

**INTERNATIONAL CENTRE FOR SETTLEMENT OF
INVESTMENT DISPUTES**

ITALBA CORPORATION,

Claimant,

v.

THE ORIENTAL REPUBLIC OF URUGUAY,

Respondent.

ICSID Case No. ARB/16/9

CLAIMANT'S MEMORIAL

September 16, 2016

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1. Italba Corporation (*Italba*), a company incorporated under the laws of the State of Florida in the United States of America (the *U.S.*), submits this Memorial in support of its claims against the Oriental Republic of Uruguay (*Uruguay*) for breach of the Treaty Concerning The Encouragement And Reciprocal Protection of Investment Between Uruguay and the U.S. (the *Treaty*).¹ Italba brought this claim for \$62.5 million against Uruguay because, in March 2015, Italba learned that Uruguay had unlawfully confiscated Italba's investments by virtue of its: (a) refusal to comply with the final judgment of a Uruguayan administrative court that reinstated the telecommunications license of Italba's subsidiary, Trigosul, S.A. (*Trigosul*); and (b) transfer of Trigosul's rights under that license to a third party competitor while the administrative court proceedings were *sub judice*. At that time, Italba also learned that Uruguay's prior treatment of Italba's investments were the product of bad faith and discrimination, in breach of the Treaty's guarantees of fair and equitable treatment, non-discrimination, and full protection and security.

I. INTRODUCTION

2. Italba is a protected U.S. investor that conducts business in the U.S. and throughout Latin America and has invested millions in the Uruguayan telecommunications sector since the mid-1990s. In December 2000, the Uruguayan government issued a license to Trigosul, one of Italba's Uruguayan subsidiaries, to provide wireless data transmission services in the 3425-3450 and 3525-3550 MHz frequency band. Three years later, Uruguay enacted new telecommunications licensing regulations that, among other things, required the Unidad

1. Treaty Between the United States of America and The Oriental Republic of Uruguay Concerning the Encouragement And Reciprocal Protection of Investment (signed on Nov. 4, 2005; entered into force on Nov. 1, 2006) (*Treaty*) (**C-001**). In accordance with Procedural Order No. 1 (¶ 18.5.5), all of Italba's Exhibits and Legal Authorities are numbered using the format provided in Procedural Order No. 1 (e.g., C-001 and CL-001, respectively). This Memorial is submitted in accordance with Procedural Order No. 1, dated July 29, 2016, and pursuant to Rule 31 of the International Centre for Settlement of Investment Disputes Rules of Procedure for Arbitration Proceedings (*ICSID Arbitration Rules*).

Reguladora de Servicios de Comunicaciones (*URSEC*) — the Uruguayan governmental agency responsible for regulating telecommunications — to provide Trigosul with a license conforming to the new regulations. The issuance of such licenses to all existing license holders subject to URSEC's jurisdiction should have been a *pro forma* ministerial act.

3. Between 2007 and 2011, URSEC issued licenses conforming to the new regulatory regime to several of Trigosul's competitors. However, URSEC did not provide Trigosul with a license conforming to the new regulations. Although frustrated with the delay, Italba believed that Trigosul's conforming license was on its way based on the fact that: (a) Trigosul had received verbal assurances from URSEC that Trigosul would soon receive a license conforming to the new regulations; (b) the regulations themselves made the issuance of conforming licenses a mere formality; and (c) Trigosul had written to URSEC repeatedly and had never been advised that there was any intention to deny Trigosul such a conforming license.

4. In anticipation of receiving a license conforming to the new regulatory regime, Italba pursued numerous business opportunities involving the spectrum covered by Trigosul's license. However, in negotiations related to each of those opportunities, Italba's business partners insisted that Trigosul first receive the license conforming to the new regulatory regime. Because URSEC never issued Trigosul its conforming license, every one of Italba's major business opportunities died on the vine.

5. In January 2011, URSEC summarily revoked Trigosul's license to operate in the 3400-3500 MHz bandwidth. URSEC's main purported reason for the termination — that it had inspected Trigosul's offices in Montevideo and found them abandoned — was confusing because Trigosul had, months earlier, provided URSEC with notice that it had moved out of its offices in Montevideo to focus on business prospects in Punta del Este. Nevertheless, Trigosul presented URSEC with evidence that it had formally notified URSEC of its relocation. In light

of that evidence, Trigosul expected URSEC to swiftly rescind the termination. Instead, URSEC ignored the evidence and, in July 2011, Uruguay's Ministry of Industry, Energy, and Mining (*MIEM*), on the basis of URSEC's erroneous findings, revoked Trigosul's license to provide wireless data transmission services.

6. Frustrated but nevertheless having no reason to believe that URSEC's conduct was in bad faith, Trigosul appealed the revocation of its license to Uruguay's highest administrative court, the Tribunal de lo Contencioso Administrativo (*TCA*). Presented with the same facts that Trigosul had presented URSEC in 2011, the TCA entered a judgment in October 2014 declaring that the URSEC and MIEM resolutions revoking Trigosul's license had no legal basis and were null and void, with the effect that the 2011 revocation of Trigosul's license was considered never to have happened. In theory, based on the TCA judgment, Trigosul's rights were automatically reinstated with retroactive effect and the matter was closed because the ruling of the TCA was final, binding, and not subject to appeal.

7. What happened next was a shocking denial of justice: Uruguay simply ignored the TCA ruling and refused to make it possible for Trigosul's to use its license. In particular, URSEC refused to provide to Trigosul the necessary paperwork to operate its equipment in the frequencies that were the subject of the license and refused to list Trigosul in the registry of license holders, as would have been necessary pursuant to the TCA ruling. Why was this happening? In early March 2015, after months of reaching out to URSEC regarding the reinstatement of Trigosul's license and receiving no response, Italba learned that, in September 2013, while Trigosul's appeal of the revocation of its license was pending before the TCA, URSEC had given away Trigosul's rights under its license to a direct competitor, Dedicado S.A. URSEC had done so without giving the TCA or Trigosul notice that it was transferring the rights that were the subject of the TCA proceedings — and thereby rendering the proceedings

potentially moot.

8. With this information, Italba understood for the first time that URSEC had no intention of complying with the TCA's ruling. URSEC's conduct in secretly re-allocating Trigosul's rights while the adjudication of those rights was *sub judice* and its silence in the face of Trigosul's requests that it restore those rights in accordance with the TCA's judgment could have no conceivable good faith basis.

9. This realization also lifted the veil on URSEC's failure to issue Trigosul a license conforming to the new regulatory regime and subsequent termination of Trigosul's license. It became clear to Italba that URSEC's conduct was not the result of bureaucratic inefficiency, incompetence, or a good faith misunderstanding of the facts, but rather a pattern of deliberate bad faith and discriminatory conduct vis-à-vis Italba and Trigosul — conduct that first manifested itself in URSEC's failure to issue Trigosul a license conforming to the categories in the new regulations, then by URSEC's baseless revocation of Trigosul's rights, and finally by URSEC's refusal to comply with the judgment of its own courts reinstating the license.

10. Why did Uruguay treat Italba so poorly? Uruguay can better explain the decisions of its own regulators. However, the problem may have started in July 2006, when Gustavo Alberelli, the President and Chief Executive Officer of Italba, refused a request from URSEC's Interim Director, Alicia Fernandez, to provide a bribe of USD \$25,000 to "expedite" the issuance to Trigosul of a license conforming to the new regulations. The problem may also relate to the desire of the national telephone company, Antel, to jealously protect its monopoly. Around the time that Trigosul's problems arose, Antel tried to obtain control over Trigosul's spectrum, fearing that it could be used to provide broadband Internet service in parts of Uruguay not connected to fixed telecommunications lines.

11. Uruguay's motives are irrelevant, however. The fact is that its conduct violated

Uruguay's obligations under the Treaty. In **Part II** of this Memorial, Italba sets out the measures that resulted in Uruguay's breach of the Treaty. In **Part III**, Italba explains why this Tribunal has jurisdiction over the dispute and the dispute is not barred by any provisions in the Treaty. In **Part IV**, Italba shows that Uruguay's measures violated its obligations under the Treaty: (a) not to expropriate Italba's investment except in accordance with Article 6; (b) to treat Italba fairly and equitably; (c) to treat Italba no less favorably than it treats other domestic and foreign investors; and (d) to provide Italba with full protection and security. Finally, in **Part V**, Italba shows why, as a result of Uruguay's conduct, Italba has, to date, incurred damages in the amount of USD \$62.5 million. Such damages are necessary to wipe out the effects of Uruguay's unlawful conduct and restore Italba to the position it would have been in, but for Uruguay's breaches of the Treaty.

II. FACTS

A. In The Late 1990s, Italba Began Investing In The Uruguayan Telecommunications Sector.

1) Overview Of Italba's Business

12. Italba was incorporated in May 1982 under the laws of the State of Florida, United States.² The company is owned in equal shares by Gustavo Alberelli, who serves as President and Chief Executive Officer, and his wife Beatriz Alberelli, who serves as the company's Secretary.³ Dr. Alberelli is an Italian citizen and has been a permanent resident of the United States since August 1, 1977; Ms. Alberelli is a U.S. citizen.⁴

13. Italba's business at the time of its founding was the import and export of fabrics

2. Articles of Incorporation of Italba Corporation (May 10, 1982) (*Italba Articles of Incorporation*) (C-002).

3. Witness Statement of Gustavo Alberelli (Sept. 16, 2016) (*Alberelli Witness Stmt.*) ¶ 8; Italba Articles of Incorporation (C-002) at 5.

4. Alberelli Witness Stmt. ¶¶ 4, 8.

and clothing to and from the United States and Latin America.⁵ However, in the mid-1990s, Italba recognized the business opportunities available in the telecommunications sector and began investing in opportunities in that field. *First*, Italba began providing telephone switchboard services to companies in the United States.⁶ *Next*, as described in more detail below, Italba obtained the right to use spectrum in Uruguay in 1997 through a license issued to Dr. Alberelli. Since that time, Italba has invested more than USD \$5 million in the Uruguayan telecommunications sector.⁷

14. *Third*, in 2000, Italba entered into an agreement with Telesat Canada, a Canadian satellite services company, by which Italba acquired the right to resell satellite capacity from Telesat Canada, as well as landing rights for Telesat Canada's satellites in Ecuador.⁸ Since that time, Italba has maintained a steady business reselling satellite capacity to customers in the United States and Latin America, while Italba's Ecuadorian subsidiary, PrivaNet, provides satellite services to customers in Ecuador.⁹

15. *Finally*, in the mid-2000s, Italba began operations in Panama, providing a variety of services to U.S. expatriate communities.¹⁰ These services include wireless data, telephone and telemedicine services.¹¹ Italba is currently seeking approval from U.S. Medicaid programs

5. *Id.* at ¶ 9.

6. *Id.* That business continued until the early 2000s, at which point it ceased to be profitable because of the emergence of new technologies. *Id.*

7. Witness Statement of Luis Herbon (Sept. 16, 2016) (*Herbon Witness Stmt.*) ¶ 12.

8. Alberelli Witness Stmt. ¶ 10.

9. *Id.*

10. *Id.* at ¶ 12.

11. Telemedicine is the use of telecommunications technology to allow a doctor to evaluate and diagnose a patient remotely. In a typical telemedicine session, the doctor and the patient interact via videoconference,

to provide similar services to residents of retirement communities in the United States.¹²

2) Italba's Initial Investments In Uruguay Involved The PCS Spectrum.

