno	USD 227,392.65
Mr. John Beechey	USD 84,515.74
Prof. Zachary Douglas	USD 73,090.67
ICSID's administrative fees	USD 106,000.00
Direct expenses	USD 174,015.77
Total	**USD 665,014.83**

293. The above costs have been paid out of the advances made by the Parties in equal parts.[238] As a result, each Party's share of the costs of the arbitration amounts to USD 332,507.42.

294. Article 61(2) of the ICSID Convention provides:

> *In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*

295. This provision gives the Tribunal discretion to allocate all costs of the arbitration between the Parties, including by ordering the losing Party to bear in full the costs of the arbitration and the legal fees and expenses incurred by both Parties.

[236] Uruguay's Submission on Costs ¶ 3.

[237] The ICSID Secretariat will provide the Parties with a detailed Financial Statement of the case account.

[238] The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

296. The Tribunal has concluded that it has no jurisdiction over Italba's claims because the Claimant has failed to prove that Italba owns or controls Trigosul.[239] As explained above, Dr. Alberelli's endorsement of Trigosul's share certificates in favor of Italba was not in conformity with the applicable legal requirements and, therefore, failed to produce effects concerning Trigosul or third parties.[240] Moreover, no evidence was adduced that Italba shared in Trigosul's profits or losses, that Italba was overseeing the management of Trigosul's business, or that Italba exercised the rights that would have been available to it if it had actually been a shareholder of Trigosul.[241] Finally, the Claimant failed to prove that Italba communicated or represented to interested parties that it was negotiating contracts for Trigosul or that it controlled it.[242]

297. In view of the above, the Tribunal finds that the application of the 'loser pays' principle is appropriate. Accordingly, the Tribunal concludes that the Claimant shall bear its legal fees and expenses in full, as well as the costs of the arbitration. The Claimant shall also reimburse the Respondent's legal and expert fees and expenses in the amounts requested,[243] which the Tribunal finds to be reasonable in view of the Claimant's costs, the duration of the proceeding and the complexity of the issues addressed, regarding not only jurisdiction but also merits and quantum.

298. Accordingly, the Tribunal orders the Claimant to pay the Respondent the amount of USD 332,507.42 for the expended portion of Uruguay's advances to ICSID and USD 5,552,836.75 to cover Uruguay's legal and expert fees and administrative expenses.

299. The Tribunal notes that the Respondent has requested that it be granted interest on any costs awarded to it. Having considered the circumstances of this arbitration proceeding and the evidence adduced by the Parties, the Tribunal has not found sufficient basis to grant

[239] See supra ¶ 285.
[240] See supra ¶¶ 212-222.
[241] See supra ¶¶ 234-235.
[242] See supra ¶¶ 241, 257.
[243] Uruguay's Submission on Costs.

interest on the costs awarded to the Respondent. Accordingly, the Respondent's request for interest on costs is denied.

VIII. DECISION

300. For the foregoing reasons, the Tribunal decides:

(a) To uphold the objection to the Tribunal's jurisdiction raised by the Oriental Republic of Uruguay on the grounds that Italba Corporation neither owns nor controls Trigosul S.A., such that Italba Corporation is not an investor for the purposes of Articles 1 and 24 of the Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment and Article 25 of the ICSID Convention.

(b) To declare that the Tribunal has no jurisdiction to settle the dispute.

(c) To reject the Claimant's request that the Tribunal disregard the expert report of Professor Eugenio Xavier de Mello Ferrand.

(d) To order the Claimant to pay to the Respondent the entirety of the costs of this arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, as well as the Respondent's legal and expert fees and expenses incurred in connection with this arbitration, assessed in the amount of USD 5,885,344.17.

(e) All other requests for relief are dismissed.

Mr. John Beechey CBE
Arbitrator

Date: 14 February 2019

Prof. Zachary Douglas, Q.C.
Arbitrator

Date: 28 February 2019

Mr. Rodrigo Oreamuno
President of the Tribunal

Date: 4 March 2019