16. In 1996, in furtherance of Italba's strategy of investing in the wireless data transmission business in Latin America, Dr. Alberelli personally applied to the Uruguayan government for a license to provide wireless data services in Uruguay.¹³ On January 17, 1997 and August 4, 1997, the Uruguay Ministry of Defense (*UMDN*) awarded Dr. Alberelli a license to provide point-to-point and multi-point wireless data transmission services in Uruguay at frequencies of 1865-1870, 1895-1900, 1945-1950, and 1975-1980 MHz (the *PCS Spectrum*).¹⁴

17. After Dr. Alberelli received the license to operate the PCS Spectrum, Italba acquired three Uruguayan companies so that it could begin developing its telecommunications business in Uruguay: Trigosul, a wireless data transmission services company; Jorter S.A. (*Jorter*), a long distance telephone services company; and Villaclara S.A. (*Villaclara*), a satellite uplink services company.¹⁵ Italba's plan was to use all three subsidiaries to provide a full suite of telecommunications services for customers in Uruguay.¹⁶ Thus, once Italba had acquired Trigosul, Dr. Alberelli applied to the Uruguay National Communications Authority (*UNCA*) to

while a nurse or physician's assistant who is on site with the patient performs physical tests (such as drawing blood). *Id.*

12. *Id.* at ¶ 13.

13. *Id.* at ¶¶ 14-15.

14. *Id.* at ¶ 15. *See also* UMDN Resolution No. 75/997 (Jan. 17, 1997) (**C-003**); UMDN Resolution No. 227/997 (Aug. 4, 1997) (**C-004**). Personal Communication Services or "PCS" is a type of wireless technology that combines phone, messaging, and data services.

15. Alberelli Witness Stmt. ¶ 16.

16. *Id.*

transfer his license to operate in the PCS Spectrum to Trigosul.¹⁷ UMDN approved the transfer of the license to Trigosul on February 8, 2000.¹⁸

18. Italba originally envisioned that Trigosul's primary clients would be Uruguayan banks that needed an encrypted wireless network to transmit confidential information between branches.¹⁹ Italba commissioned an independent study to evaluate the feasibility and profitability of this business plan. The study concluded that the plan was both technically feasible and profitable, and Italba submitted it to UNCA for approval.²⁰ Pursuant to that plan, Trigosul and Villaclara began providing services to Banco de Montevideo and to the Uruguayan offices of Reuters, the international news agency.²¹

19. Based on this initial success, Italba sought to expand operations with a strategic partner. In July 1999, Italba finalized a joint venture agreement with the U.S.-based telecommunications company Worldstar Communications Corporation (*Worldstar*) to provide voice, data, and video services in Uruguay, including Voice over Internet Protocol (*VoIP*), a method of transmitting voice communications over the Internet.²² Based on that agreement, Italba purchased microwave equipment compatible with the PCS Spectrum.²³

17. *Id.* at ¶ 17.

18. *Id.*; UMDN Resolution No. 142/000 (Feb. 8, 2000) (C-005).

19. Alberelli Witness Stmt. ¶ 18.

20. A Proposal for a Banking Communication Network (Jan. 6, 1999) (C-006).

21. Alberelli Witness Stmt. ¶ 18.

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

23. Alberelli Witness Stmt. ¶ 20; Wavelynx Shipment Invoice No. 5925 (Feb. 18, 2000) (C-009).

3) In 2000, Uruguay Required Italba To Refocus Its Investments In Uruguay To A Business Compatible With Frequencies In The 3400-3500 MHz Bandwidth.

20. On October 3, 2000, the President of Uruguay issued a decree reserving the 1700-2200 MHz frequency band (other than 1910-1930 MHz) for the development of a type of wireless technology known as Personal Communication Services.²⁴ Because Trigosul's frequencies fell into this range, UNCA revoked the allocation of those frequencies to Trigosul and granted Trigosul a license to operate in the 3425-3450 and 3525-3550 MHz frequency band (the *Spectrum*) as compensation for the change.²⁵ The new Spectrum was not compatible with the services that Italba had agreed to provide to Worldstar or with the equipment that Trigosul had acquired for the PCS Spectrum.²⁶ As a result, Italba's joint venture with WorldStar was no longer viable.²⁷ At the same time, Trigosul could not provide the services to Banco de Montevideo and Reuters that those companies needed, and Trigosul lost that business.²⁸

24. Decree No. 282/000 (Oct. 3, 2000) (C-010) at 3-4.

25. Resolution No. 278/000 (Oct. 4, 2000) (C-011) at 9-10; UNCA Resolution No. 444/000 (Dec. 12, 2000) (C-012) at 2. UNCA originally offered Trigosul replacement frequencies in the 3600-3700 MHz range, but Trigosul explained that such frequencies, because they did not permit simultaneous upload and download of data, would not be acceptable. UNCA therefore agreed to grant Trigosul frequencies in the 3400-3500 MHz range. Herbon Witness Stmt. at ¶ 10.

26. Alberelli Witness Stmt. ¶ 22. As noted, Trigosul had just invested approximately USD \$700,000 to purchase microwave equipment that was only compatible with the PCS Spectrum. UNCA also required Trigosul to pay 632,674 Uruguayan pesos (at the time, roughly the equivalent of USD \$56,000) as an advance payment of two years of fees for Trigosul's operation in the Spectrum. UNCA Resolution No. 444/000 (Dec. 12, 2000) (C-012), ¶ 3.

27. Alberelli Witness Stmt. ¶ 22.

28. *Id.*; Herbon Witness Stmt. ¶ 11.

B. Italba's Efforts To Commercialize The Spectrum In Uruguay Were Frustrated By URSEC's Failure To Issue The Company A License Conforming To The Regulatory Structure It Had Created.

1) URSEC Is Created To Regulate Telecommunications In Uruguay.

21. On February 21, 2001, the Uruguayan executive branch enacted Ley 17.296, which created URSEC as a public agency charged with the regulation and control of activities related to telecommunications in Uruguay.²⁹ Among other things, Ley 17.296 vested URSEC with the authority to manage, protect, and control the national radio-electric spectrum; grant licenses for the use of the national radioelectric spectrum; and control the installation, operation, quality, and scope of all telecommunications services provided by public or private operators.³⁰

2) Uruguay Enacts The 2003 License Regulations.

22. After the government replaced Trigosul's license to use the PCS Spectrum with a license to use the Spectrum, Italba began looking for a new strategic business partner. In early 2002, Italba entered into negotiations with Eastern Pacific Trust (*EPIC*), a U.S.-based investment trust, that involved the creation of a joint venture focused on providing VoIP services.³¹ In February 2002, the parties signed a letter of intent³² and executed a joint venture agreement in June 2002.³³

23. During the standard due diligence that followed the signature of the joint venture agreement, EPIC's counsel advised EPIC that Uruguay was contemplating new

29. Uruguay Law No. 17,296 (Feb. 21, 2001) (C-013) at Art. 70.

30. *Id.* at 2-3 (Art. 86).

31. Alberelli Witness Stmt. ¶¶ 25-26; Herbon Witness Stmt. ¶ 13.

32. Letter from A. Cherp to A. Jansenson & G. Alberelli (Feb. 3, 2002) (C-014) at 1, 2, 4.

33. Alberelli Witness Stmt. ¶ 26; Herbon Witness Stmt. ¶ 13; Co-Investment Agreement Among Eastern Pacific Trust and Italba Corporation (June 14, 2002) (C-015) at § 1.02(a) (referring to "Newco USA, a to-be-formed Florida corporation set up by [EPIC] as the investment vehicle to invest into Trigosul").

telecommunications licensing regulations that would amend the categories of telecommunications licenses.³⁴ For companies like Trigosul that had existing licenses to provide services in Uruguay, URSEC would need to issue licenses that referred specifically to the new categories for telecommunications services provided in the regulations.³⁵

24. EPIC made clear to Italba that it could not move forward with the joint venture unless and until URSEC issued to Trigosul a license that conformed to the new regulations.³⁶ EPIC also advised Italba that a conforming license would be needed soon as EPIC was not interested in a protracted wait for the updated license to issue.³⁷ In order to obtain information on the length of time needed for URSEC to issue Trigosul a license conforming to the new regulations, EPIC contacted URSEC directly and received assurances that, once the new regulations were adopted, Trigosul would receive its license conforming to the new regulations in short order.³⁸

25. The anticipated regulations were adopted on March 25, 2003 (the **2003 License Regulations**).³⁹ Among other things, the 2003 License Regulations set out a new licensing scheme, under which all existing licenses would be converted to licenses falling into one of four categories:

34. Alberelli Witness Stmt. ¶ 27; Herbon Witness Stmt. ¶ 14.

35. *Id.*

36. Alberelli Witness Stmt. ¶ 27; Herbon Witness Stmt. ¶ 14; Letter from A. Cherp to A. Jansenson, G. Alberelli and L. Herbon (Jan. 8, 2003) (C-016) (“[O]ur investment group Eastern Pacific Trust cannot move forward with concluding our agreements with Trigosul until we receive the certified copy of the actual License to be issued by URSEC.”).

37. Alberelli Witness Stmt. ¶ 27.

38. *Id.*

39. Reglamento De Administracion Y Control Del Espectro Radioelectrico (Mar. 25, 2003); Decree No. 114/000 (Mar. 25, 2003); Decree No. 115/003 (Mar. 25, 2003) (C-017).

(a) Class A licenses authorized the operation of a public telecommunications network and the provision of telecommunications services, except for the provision of subscription television services.

(b) Class B licenses authorized the provision of telecommunications services through the network, means or links owned by any licensee or by a third party service provider.

(c) Class C licenses granted the exclusive right to lease telecommunications links, media and systems for the provision of telecommunications services.

(d) Class D licenses authorized the provision of subscription television services requiring the use of wired or wireless means of transmission for data broadcasting.⁴⁰

26. Importantly, the 2003 License Regulations obligated URSEC to adjust existing licenses, like the one held by Trigosl, to bring them into conformity with the new licensing scheme.⁴¹

27. Recognizing that Italba's joint venture with EPIC depended on URSEC issuing to Trigosl a license conforming to the 2003 License Regulations as soon as those regulations were enacted, Trigosl's Director, Luis Herbon, began visiting URSEC's offices in person every few days to inquire about the status of the license and communicate to URSEC that Trigosl needed URSEC to issue to the company a license conforming to the 2003 License Regulations as soon as possible or it would lose an important business opportunity.⁴² URSEC's representatives always responded that they would issue Trigosl a license conforming to the 2003 License Regulations

40. *Id.* at 38-39 (Art. 9).

41. *Id.* at 18 (Art. 38), 32 (Art. 38).

42. Alberelli Witness Stmt. ¶ 28; Herbon Witness Stmt. ¶ 15.

soon.⁴³ Nevertheless, time passed, and no conforming license had been issued. Dr. Alberelli began calling URSEC nearly every day.⁴⁴ Dr. Alberelli and Mr. Herbon also arranged meetings with one of URSEC's Directors, Dr. Elena Grauert, to expedite the process.⁴⁵ Like every other URSEC official, Dr. Grauert told Dr. Alberelli and Mr. Herbon that URSEC would shortly provide to Trigosul a license conforming to the 2003 License Regulations.⁴⁶

28. Time was of the essence, however, as EPIC needed to close its deal with Italba or move on to another opportunity. As EPIC explained on April 10, 2003:

[W]e have not received the certified copy of your new telecommunication license granted by URSEC of Uruguay. It was our understanding that you would have this license soon after the approval issued to Trigosul on 11/30/02. . . . But we are not able to go to the next step without this document and accordingly we will lose the potential funding for your Telecommunication project.⁴⁷

29. A month later, when URSEC had not yet issued to Trigosul a license conforming to the 2003 License Regulations, EPIC terminated the joint venture agreement based on URSEC's failure to issue to Trigosul a license conforming to the 2003 License Regulations:

The purpose of this correspondence is to advise your group that we have not received the certified copy of your new telecommunication license granted by URSEC of Uruguay.

This license is the cornerstone of our proposed agreements and in that we have not received the required License documentation, it is

43. Alberelli Witness Stmt. ¶ 28; Herbon Witness Stmt. ¶ 15.

44. Alberelli Witness Stmt. ¶ 31.

45. *Id.*; Herbon Witness Stmt. ¶ 15.

46. Alberelli Witness Stmt. ¶ 31; Herbon Witness Stmt. ¶ 15.

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

with regret that I must inform you that we cannot proceed as outlined in the Eastern Pacific Trust proposal.⁴⁸

3) Trigosl Was Repeatedly Advised That URSEC Would Soon Issue Trigosl A License Conforming To The 2003 License Regulations.

30. After the collapse of the EPIC transaction, Trigosl continued to follow up with URSEC regularly to inquire as to when Trigosl would receive a license conforming to the 2003 License Regulations. In particular, in early 2004, Dr. Alberelli and Mr. Herbon arranged a meeting with the then-President of URSEC, Fernando Perez Tabo, to discuss when Trigosl would be in receipt of a license conforming to the 2003 License Regulations. In that meeting, Dr. Perez Tabo repeated that Trigosl's conforming license would be issued soon.⁴⁹

31. In 2005, URSEC's General Manager, Juan Piaggio, suggested that Trigosl write URSEC to memorialize its right to a license conforming to the 2003 License Regulations.⁵⁰ Based on this advice, on July 6, 2005, Mr. Herbon sent a letter formally reminding URSEC of Trigosl's right to a license conforming to the 2003 License Regulations. Mr. Herbon wrote:

Nos dirigimos a ustedes a efectos de solicitarle la adecuación de la licencia de transmisión de datos de TRIGOSUL S.A., a los términos de lo dispuesto por la ley No. 17296 de 21 de Febrero de 2001 y los Decretos 114/03 y 115/03 ambos el 25 de Marzo de 2003. Vuestra autorización así como la asignación de frecuencias son anteriores a las normas precitadas.⁵¹

URSEC never responded to that letter.

48. Letter from A. Cherp to A. Jansenson, G. Alberelli, & L. Herbon (May 12, 2003) (C-019); Alberelli Witness Stmt. ¶ 32; Herbon Witness Stmt. ¶ 16.

49. Alberelli Witness Stmt. ¶ 33; Herbon Witness Stmt. ¶ 17.

50. Herbon Witness Stmt. ¶ 18.

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

32. Mr. Herbon sent another letter to URSEC on August 15, 2005, requesting authorization to import equipment for Trigosul to use in connection with the Spectrum and reiterating Trigosul's entitlement to a license conforming to the 2003 License Regulations.⁵² URSEC did not respond to that letter either.

33. In late 2005, a representative of Brasil Telecom contacted Dr. Alberelli to discuss a new joint venture opportunity involving a U.S.-based investment group called Starborn.⁵³ The parties discussed the terms of the potential joint venture, which would have involved Starborn making a substantial investment in Trigosul.⁵⁴ As with EPIC, Italba understood that Starborn would not move forward unless Trigosul was issued a license conforming to the 2003 License Regulations.⁵⁵ As a result, on January 26, 2006, Trigosul sent another letter to URSEC, formally reminding it of Trigosul's entitlement to a license conforming to the 2003 License Regulations and also informing URSEC that, as a result of its delay in issuing that license, Trigosul was in danger of losing a significant investment.⁵⁶ URSEC did not respond to the letter.

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

53. Alberelli Witness Stmt. ¶ 36; Herbon Witness Stmt. ¶ 19.

54. Alberelli Witness Stmt. ¶ 36.

55. *Id.* ¶¶ 36-38.

56. Letter from L. Herbon to R. Martinez (Jan. 26, 2006) (C-022) ("Ahora la adecuación de la licencia nos tiene demorada otra inversión esta vez por US \$6,500,000, y los inversionistas han estudiado el tema legal y nos lo exigen como condición para continuar con el proyecto. Lo que sucede ahora es que la demora está preocupando a los inversionistas que nos han puesto una fecha tope, y si no se consigue la adecuación los fondos serán invertidos en otro emprendimiento. Como ustedes sabrá lo difícil que resulta traer inversores al país a invertir en un negocio de la industria de las telecomunicaciones, y realmente estas demoras no solo nos complican a nosotros, sino que también transmiten una imagen del país que no es conveniente ni correcta.") ("Now the adjustment of the license has delayed another investment, this time worth USD \$6,500,000, and

34. On March 15, 2006, having received no response from URSEC to Trigosul's January 2006 letter, Dr. Alberelli and Mr. Herbon met with the new President of URSEC, Leon Lev.⁵⁷ In that meeting, Mr. Lev promised that URSEC would issue Trigosul a license conforming to the 2003 License Regulations very soon.⁵⁸ Mr. Herbon sent a follow-up letter to URSEC a few days later, on March 23, 2006, reminding URSEC that Trigosul would lose the investment if URSEC did not act as required by the 2003 License Regulations before March 31.⁵⁹ Again, URSEC did not respond, and as a result, Starborn advised Italba that it was unwilling to move forward with the proposed joint venture.⁶⁰

4) An URSEC Official Requests A Bribe To Expedite The Issuance Of Trigosul's License Conforming To The 2003 License Regulations.

35. In July 2006, Dr. Alberelli arranged a meeting with an Interim Director of URSEC, Alicia Fernandez, in an attempt to understand why URSEC had not yet issued Trigosul a license conforming to the 2003 License Regulations.⁶¹ Ms. Fernandez did not provide any explanation for URSEC's delay, but instead offered to "expedite" the issuance of Trigosul's conforming license in exchange for a payment to her personal account of USD \$25,000.⁶² Dr.

the investors, having examined the legal issue, demand [the adjustment of the license] as a requirement to continue with the project. What happens now is that the delay is a concern for the investors who have imposed a deadline, and if the adjustment does not occur, the funds will be invested in another venture. As you know, it is difficult to attract investors in this country to invest in a business within the telecommunications industry, and really these delays not only burden us, but also convey an image of the country that is neither appropriate nor correct.”).

57. Alberelli Witness Stmt. ¶ 38; Herbon Witness Stmt. ¶ 21.

58. Alberelli Witness Stmt. ¶ 38; Herbon Witness Stmt. ¶ 21.

59. Letter from L. Herbon to L. Lev (Mar. 23, 2006) (C-023).

60. Alberelli Witness Stmt. ¶ 38; Herbon Witness Stmt. ¶ 21.

61. Alberelli Witness Stmt. ¶ 39; Herbon Witness Stmt. ¶ 22.

62. Alberelli Witness Stmt. ¶ 39; Herbon Witness Stmt. ¶ 22.

Alberelli did not comment on the bribe in that meeting, and neither Italba nor Trigosul ever paid a bribe to any URSEC official.⁶³

36. After Dr. Alberelli refused to pay the bribe to “expedite” the license issuance, Italba expected that URSEC would not expedite the issuance to Trigosul of a license conforming to the 2003 License Regulations. However, Italba had no reason to believe, given the repeated assurances it had received from URSEC officials in the preceding years and the clear terms of the 2003 License Regulations, that URSEC would never issue Trigosul a license conforming to the 2003 License Regulations.⁶⁴

37. In November 2006, the Treaty entered into force.

5) Uruguay’s State-Owned Telecommunications Company Attempts To Force The Reassignment Of Trigosul’s Frequencies.

38. Following Dr. Alberelli’s meeting with Ms. Fernandez, Italba began negotiating a potential deal with Antel, Uruguay’s state-owned telecommunications company, involving Trigosul’s rights to the Spectrum.⁶⁵ Initially, Antel offered to purchase Trigosul’s rights for USD \$ 1 million, a mere fraction of their value. Italba rejected that offer and suggested an alternative: that Antel lease Trigosul’s frequencies for the purpose of providing wireless data services to customers in Uruguay and pay Trigosul \$2 per customer per month. Antel rejected that proposal.⁶⁶

39. During these discussions, Antel informed Italba that it had requested that URSEC re-allocate Trigosul’s rights to the Spectrum to Antel. Italba responded that it would not give up

63. Alberelli Witness Stmt. ¶ 39; Herbon Witness Stmt. ¶ 22.

64. Alberelli Witness Stmt. ¶ 39; Herbon Witness Stmt. ¶ 22.

65. Alberelli Witness Stmt. ¶ 40; Herbon Witness Stmt. ¶ 23.

66. Alberelli Witness Stmt. ¶ 40. The value of Italba’s proposal would have exceeded USD \$2 million per year since there were approximately 100,000 customers that would have been affected.

Trigosul's frequencies.⁶⁷

40. Nevertheless, on December 27, 2006, URSEC announced plans to hold an auction in March 2007 for the frequencies in the 3300-3700 MHz bandwidth — including Trigosul's Spectrum.⁶⁸ On March 8, 2007, Antel submitted a statement to URSEC indicating its desire that all current owners of frequencies in the 3300-3700 MHz bandwidth should return their frequencies to URSEC.⁶⁹ However, Italba rejected Antel's offer and Antel did not overtly pursue the matter further.⁷⁰

6) URSEC's Unjustified Refusal To Issue Trigosul A License Conforming To The 2003 License Regulations Results In The Loss Of Significant Business Opportunities.

41. In the years that followed Ms. Fernandez's request for a bribe and Antel's attempt to expropriate Trigosul's rights to the Spectrum, Trigosul waited for its license conforming to the 2003 License Regulations and continued to carry on its business with a few customers, including both private individuals and corporate clients.⁷¹ However, without a conforming license, it was difficult for Trigosul to grow its business. Under its non-conforming license, Trigosul was required to pay USD \$600 per megabyte for Internet access, while its competitors with conforming licenses could purchase access for only USD \$50 per megabyte.⁷² As a result,

67. Alberelli Witness Stmt. ¶ 41; Herbon Witness Stmt. ¶¶ 23-24.

68. Decree No. 249/006 (Dec. 27, 2006) (C-024) at 2-3, 5-7, 9-10.

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

70. Alberelli Witness Stmt. ¶ 43.

71. Alberelli Witness Stmt. ¶ 44; Herbon Witness Stmt. ¶ 31.

72. Herbon Witness Stmt. ¶ 31; *see also* Letter from L. Herbon to G. Lombide (Jan. 12, 2011) (*Jan. 12, 2011 Letter*) (C-026).

Trigosul could not offer its customers competitive rates. Nevertheless, Italba continued to pursue negotiations with potential strategic partners in order to ensure that it was ready to capitalize on the Spectrum's potential as soon as URSEC issued to Trigosul a license conforming to the 2003 License Regulations.

(a) Italba Loses A Business Opportunity With Phinder Due To URSEC's Delay In Issuing Trigosul A License Conforming To The 2003 License Regulations.

42. In January 2007, Italba began negotiations with Phinder Technologies Inc. (**Phinder**), a Canadian telecommunications company, regarding a potential joint venture.⁷³ Through one of its related companies, Phinder held a license to provide Internet services in Argentina along that country's Internet "backbone" (*i.e.*, principal data route for Internet connectivity). The primary objective of the proposed joint venture was to link the Argentinian and Uruguayan backbones so that Phinder could extend its services into Uruguay.⁷⁴ Trigosul's license to operate in the Spectrum covered the geographical areas from Colonia through San Jose to Montevideo — areas that would be necessary to connect the Argentinian and Uruguayan backbones. Trigosul's license was therefore a cornerstone of the deal.⁷⁵ Italba agreed that it would contribute Trigosul's license to the joint venture, as it related to the relevant geographic territories, in exchange for Phinder providing funding for the project.⁷⁶

43. In February 2007, the parties exchanged a first draft of proposed terms for the joint venture. The draft contemplated that Phinder and Italba would jointly form a new entity in Panama, Zupintra Panama, S.A. (**Zupintra**), to provide telecommunications services in Latin

73. Alberelli Witness Stmt. ¶ 45.

74. *Id.* at ¶ 46.

75. *Id.*

76. Italba Corporation Project Structure (Jan. 21, 2007) (C-027).

America.⁷⁷ Phinder and Italba would own 51% and 49% of Zupintra, respectively.⁷⁸

44. On February 14, 2007, the parties executed a final term sheet that provided that Phinder would contribute its VoIP network and infrastructure to the joint venture, together with USD \$300,000 in initial cash funding for the purchase of necessary equipment and USD \$100,000 to obtain licenses in Panama.⁷⁹ For its part, Italba agreed to contribute the non-exclusive use of its telecommunications licenses in target countries (including Trigosul's license in Uruguay), to provide consulting services, and to use best efforts to obtain licenses in other target countries, engage carriers, and enter into service contracts.⁸⁰

45. The first stage of the deal would have covered three regions in Uruguay (Colonia, San Jose, and Montevideo), with an option to expand into four additional regions (Salto, Paysandú, Rio Negro, and Soriano).⁸¹ Italba estimated that the joint venture would have generated an average annual net profit of USD \$400,000 for the first five years in Colonia, San Jose, and Montevideo alone.⁸² That profit would have increased significantly with expansion into the other four regions, where Italba estimated the customer base would be approximately 60,000 people (10% of a population of approximately 600,000). Because there were no other operators in those regions in 2007, Italba projected that profits per customer could have been as

77. Redline of Joint Venture Terms Sheet between Phinder Technologies Inc. and Italba Corporation (Feb. 2007) (C-028) at 1, 4.

78. Alberelli Witness Stmt. ¶ 47; Shareholders' Agreement between Phinder Technologies and Italba Corporation (Mar. 2007) (C-029), at 1.

79. Joint Venture Terms Sheet Between Phinder Technologies Inc. and Italba Corporation (Feb. 2007) (C-030).

80. *Id.* at 2.

81. Alberelli Witness Stmt. ¶ 47.

82. *See id.*

high as USD \$20 per month or USD \$14.4 million annually.⁸³

46. After the parties executed the term sheet, they moved forward quickly with preparations for the joint venture to begin operations. On March 8, 2007, the parties formed Zupintra,⁸⁴ and on March 19, 2007, issued press releases announcing that Zupintra would be developing next generation telecommunications opportunities in Latin America and the Caribbean.⁸⁵ By June 2007, Zupintra had completed initial construction on its Latin American network, linked the Argentinian and Uruguayan Internet backbone, and conducted connection tests on that backbone.⁸⁶

47. Despite the parties' progress, Phinder was clear that the joint venture agreement could not close until URSEC issued to Trigosl license conforming to the 2003 License Regulations. Italba made every effort to finalize the project and begin operations with the license it had, but Phinder was not willing to continue without Trigosl's conforming license.⁸⁷ At that time, both Phinder and Trigosl expected Trigosl's conforming license to issue shortly. Expectations in that regard were raised because, around that time, URSEC issued a conforming license to Telefonica Moviles del Uruguay S.A.⁸⁸ However, by 2008, URSEC still had not issued to Trigosl a similar license conforming to the 2003 License Regulations, and the joint

83. See *id.*; see also Financial Projections for Phinder/Zupintra Joint Venture (C-031).

84. Zupintra Certificate of Incorporation (Mar. 8, 2007) (C-032).

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

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

87. Alberelli Witness Stmt. ¶¶ 50-53; Herbon Witness Stmt ¶¶ 25-26.

88. URSEC Resolution No. 611/007 (Dec. 27, 2007) (C-041) at 1, 3.

venture opportunity failed as a result.⁸⁹

(b) *Italba Loses A Business Opportunity With Telmex Due To URSEC's Delay In Issuing Trigosul A License Conforming To The 2003 License Regulations.*

48. Around the same time that Italba was in negotiations with Phinder, the Director of Telmex Uruguay — the Uruguayan branch of Mexican telecommunications giant Telmex — contacted Trigosul to discuss the possibility of a joint venture.⁹⁰ At the time, Telmex had a license to provide national and international telephone and data services in Uruguay and was interested in expanding its presence in Uruguay. Telmex suggested that a partnership with Trigosul could help further that end.⁹¹ Dr. Alberelli understood that the project with Telmex could be done in parallel with the project with Phinder.⁹² As a result, on June 21, 2007, the parties signed a Confidentiality Agreement to facilitate the sharing of information in the context of negotiations.⁹³ The Confidentiality Agreement identified Trigosul's license to operate in the Spectrum as the subject of the parties' anticipated negotiations and stated that the parties intended to cooperate to provide telecommunications services jointly through a new commercial company with a "revenue sharing" form.⁹⁴ After the agreement was signed, the parties entered into discussions regarding various potential business options, including an outright purchase of Trigosul's license by Telmex, with or without Trigosul retaining rights to operate in certain

89. Alberelli Witness Stmt. ¶ 52.

90. Herbon Witness Stmt ¶ 27; Alberelli Witness Stmt. ¶ 53.

91. Herbon Witness Stmt ¶ 27; Alberelli Witness Stmt. ¶ 54.

92. Alberelli Witness Stmt. ¶ 57.

93. Confidentiality Agreement between Telmex and Trigosul S.A. (June 21, 2007) (C-042).

94. *Id.*

areas, and a lease of Trigosl's Spectrum.⁹⁵ Around the same time, Telmex offered to purchase Trigosl's rights to operate in the Spectrum for USD \$6 million. Dr. Alberelli considered the value of Trigosl's rights to be significantly higher than USD \$6 million. As a result, Italba rejected the offer.⁹⁶

49. In October 2008, URSEC issued Telmex a license to provide "direct-to-home" (*DTH*) satellite television services in Uruguay.⁹⁷ The Trigosl Spectrum would have been important to Telmex's ability to offer triple play services to customers of its DTH platform as the Spectrum would give customers access to broadband Internet and VoIP. Perhaps for this reason, a few months later, in January 2009, the Uruguayan government revoked the Telmex DTH license, ostensibly because it was still in the process of finalizing national telecommunications policy regarding the provision of "triple play" services.⁹⁸ At the time, many speculated that the real reason for the revocation was that the license threatened Antel's monopoly.⁹⁹

50. On February 17, 2009, the President of Uruguay signed Executive Order IE 810, which amended the descriptions of the four categories of licenses in the 2003 License

95. See, e.g., Email from G. Alberelli to L. Herbon (Dec. 19, 2007) (C-043) (inquiring as to whether Trigosl would sell its license to Telmex); Email from L. Herbon to G. Alberelli (Apr. 4, 2008) (C-044) (discussing various business options, including Telmex purchasing Trigosl's license and Trigosl's halting operations, Telmex purchasing Trigosl's license and Trigosl continuing operation in a few areas only, and Telmex leasing Trigosl's rights to operate in Montevideo and Canelones).

96. Alberelli Witness Stmt. ¶ 54; Herbon Witness Stmt ¶ 27.

97. Juan Pedro Tomas, *Govt limits triple play to national firms, cancels Telmex satellite TV license* (Feb. 20, 2009), (C-045); *Telmex Acusa A Uruguay De Violar TLC Con Mexico* (Mar. 15, 2009), (C-046); Jonathan Marie, *Uruguay Might Give Telmex Its DTH License Back* (Dec. 17, 2009), (C-047).

98. Juan Pedro Tomas, *Govt limits triple play to national firms, cancels Telmex satellite TV license* (Feb. 20, 2009), (C-045); *Telmex Acusa A Uruguay De Violar TLC Con Mexico* (Mar. 15, 2009), (C-046); Jonathan Marie, *Uruguay Might Give Telmex Its DTH License Back* (Dec. 17, 2009), (C-047).

99. *Id.* Telmex challenged the revocation of its license in Uruguay's highest administrative court, which ultimately nullified the revocation and ordered URSEC to return Telmex's license. Jonathan Marie, *Uruguay Returns DTH License To Telmex* (Feb. 6, 2013) (C-048).

Regulations¹⁰⁰ and buoyed Italba's hopes that URSEC would soon issue Trigosul a license conforming to the 2003 License Regulations.

51. In that context, with Trigosul still waiting for a license conforming to the 2003 License Regulations and Telmex appealing the termination of its DTH license, from March 2009 to April 2010, Italba and Telmex continued negotiating the terms of a potential business partnership. Trigosul engaged a consultant, Maurizio Hublitz from Group SM International, to advise it with respect to a potential joint venture.¹⁰¹ Over the months that followed, the parties developed a plan to provide "triple play" services to customers in Uruguay by using Telmex's fiber optic network to import an Internet signal from Argentina and Trigosul's Spectrum to transmit that data from the towers of Telmex's local subsidiary, Claro, to individual households.¹⁰² For this purpose, Telmex would lease Trigosul's rights to the Spectrum for 15 years, with a buy-out option after five years.¹⁰³ The parties agreed that Telmex would develop the network in the urban areas of Montevideo and Canelones, while Trigosul would concentrate on building a network in smaller towns and rural areas.¹⁰⁴ The project would use approximately 60% of Trigosul's bandwidth in the affected regions.¹⁰⁵

52. Italba understood that the joint venture with Telmex was contingent on URSEC's issuance to Trigosul of a license conforming to the 2003 License Regulations. Again,

100. Executive Order IE 810 (Feb. 17, 2009) (C-049) at 1-2; Alberelli Witness Stmt. ¶ 60.

101. See, e.g., Email from M. Hublitz to G. Alberelli (Mar. 28, 2009) (C-050); Email from G. Alberelli to M. Hublitz (Mar. 25, 2009) (C-051).

102. Email from M. Hublitz to G. Alberelli (Nov. 12, 2009) (attaching Uruguay Mobile WiMAX Network Presentation) (C-052) at 6.

103. *Id.* at 4.

104. *Id.* at 3.

105. Alberelli Witness Stmt. ¶ 57.

expectations in this regard were that a conforming license was imminent, particularly since, around that time, longstanding requests for conforming licenses were issued to Italba's competitors: in particular, in March 2010 and October 2010, URSEC issued conforming licenses to Dedicado S.A. and Telstar S.A., respectively.¹⁰⁶ Expectations were reinforced by the fact that, every time Trigosul had spoken with an URSEC representative regarding the status of its license, the response was always the same: URSEC would issue Trigosul a license conforming to the 2003 License Regulations soon.¹⁰⁷ At no point did URSEC say or write to Trigosul or Italba that URSEC would never issue to Trigosul a license conforming to the 2003 License Regulations. Therefore, Italba believed that Trigosul's license conforming to the 2003 License Regulations would be issued imminently.¹⁰⁸ However, when a license conforming to the 2003 License Regulations was not issued to Trigosul by late 2010, Telmex withdrew its joint venture proposal with Italba.¹⁰⁹

C. Uruguay Revokes Trigosul's License Based On Incorrect Facts, Further Damaging Italba.

1) Trigosul Relocates To Punta Del Este To Pursue Further Business Opportunities.

53. In 2010, Trigosul decided to relocate from Montevideo to the Punta del Este area of Uruguay to take advantage of business opportunities it had identified there. Trigosul formally notified URSEC of the relocation on July 30, 2010 and indicated that it was prepared for URSEC

106. URSEC Resolution No. 157/010 (Mar. 25, 2010) (C-053) (Dedicado); URSEC Resolution No. 544/010 (Oct. 29, 2010) (C-054) (Telstar SA). Rinytel S.A. received its conforming license in March 2011. URSEC Resolution No. 053/011 (Mar. 16, 2011) (C-055).

107. Alberelli Witness Stmt. ¶¶ 31, 33, 38, 61; Herbon Witness Stmt. ¶¶ 15, 30.

108. Alberelli Witness Stmt. ¶ 61; *see also* Herbon Witness Stmt. ¶¶ 30-31.

109. Alberelli Witness Stmt. ¶ 58.

to inspect its equipment and approve it to begin operations in the region.¹¹⁰

54. Trigosul subsequently engaged a contractor, Service e Instalaciones S.A. (*SEI*), to install two test nodes (*i.e.*, data connection points) in the Spectrum. On October 6, 2010, SEI notified URSEC of the installation and noted that Trigosul's equipment was ready for inspection.¹¹¹

(a) *Trigosul Agrees To Provide Services To Dr. Fernando Garcia's Radiology Clinics.*

55. In late 2010, after the move to Punta del Este, Trigosul began negotiating a contract with Dr. Fernando Garcia to provide data transmission services for his radiology clinics across Uruguay. Specifically, Dr. Garcia was interested in using Trigosul's Spectrum to transmit files to and from his radiology clinics in the Montevideo, Maldonado, and Colonia areas of Uruguay and to offer telemedicine services in other regions of Uruguay.¹¹²

56. On December 1, 2010, Trigosul and Dr. Garcia executed a Data Transmission and Equipment Loan Agreement.¹¹³ Pursuant to that agreement, Trigosul would lease telecommunications equipment to Dr. Garcia for the wireless transmission of radiology studies and reports through the Spectrum. Trigosul would also provide training and maintenance services.¹¹⁴ The parties agreed that all radiology studies and reports from Dr. Garcia's clinics

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

111. Jan. 12, 2011 Letter (attaching Letter from A. Amaro to URSEC (Oct. 6, 2010)) (C-026) at 8.

112. Letter from F. Garcia to G. Alberelli (Oct. 4, 2010) (C-056); Alberelli Witness Stmt. ¶¶ 64-65; Herbon Witness Stmt. ¶ 33.

113. Data Transmission and Equipment Loan Agreement (Dec. 2010) (C-057).

114. *Id.* at 1.

would be transmitted through Trigosul's Spectrum.¹¹⁵ That month, anticipating that URSEC would shortly approve Trigosul to operate out of its new offices in Punta del Este, Trigosul began providing services to Dr. Garcia free of charge.¹¹⁶

(b) Trigosul Agrees To Provide Services To Canal 7.

57. In late 2010, Trigosul also began negotiating a potential business relationship with Canal 7, a television channel broadcasting out of the Maldonado region of Uruguay that needed wireless data transmission services to communicate between the channel's headquarters and its reporters on location.¹¹⁷ Canal 7 was interested in using Trigosul's network for this purpose, because it allowed Canal 7 to avoid having to develop its own infrastructure or rely on satellite-equipped trucks.¹¹⁸ Trigosul thus agreed to provide data transmission services for Canal 7.¹¹⁹

58. In connection with providing services to Canal 7, Trigosul engaged SEI to install test nodes and radio equipment in Canal 7's tower.¹²⁰ SEI completed this work in December 2010, and Trigosul began providing services to Canal 7 that same month. As with Dr. Garcia, Trigosul did not charge Canal 7 for these services while it was waiting for URSEC to inspect and approve its operations in Punta del Este.¹²¹

115. *Id.* at 1-2.

116. Alberelli Witness Stmt. ¶ 64; Herbon Witness Stmt. ¶ 33.

117. Alberelli Witness Stmt. ¶ 65; Herbon Witness Stmt. ¶¶ 34-35.

118. Alberelli Witness Stmt. ¶ 65.

119. *Id.* ¶ 66; Herbon Witness Stmt. ¶ 35.

120. Trigosul-SEI Written Agreement (Aug. 18, 2010) (C-058); Letter from L. Herbon to SEI (Sept. 17, 2010) (C-059); Letter from L. Herbon to Canal 7 (Oct. 6, 2010) (C-060); Alberelli Witness Stmt. ¶ 65; Herbon Witness Stmt. ¶ 35.

121. Alberelli Witness Stmt. ¶¶ 65-66; Herbon Witness Stmt. ¶ 35.

(c) *Italba's Negotiations With DirecTV.*

59. In October 2010, Martin Colombo, a lawyer representing DirecTV, a U.S.-based satellite television company operating in Uruguay, introduced Dr. Alberelli to Evan Grayer, the President of DirecTV's Latin American division, and Italba and DirecTV began discussing a potential joint venture for the provision of Internet services to DirecTV customers in rural Uruguay.¹²² These discussions continued into early 2011, when DirecTV proposed leasing Trigosul's rights to the Spectrum for ten years (with the option to renew for another ten years) and providing services directly to its customers in exchange for paying Trigosul USD \$5 per customer for month.¹²³ The amounts that Trigosul stood to make in connection with its deal with DirecTV were significant. As of December 2011, DirecTV had an 8% share in Uruguay's television market;¹²⁴ as of December 2015, DirecTV's market share was 24%.¹²⁵ Over the course of a ten-year contract, the amounts DirecTV paid to Trigosul for each of its customers would have been well over USD \$10 million.¹²⁶

60. Moreover, because DirecTV would only have been leasing Trigosul's frequencies in the Maldonado region, Trigosul would still have been able to provide services to or enter into joint ventures for customers in other areas of Uruguay.¹²⁷

122. Alberelli Witness Stmt. ¶ 67; Herbon Witness Stmt. ¶ 44; *see also* Email from M. Colombo to G. Alberelli & E. Grayer (Mar. 17, 2011) (C-061).

123. Alberelli Witness Stmt. ¶ 68; Herbon Witness Stmt. ¶ 44.

124. Evolución del Sector Telecomunicaciones en Uruguay (Datos Estadísticos) (Dec. 2011) (C-062) at 34.

125. Evolución del Sector Telecomunicaciones en Uruguay (Datos Estadísticos) (Dec. 2015) (C-063) at 57.

126. Alberelli Witness Stmt. ¶ 68.

127. *Id.*

(d) Trigosul Prepares To Provide Services To The U.S. Retiree Community In Uruguay.

61. In January 2011, Trigosul developed a plan to offer Internet, telephone, DTH satellite television, and telemedicine services to Grupo Afinidad Mary, a community of 2,100 retired Americans living in the Maldonado region.¹²⁸ Trigosul projected profits of USD \$15 per customer per month for Internet, telephone, and television, and USD \$35 per customer per month for telemedicine services.¹²⁹ Trigosul anticipated that the business would generate USD \$7 million over a five year period.¹³⁰

62. There was a great deal of interest among the U.S. expatriate retirement community regarding Trigosul's proposal. For example, one such retiree, Richard Weber, later wrote that Trigosul's proposal was "an incredibly important process to ex-pats in need of a medical professional they could communicate directly [...] in their native tongue," and that it would make it easier for a patient in another country "to be able to [have access to] their primary care provider or specialist in their home country."¹³¹

2) URSEC Revokes Trigosul's License To Operate In The Spectrum.

63. On December 28, 2010, URSEC's General Counsel issued a memorandum recommending the revocation of Trigosul's license to provide wireless data services in Uruguay.¹³² URSEC sent the memorandum to Trigosul on January 3, 2011.¹³³

128. Alberelli Witness Stmt. ¶ 69; Herbon Witness Stmt. ¶ 45; Grupo Afinidad Mary – Proyeccion de Ingresos, Inversiones y Costos (C-064) at ¶ 2.1.

129. Grupo Afinidad Mary – Proyeccion de Ingresos, Inversiones y Costos (C-064) at ¶¶ 2.1, 2.2; Alberelli Witness Stmt. ¶ 69.

130. Herbon Witness Stmt. ¶ 45.

131. Letter from R. Weber to G. Alberelli (May 1, 2012) (C-065).

132. URSEC Memorandum (Dec. 28, 2010) (*URSEC Memorandum*) (C-066).

64. The memorandum set forth two bases for this recommendation. *First*, URSEC alleged that Trigosul failed to comply with its obligation to provide data services in Uruguay.¹³⁴ This allegation was based on a failed inspection that URSEC conducted a week earlier at the address in Montevideo it claimed to have on file for Trigosul.¹³⁵ URSEC noted that its inspectors found that Trigosul had no office in Montevideo and that a company other than Trigosul was operating in that location. URSEC therefore concluded that Trigosul was no longer in operation.¹³⁶ *Second*, URSEC alleged that Trigosul had not paid the required fees for its use of the Spectrum.¹³⁷ Based on these two allegations, URSEC concluded that, as a service provider, Trigosul had breached its principal and inherent obligation to provide services. Therefore, in light of URSEC's own obligation to promote the efficient use of frequencies at the national level, URSEC recommended that Trigosul's license be revoked.¹³⁸

65. Trigosul responded promptly to the allegations in the memorandum. On January 12, 2011, Mr. Herbon sent a letter to Gabriel Lombide, the President of URSEC, refuting both bases for the recommendation to revoke Trigosul's license.¹³⁹ With respect to the allegation that Trigosul was no longer providing services, Trigosul produced evidence that it had formally notified URSEC of its move to Punta del Este in July 2010 and noted that it was providing

133. Herbon Witness Stmt. ¶ 36.

134. URSEC Memorandum (C-066) at 2.

135. *Id.*

136. *Id.* As noted above, Trigosul had moved to Punta del Este five months before the date of the inspection and had formally notified URSEC of its new address in Punta del Este. Jan. 12, 2011 Letter (C-026) at 2-6. URSEC did not mention that notice in its memorandum. *See* URSEC Memorandum (C-066).

137. *Id.* at 2.

138. *Id.* at 2-3.

139. Jan. 12, 2011 Letter (C-026).

services in accordance with its obligation.¹⁴⁰ Specifically, Mr. Herbon noted that URSEC's memorandum had failed to take into account: (a) a letter dated July 30, 2010 informing URSEC of the transfer of its operations to Punta del Este; and (b) a letter dated October 6, 2010, which reported that SEI, at Trigosul's direction, had installed two test nodes in Maldonado.¹⁴¹ Trigosul also rejected the allegation that Trigosul had not paid the required fees for its use of the Spectrum and attached evidence that Trigosul had paid all of those fees.¹⁴²

66. Having produced evidence demonstrating that the facts alleged in URSEC's December 2010 memorandum were incorrect, Trigosul expected that URSEC would rescind its recommendation that Trigosul's license be revoked and, hopefully, finally issue the license conforming to the 2003 License Regulations.¹⁴³ Instead, on January 19, 2011, URSEC issued a report, which did not address any of the evidence that Trigosul had attached to its letter, but instead asserted, without any explanation, that Trigosul had failed to provide a reason for URSEC's determination to revoke Trigosul's license.¹⁴⁴ The report also stated that there was no evidence that Trigosul had any project to provide services or that it had even begun providing services, and, for the first time, added a third alleged basis for the recommendation to revoke Trigosul's license, namely that Trigosul had allowed its contractor, SEI, to operate in the

140. *Id.* at 2, 6.

141. *Id.* at 2, 8.

142. *Id.* at 2-3, 11-16. In the same letter, Trigosul also noted that URSEC's failure to issue Trigosul a license conforming to the 2003 License Regulations had placed Trigosul in a difficult position because Trigosul's outdated license did not allow Trigosul to purchase access to Internet at USD \$50 per megabyte, as was available internationally, but forced it to pay USD \$600 per megabyte. *Id.* at 2.

143. Alberelli Witness Statement ¶ 73.

144. URSEC Report (Jan. 19, 2011) (C-067) at 2.

Spectrum and provide services without due authorization from URSEC.¹⁴⁵ Ultimately, the report recommended “without hesitation” that: (a) URSEC release the frequencies that had been allocated to Trigosul, and (b) the Executive branch revoke Trigosul’s license to operate in the Spectrum and provide wireless data services in Uruguay.¹⁴⁶

67. The very next day, January 20, 2011, URSEC entered a resolution revoking Trigosul’s rights to the Spectrum.¹⁴⁷ The resolution adopted the three reasons set forth URSEC’s January 19, 2011 report.¹⁴⁸ It did not mention or address the evidence that Trigosul had produced to refute the factual bases underlying the recommendation to revoke Trigosul’s license.

(a) *Trigosul Appeals The License Revocation.*

68. At the time, Italba had no legitimate basis for believing that URSEC’s revocation of Trigosul’s license was based on a deliberate intent to discriminate against Trigosul, as opposed to a good faith misapprehension of the relevant facts.¹⁴⁹ Italba believed that if the facts were fully presented, Trigosul’s license would be reinstated. Accordingly, on March 1, 2011, Trigosul formally appealed URSEC’s resolution releasing Trigosul’s frequencies.¹⁵⁰ In its appeal letter, Trigosul disputed all of URSEC’s alleged bases for the release of its Spectrum:

- a. *First*, Trigosul presented evidence that it had been providing data transmission services to customers such as Dr. Fernando Garcia and Canal 7. The reason it was not able to provide additional services was due to URSEC’s failure to update

145. *Id.* at 1-2.

146. *Id.* at 2.

147. URSEC Resolution No. 001/011 (Jan. 20, 2011) (C-068) at 3.

148. *Id.* at 1-2.

149. Alberelli Witness Stmt. ¶ 76.

150. *Id.* at ¶¶ 76-77; Herbon Witness Stmt. ¶ 39; Letter from A. Duran Martinez to G. Lombide (Mar. 1, 2011) (C-069).

Trigosul's license, which placed it at a disadvantage vis-à-vis competitors.¹⁵¹

- b. *Second*, Trigosul submitted evidence showing that it had paid all amounts owed for the 2010 fiscal year and that URSEC had failed to account for three payments made by Trigosul. Taking these three payments in consideration, URSEC owed Trigosul 13,286 Uruguayan pesos.¹⁵²
 - c. *Third*, Trigosul demonstrated that SEI had not commercially operated in the Spectrum and that Trigosul had engaged SEI to install and test two nodes at Trigosul's new location. Trigosul had in fact notified URSEC on July 30, 2010, that it was moving its transmission equipment to a new location. URSEC was thus fully aware of Trigosul's new address and of SEI's limited role in installing and testing the nodes.¹⁵³
 - d. *Finally*, Trigosul requested a hearing to present its case.¹⁵⁴
69. URSEC did not respond to Trigosul's letter or grant a hearing.

(b) Trigosul Loses Its Business Opportunities With Dr. Fernando Garcia, Canal 7, The U.S. Retiree Community, and DirecTV.

70. Because URSEC did not promptly rescind its decision to revoke Trigosul's license to operate in the Spectrum, the business opportunities with DirecTV and the U.S. retirees in Maldonado could not progress.¹⁵⁵ For the same reason, Trigosul lost its business with Dr. Garcia and Canal 7 and was never able to profit from the services that it had already provided free of charge.¹⁵⁶ Italba continued to believe, however, that URSEC would restore Trigosul's rights following Trigosul's appeal. Accordingly, on March 21, 2011, Trigosul made a business proposal to Canal 7 that would have involved Canal 7 leasing four radio links in the 3400 MHz

151. Letter from A. Duran Martinez to G. Lombide (Mar. 1, 2011) (C-069) at 2.

152. *Id.* at 3.

153. *Id.* at 4.

154. *Id.* at 5.

155. Alberelli Witness Stmt. ¶ 82; Herbon Witness Stmt. ¶ 39.

156. Alberelli Witness Stmt. ¶ 75; Herbon Witness Stmt. ¶¶ 44-45.

bandwidth for use in three cities in Maldonado (Piriapolis, San Carlos, and Punta del Este), as well as a fiber optic link that would connect Canal 7's offices in Maldonado with the offices of Canal 10 in Montevideo.¹⁵⁷ The parties entered into advanced negotiations, but Canal 7 eventually backed away from the deal because of the legal uncertainty surrounding URSEC's revocation of Trigosul's license.¹⁵⁸

(c) *Italba Attempts To Mediate Its Dispute With Uruguay, And MIEM Revokes Trigosul's Right To Provide Wireless Data Services.*

71. After Trigosul lodged its appeal of URSEC's revocation of its license, Dr. Alberelli contacted the U.S. Embassy in Uruguay for assistance in mediating Italba's dispute with URSEC.¹⁵⁹ On April 14, 2011, Robert Gorter, Senior Commercial Specialist at the U.S. Embassy, arranged an informal meeting with Mr. Lombide and another URSEC employee. In that meeting, according to Mr. Gorter, URSEC repeated its arguments that Trigosul had failed to comply with its obligation to provide services in the Spectrum, noting that URSEC's inspection of Trigosul's offices at the address URSEC allegedly had on file had revealed that Trigosul was not operating. URSEC did not address Trigosul's defense to these arguments.¹⁶⁰

72. On July 8, 2011, following URSEC's termination of Trigosul's license, MIEM revoked Trigosul's license to provide wireless data services in Uruguay, repeating the same arguments raised by URSEC as the basis for the termination without any reference to Trigosul's

157. Alberelli Witness Stmt. ¶ 75; Business Proposal to Canal 7 (Mar. 21, 2011) (C-070).

158. Alberelli Witness Stmt. ¶ 75.

159. *Id.* ¶ 78.

160. Alberelli Witness Stmt. ¶ 79; Email from R. Gorter to G. Alberelli et al. (Apr. 14, 2011) (C-071).

defenses.¹⁶¹ In particular, MIEM stated that the December 21, 2010 inspection had led MIEM to conclude that Trigosl was not commercially operating the Spectrum and had thus breached its inherent obligation to provide data transmission services.¹⁶²

73. Thereafter, Mr. Gorter and Kevin Skillin, Chief of the U.S. Embassy's Economic and Commercial Division, scheduled a mediation session to take place on August 23, 2011 between Italba and URSEC.¹⁶³ Mr. Lombide attended for URSEC with Mariela Machado (a member of URSEC's Board of Directors), Graciela Coronel (URSEC's General Counsel), and Hector Bude (Chief of URSEC's Frequencies Department). Dr. Alberelli, Mr. Herbon, and Trigosl's attorney, Dr. Augusto Duran Martinez, attended on behalf of Italba.¹⁶⁴ The mediation lasted approximately five hours, and both parties presented their positions. At the end of the session, Mr. Lombide agreed to review Italba's request for the return of Trigosl's frequencies.¹⁶⁵ Italba never heard anything further from URSEC about that request.¹⁶⁶

D. The Destruction of Italba's Investments In Uruguay.

1) Uruguay's Highest Administrative Court Nullified The URSEC And MIEM Resolutions Revoking Trigosl's License.

74. After Trigosl's attempts at mediation with URSEC failed, Trigosl was left with no choice but to seek the intervention of the TCA, Uruguay's highest administrative court. On October 24, 2011 and March 22, 2012, Trigosl filed claims against URSEC and MIEM,

161. MIEM Resolution No. 335/011 (July 8, 2011) (C-072) at 2-3.

162. *Id.* at 1-2.

163. Alberelli Witness Stmt. ¶ 81; Herbon Witness Stmt. ¶ 43; Email from R. Gorter to G. Alberelli et al. (Aug. 12, 2011) (C-073).

164. Alberelli Witness Stmt. ¶ 81; Herbon Witness Stmt. ¶ 43.

165. Alberelli Witness Stmt. ¶ 81; Herbon Witness Stmt. ¶ 43.

166. Alberelli Witness Stmt. ¶ 81; Herbon Witness Stmt. ¶ 43.

respectively, requesting that the TCA overturn URSEC's January 20, 2011 resolution and MIEM's July 8, 2011 resolution revoking Trigosul's rights to the Spectrum and to provide wireless data services in Uruguay.¹⁶⁷ The TCA consolidated the proceedings on October 25, 2012.¹⁶⁸

75. On October 23, 2014, the TCA rendered a final, non-appealable decision, finding that URSEC and MIEM had no legitimate basis for revoking Trigosul's rights, that the challenged resolutions were based on inaccurate factual findings, and that those resolutions were therefore null and void (*TCA Judgment*):¹⁶⁹

[H]a de señalarse que en virtud de los documentos obrantes en los antecedentes administrativos, que dan cuenta del cambio de domicilio, resulta sorprendente que en el informe letrado fechado el 19.1.2011, donde se analizó la comparecencia de la empresa previo al dictado del acto, se haya concluido que: "*los argumentos invocados por Trigosul S.A. no aportan nuevos elementos que enerven lo oportunamente informado*" (fs. 162 de los AA en 297 fs.). Así se advierte, una vez más, el actuar erróneo seguido por la Administración demandada, lo que desembocó en que, el acto que aquí se procesa, adolezca de error en sus motivos. . . .

En definitiva, siendo que la Resolución mediante la cual se resolvió revocar la autorización transferida a la empresa TRIGOSUL S.A. para la prestación de los servicios asignados adolece de una motivación inexacta e incongruente, solo resta declarar la nulidad de la misma.¹⁷⁰

167. Petition for Annulment (Oct. 28, 2011) (C-074); Petition for Annulment (Mar. 22, 2012) (C-075); TCA Judgment (Oct. 23, 2014) (C-076) at 7.

168. Prueba Trigosul SA con Poder Ejecutivo URSEC (Oct. 25, 2012) (C-077) at 44-46.

169. TCA Judgment (Oct. 23, 2014) (C-076) at 17, 19, 21.

170. *Id.* at 15, 20 ("[I]t should be pointed out that in view of the documents included in the Administrative Records which provide evidence of the change of domicile, it is surprising that the report dated 1.19.2011 which analyzed the company's deposition before the resolution was adopted, concluded that "*the arguments referred to by TRIGOSUL S.A. do not provide new elements that affect what was previously informed*" (folio 162 of the A.R. in 297 folios). This shows, once again, the wrongful behavior of the sued Administration, as a result of which, the action herein challenged had flaws in the grounds supporting it . . . In conclusion, since the Resolution which revoked the authorization granted to TRIGOSUL S.A. for the provision of the appointed services is based on inaccurate grounds, said resolution is declared null and void.").

76. Because the TCA found that the resolutions of URSEC and MIEM were null and void, the TCA Judgment had the effect of immediately reinstating Trigosl's rights with retroactive effect and without requiring any further action on the part of Trigosl.¹⁷¹

2) URSEC Frustrates The TCA Judgment.

77. Following the entry of the TCA Judgment, Trigosl prepared to begin commercial operation in the Spectrum again. On December 23, 2014 and January 19, 2015, Trigosl wrote letters to URSEC seeking URSEC's approval of new equipment that Trigosl had purchased.¹⁷² URSEC responded by email on January 21, 2015, requesting that Trigosl complete certain forms.¹⁷³ Trigosl sent the completed forms to URSEC on January 26, 2015,¹⁷⁴ but never heard anything further from URSEC on this issue.

78. On February 5, 2015, Trigosl wrote to the President of URSEC, reminding him that the TCA Judgment had reinstated Trigosl's rights to operate in the Spectrum and requesting that, in accordance with the judgment, URSEC add Trigosl back to the *Registro de Prestadores de Servicios de Trasmisiones de Datos* and take all further steps necessary to effectuate the reinstatement of Trigosl's rights to operate in the Spectrum.¹⁷⁵ URSEC did not respond to the letter and did not take any action to comply with the TCA Judgment. On February 26, 2015, the TCA provided URSEC a full copy of the case file from the Trigosl proceedings.¹⁷⁶ Still, URSEC did nothing to comply with the TCA Judgment.

171. *Id.* at 17, 19, 21.

172. Letter from L. Herbon to URSEC (Dec. 23, 2014) (C-078); Letter from L. Herbon to URSEC (Jan. 19, 2015) (C-079).

173. Email from D. Capdevielle to L. Herbon et al. (Jan. 21, 2015) (C-080).

174. Letter from L. Herbon to URSEC (Jan. 26, 2015) (C-081).

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

176. Letter from S. Gianarelli to G. Lombide (Feb. 26, 2015) (C-083).

79. In early March 2015, Italba discovered that, in September 2013 and without notice to Italba or the TCA, URSEC had re-allocated Trigosul's rights to operate in the Spectrum to a competitor company, Dedicado.¹⁷⁷ Italba concluded that the transfer of the Spectrum during the TCA proceedings and the failure of URSEC to implement the TCA Judgment was unmistakable evidence of bad faith. Italba further saw URSEC's conduct as evidence that the failure between 2006 and 2011 to issue to Trigosul a license conforming to the 2003 License Regulations and the wrongful termination of the license in 2011 was part of a pattern of discrimination against Trigosul stemming back to when Italba refused to bribe Ms. Fernandez and refused to agree to Antel's efforts to obtain its license at an unreasonably low price.¹⁷⁸

80. Italba concluded, based on these observations, that there was no longer any prospect for Italba to do business in Uruguay. Italba shortly thereafter provided Uruguay with formal notice of a dispute under the Treaty.¹⁷⁹

177. Herbon Witness Stmt. ¶ 49; Alberelli Witness Stmt. ¶ 88; URSEC Resolution No. 220/013 (Sept. 5, 2013) (C-084) at 2.

178. Alberelli Witness Stmt. ¶ 90; Herbon Witness Stmt. ¶ 50. Indeed, URSEC's desire to protect Antel's monopoly as a reason for URSEC's discriminatory conduct against Italba seemed particularly relevant because, at the same time that Italba was attempting to enforce the TCA Judgment, Uruguay passed a new media law that, among other things, made it illegal for any company other than Antel to provide "triple play" services. Uruguay Law No. 19,307 (Jan. 14, 2015) (C-085), Art. 56. Several commentators opined that the new law was unconstitutional because it clearly favored and supported a telecommunications monopoly by Antel. See, e.g., *Corte abre camino para que los cables puedan ofrecer Internet* (Aug. 12, 2016) (C-086); *Canales podrán enviar datos por web* (Aug. 13, 2016) (C-087). Several telecommunications companies challenged the constitutionality of the law. Recently, the Uruguay Supreme Court struck down several articles of the law as unconstitutional, including Article 56, which contained the restriction on companies other than Antel offering "triple play" services. See Judgment of Supreme Court of Uruguay No. 240 (Aug. 8, 2016) (C-088) at 2. Notwithstanding this clear direction from its highest court, Uruguay has indicated that it does not intend to comply with the Supreme Court's judgment. Rather, Uruguay's Minister of Industry, Carolina Cosse, publicly stated that Uruguay already has good Internet services and, as such, there is no need to open the market to private companies. *Tendencia de operadores de cable y empresas de telecomunicaciones a brindar servicios cruzados se está "imponiendo" en Uruguay* (Aug. 24, 2006) (C-089).

179. Letter from Italba to Uruguay International Economic Affairs Secretariat & President of Uruguay (Aug. 5, 2015) (C-090) at 3.

3) Nearly A Year And A Half After The Entry Of The TCA Judgment, Uruguay Makes Belated And Inadequate Attempts To Comply With That Judgment.

81. On March 24, 2016, ICSID registered this arbitration after Uruguay sent ICSID several letters urging that ICSID delay registration of the request.¹⁸⁰ On April 5, 2016 — more than 17 months after the TCA entered its judgment immediately reinstating Trigosl's rights — the President of Uruguay issued an Executive Order confirming that the TCA Judgment had reinstated Trigosl's rights and directing URSEC to assign frequencies to Trigosl so that Trigosl could return to providing wireless data services in Uruguay.¹⁸¹

82. Following the issuance of the Executive Order, rather than reinstate Trigosl's rights to the Spectrum, as the TCA Judgment required, URSEC proposed to assign to Trigosl a different set of frequencies in the 3600-3625 MHz and 3675-3700 MHz ranges.¹⁸² In the same document, URSEC admitted that it had transferred the Spectrum to Dedicado in 2013.¹⁸³ The frequencies in the 3600-3700 MHz range are significantly less valuable than the Spectrum that Trigosl previously held and to which it was entitled under the TCA Judgment. In fact, Italba viewed URSEC's offer as further evidence that URSEC's pattern of discriminatory conduct vis-à-vis Italba was continuing — even after the Executive issued an order that URSEC comply with the TCA Judgment, URSEC was looking for ways to undermine Italba's ability to operate in

180. Letter from G. Mata Prates to M. Kinnear (Mar. 10, 2016) (C-091); Letter from C. Mata Prates to M. Kinnear (Mar. 16, 2016) (C-092); Letter from C. Gianelli to M. Kinnear (Mar. 23, 2016) (C-093).

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

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

183. *Id.*

Uruguay. Italba rejected URSEC's proposal.¹⁸⁴

83. A few weeks later, on May 19, 2016, Uruguay provided to Italba a draft URSEC resolution dated May 9, 2016. The draft resolution proposed to retrieve from Dedicado the Spectrum that Uruguay had unlawfully expropriated and return the Spectrum to Trigosul.¹⁸⁵

84. Italba advised Uruguay, in response, that URSEC's proposal was not acceptable. In particular, on May 31, 2016, Italba noted that it had elected monetary compensation, rather than restitution, as its remedy in this arbitration. Italba had done so specifically because, after having been exposed to years of discriminatory and illegal treatment by URSEC, Italba was not prepared to return to doing business in Uruguay and subject itself to the risk that Uruguay would retaliate against Italba or engage in further unlawful conduct to destroy Italba's rights and investments in the country.¹⁸⁶

III. JURISDICTION

85. Article 25(1) of the ICSID Convention provides that:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.¹⁸⁷

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

185. Draft URSEC Resolution (May 9, 2016) (C-098) at 3.

186. Alberelli Witness Stmt. ¶ 91; Letter from A. Yanos to P. Reichler (May 31, 2016) (C-099). Counsel for Uruguay responded by letter on June 8, 2016 to say that Uruguay disagreed with the statements in Italba's letter. Letter from P. Reichler to A. Yanos (June 8, 2016) (C-100).

187. ICSID Convention, Regulations and Rules, ICSID/15 (Apr. 2006) (CL-001).

86. Each of the elements of Article 25(1) is present here.

A. There Is A Legal Dispute Between A Contracting Party And A National Of Another Contracting Party Arising Directly Out Of An Investment.

1) The United States And Uruguay Are Both Contracting States Of The ICSID Convention.

87. Uruguay and the United States are both Contracting States of the ICSID Convention. Uruguay signed the ICSID Convention on May 28, 1992 and ratified it on August 9, 2000.¹⁸⁸ The Convention entered into force in Uruguay on September 8, 2000.¹⁸⁹ The United States signed the ICSID Convention on August 27, 1965 and ratified it on June 10, 1966.¹⁹⁰ The Convention entered into force in the United States on October 14, 1966.¹⁹¹

2) Italba Is A National Of The United States.

88. Under Article 25(2)(b) of the ICSID Convention, a “[n]ational of another Contracting State” includes “any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration.” Italba is a corporation constituted under the laws of the State of Florida, United States with its corporate headquarters in Miami, Florida.¹⁹² It was incorporated in the United States in May 1982 and has operated there since that time.¹⁹³ Italba is therefore a “national of another Contracting State” within the meaning of Article

188. International Centre For Settlement Of Investment Disputes, Signatory and Contracting States (C-101), <https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Database-of-Member-States.bak.aspx?tab=UtoZ&rdo=BOTH> (last visited Sept. 16, 2016).

189. *Id.*

190. *Id.*

191. *Id.*

192. Italba Articles of Incorporation (C-002).

193. *Id.*; Alberelli Witness Stmt. ¶¶ 1, 8-9.

25(2)(b) of the ICSID Convention.

3) Italba Is A Protected Investor Under The Treaty.

89. Article 1 of the Treaty defines “investor of a Party” to mean “an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party.” An “enterprise of a Party,” in turn, is defined as “an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there.”¹⁹⁴

90. Italba is a corporation constituted and organized under the laws of the State of Florida, United States. Since its incorporation in May 1982, its corporate headquarters has been in Miami, Florida.¹⁹⁵ Therefore, Italba qualifies as a U.S. enterprise and investor under the Treaty.

4) Italba’s Business Activities In Uruguay Are “Investments” Subject To The Protections Of The Treaty.

91. Italba’s business activities in Uruguay qualify as “investments” under the language of the Treaty. In particular, Article 1 of the Treaty defines the term “covered investment” to mean “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.”

92. The Treaty defines “investment” as follows:

194. The term “enterprise” is further defined in Article 1 of the Treaty to mean “any entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization; and a branch of an enterprise.” Treaty (C-001) at Art. 1.

195. Italba Articles of Incorporation (C-002); Alberelli Witness Stmt. ¶¶ 1, 8.

[E]very 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;
- (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.

93. Italba's interests in Uruguay qualify as investments under Article 1 of the Treaty.

Italba has 100% ownership and control of Trigosul, its subsidiary enterprise in Uruguay.¹⁹⁶

Through Trigosul, Italba held a license under Uruguayan law that granted Trigosul the right to operate in the Spectrum and provide wireless data services.¹⁹⁷ Trigosul's license to operate in the Spectrum constitutes an "investment" under the Treaty because it is a "license . . . conferred

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

197. UMDN Resolution No. 142/000 (Feb. 8, 2000) (C-005); UNCA Resolution No. 444/000 (Dec. 12, 2000) (C-012).

pursuant to domestic law.”¹⁹⁸ Italba also held telecommunications equipment, office equipment, commercial leases, and other tangible property and related property rights that allow Trigosul to run its operations in Uruguay.¹⁹⁹

94. Italba began investing in Uruguay twenty years ago.²⁰⁰ 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.²⁰¹ Around 1999, Italba acquired Trigosul as a subsidiary enterprise.²⁰² Through Trigosul, Italba purchased equipment, hired personnel, obtained a telecommunications license, and began commercial operation in Uruguay in June 2003.²⁰³ 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.”²⁰⁴

198. Treaty (C-001) at Art. 1(g)-(h); *supra* Sections II.A.2, IIB.2, II.B.3.

199. *See, e.g.*, Herbon Witness Stmt. ¶¶ 11-12, 32; Alberelli Witness Stmt. ¶¶ 20, 22, 24.

200. Alberelli Witness Stmt. ¶¶ 14-16.

201. Herbon Witness Stmt. ¶ 12.

202. Alberelli Witness Stmt. ¶ 16.

203. Herbon Witness Stmt. ¶¶ 11-12, 32; Alberelli Witness Stmt. ¶¶ 15-18, 21, 24.

204. Many have looked to *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco* for a definition of “investment.” ICSID Case No. ARB/00/4, Decision on Jurisdiction (July 23, 2001) (CL-002). The *Salini* criteria include: (a) a contribution of the investor to the host State; (b) a certain duration of the investment; (c) a participation in the risks of the transaction; and (d) a contribution to the host State’s economic development. *Id.* at ¶ 52. A majority of tribunals have since followed the *Salini* approach, albeit with certain variations regarding the interrelationship of the factors. For example, in *Bernhard von Pezold and Others v. Republic of Zimbabwe*, the tribunal noted that some tribunals are departing from the *Salini* test to adopt “a simpler test involving contribution, duration and risk.” ICSID Case No. ARB/10/15, Award (July 28, 2015) (CL-003), ¶ 285. Under either definition, Italba’s activities in Uruguay qualify as investments.

5) The Parties Have A Legal Dispute Arising Directly Out Of Italba's Investments.

95. A legal dispute exists where there is “a disagreement on a point of law or fact, a conflict of legal views or interests between the parties.”²⁰⁵ In this arbitration, Italba maintains that Uruguay has violated the Treaty and applicable international law by, among other things, unlawfully expropriating Italba's investment in Uruguay and failing to treat Italba's investment fairly and equitably. Uruguay opposes such claims. Accordingly, there is a “legal dispute” between the parties that arises out of Italba's investment in Uruguay.

B. The Parties Consented To ICSID Arbitration.

96. By virtue of Articles 24(3) and 25 of the Treaty, Uruguay has made a standing offer to resolve investment disputes with U.S. investors, such as Italba, through international arbitration. In particular, Article 24(3) of the Treaty provides in relevant part that “a claimant may submit a claim . . . (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.” As of the date of this Memorial, both Uruguay and the United States remain parties to the ICSID Convention.

97. Furthermore, Article 25 of the Treaty provides that “[e]ach Party consents to the submission of a claim to arbitration under this Section in accordance with this Treaty” and that “[t]he consent under paragraph 1 and the submission of a claim to arbitration under this Section shall satisfy the requirements of . . . Chapter II of the ICSID Convention (Jurisdiction of the Centre) . . . for written consent of the parties to the dispute.” Accordingly, Uruguay has

205. *Case Concerning East Timor*, 1995 ICJ Reports (June 30, 1995) (CL-004) at 99; *see also The Mavrommatis Palestine Concessions*, PCIJ Ser. A No. 2 (Aug. 30, 1924) (CL-005) at 11. Stated differently, “it must be shown that the claim of one of the Parties meets obvious opposition from the other. . . . It is only with the expression and the confrontation of the points of view of the Parties that the dispute is crystallized.” *Lao Holdings N.V. v. Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction (Feb. 21, 2014) (CL-006), ¶ 121 (citation omitted).

expressly and unequivocally consented in writing to resolve investment disputes under the Treaty through international arbitration, and such consent expressly satisfies the ICSID Convention's jurisdictional requirements.²⁰⁶ In the same way, Italba's formal notification to Uruguay on August 5, 2015 and subsequent commencement of this arbitration establish Italba's express and unequivocal acceptance of Uruguay's offer to arbitrate investment disputes under the Treaty in accordance with Article 24(2).

98. Finally, in its August 5, 2015 notice of dispute, Italba notified Uruguay that a dispute with respect to its investments in Uruguay had arisen.²⁰⁷ Uruguay did not respond to that letter within the ninety-day negotiation period set forth in Article 24(2) of the Treaty, nor have the parties agreed on any alternative arbitration mechanisms established in Article 24(3)(b) of the Treaty. Accordingly, this dispute is validly submitted to this Tribunal.

C. The Dispute Was Brought Within The Time Period Required By Article 26 Of The Treaty.

99. Under Article 26 of the Treaty, "[n]o claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 24(1) and knowledge that . . . the enterprise (for claims brought under Article 24(1)(b)) has incurred loss or damage." Uruguay is responsible for URSEC's refusal to abide by the TCA Judgment rendered in October 2014. That refusal resulted in an expropriation in March 2015, less than three years

206. Treaty (C-001) Art. 25.

207. Letter from Italba to Uruguay International Economic Affairs Secretariat & President of Uruguay (Aug. 5, 2015) (C-090) at 3 ("Italba hereby expresses its unconditional consent, and thus its acceptance of the consent expressed by Uruguay in Article Twenty Five of the Treaty, to submit the dispute to arbitration either before the International Centre for Settlement of Investment Disputes or in an *ad hoc* arbitration under the UNCITRAL Arbitration Rules."); Letter from A. Yanos to Uruguay Minister of Economy & Finance (Oct. 15, 2015) (C-103) ("En caso de que no seamos capaces de llegar a una solución, tenemos la intención de presentar una Solicitud de Arbitraje en virtud de los Tratados antes mencionado, a finales del mes de noviembre de 2015.").

before Italba sent Uruguay a notice of dispute in August 2015.

100. While Uruguay originally revoked Trigosl's license in 2011, the TCA Judgment explicitly nullified that prior act.²⁰⁸ The TCA's ruling that the 2011 revocation of Trigosl's license lacked a legal basis and was therefore null and void had, under Uruguayan law, a retroactive effect going back to the date of the revocation. In other words, the TCA Judgment had the effect of erasing the 2011 revocation, such that it never existed.²⁰⁹ As a result, there is no expropriatory act in 2011 that could trigger the running of the statute of limitations.

101. At the same time, although some of Uruguay's unlawful conduct *commenced* more than three years before the August 2015 trigger letter was sent, the fact that such conduct was in breach of the Treaty was *unknown* and *unknowable* to Italba until March 2015, when Italba learned that URSEC had transferred the Spectrum to Dedicado while Trigosl's challenge to its license termination was *sub judice* and had no intention of implementing the TCA Judgment.²¹⁰ Only at that point, in 2015, could Italba see for the first time that URSEC's failure between 2006 and 2011 to issue Trigosl a license conforming to the 2003 License Regulations and its improper termination of Trigosl's license in 2011 were not the product of bureaucratic inefficiency or a good faith misapprehension of the facts, but rather the product of bad faith and a pattern of discriminatory conduct. As a result, Italba did not become aware of the fact that Uruguay's prior conduct was unlawful under the Treaty until March 2015 and could not have

208. TCA Judgment (Oct. 23, 2014) (C-076) at 20-21. Moreover, under Uruguayan law, the administrative acts revoking Trigosl's license were not even considered "final" acts because they were the subject of a pending challenge in the TCA. *See, e.g.*, TCA Judgment 773 (Nov. 22, 2012) (C-104) at 7; Augusto Duran Martínez, *Contencioso Administrativo* (F.C.U. Jan. 2007) (C-105) at 47 (citation omitted).

209. *See, e.g.*, Carlos E. Delpiazso, *Derecho Administrativo General* (A.M.F. Montevideo 2015), v. 1 (C-106) at 353 ("The annulment is the restoration to the identical legal situation that would have existed if the act, subject to the annulment, had never existed or been issued"); Graciela Ruocco, *IV Jornadas Académicas del TCA en homenaje al Prof. Mariano R. Brito* (F.C.U. Montevideo 2010) (C-107) at 44-45.

210. Herbon Witness Stmt. ¶ 49; Alberelli Witness Stmt. ¶¶ 88-89.

learned such information earlier with any amount of due diligence. Italba submitted its notice of arbitration to Uruguay five months later — well within the statute of limitations.

102. Furthermore, Italba cannot be blamed for its failure to complain about Uruguay's breaches of the Treaty before March 2015 because Uruguay affirmatively concealed from Italba the fact that it was in breach of the Treaty until that time. Throughout the period of time that Trigosul was waiting for URSEC to issue it a license conforming to the 2003 License Regulations, URSEC never communicated to Trigosul that it had no intention of ever providing that license; to the contrary, URSEC representatives told Trigosul that URSEC was processing the license and would issue it in due course and accepted Trigosul's letters on that subject without any response whatsoever.²¹¹ Italba thus had no reason to believe that URSEC's delay in providing the license was due to bad faith or an intent to deny Trigosul a license conforming to the 2003 License Regulations. Even when URSEC revoked Trigosul's license in January 2011, URSEC made no mention of any past deficiencies with Trigosul's license or a prior rejection of Trigosul's request for a conforming license.²¹² Thus, the fact that URSEC intended to deny Trigosul a license conforming to the 2003 License Regulations through inaction was unknowable to Italba. Similarly, when URSEC terminated Trigosul's license, URSEC cited specific (albeit inaccurate) facts in support of its conduct; thus, Italba had no legitimate basis for believing that revocation was part of a deliberate and unlawful plan to discriminate against Trigosul, as opposed to a good faith misapprehension of the relevant facts.²¹³

103. In summary, URSEC and, by extension, Uruguay, concealed its true motivations by: (a) assuring Trigosul that its license conforming to the 2003 License Regulations was

211. Alberelli Witness Stmt. ¶¶ 31, 33, 38, 61; Herbon Witness Stmt. ¶¶ 15, 30.

212. URSEC Memorandum (C-066) at 2.

213. Alberelli Witness Stmt. ¶¶ 73, 76; Herbon Witness Stmt. ¶¶ 36-43.

forthcoming; (b) remaining silent in the face of numerous letters from Trigosl concerning the conforming license; (c) revoking Trigosl's license based on Trigosl's purported breach of the license terms; and (d) transferring the Spectrum to Dedicado without notice to Trigosl even though Trigosl's challenge to its license revocation was before the TCA at the time.²¹⁴

Accordingly, Italba could not have known that Uruguay was in breach of the Treaty until March 2015, when Italba learned that URSEC had no intention of complying with the TCA Judgment because it had already given Trigosl's rights away to Dedicado, since it was only at that point that there was no veneer of good faith that could possibly explain Uruguay's conduct. Italba gave Uruguay notice of its intent to arbitrate this dispute a few months later. Accordingly, Italba timely submitted its claims under the Treaty.

IV. LIABILITY

A. Uruguay Expropriated Italba's Investments.

1) The Treaty Protects Trigosl's License From Unlawful Expropriation.

104. The Treaty guarantees that investments made by qualifying U.S. nationals in Uruguay will not be expropriated except in accordance with Article 6. Article 6 provides that:

(1) Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:

214. See *supra* Sections II.B.2-5, II.B.8, II.C.2 and II.D.

- (a) for a public purpose;
 - (b) in a non-discriminatory manner;
 - (c) on payment of prompt, adequate, and effective compensation; and
 - (d) in accordance with due process of law and Article 5(1) through (3).
- (2) The compensation referred to in paragraph 1(c) shall:
- (a) be paid without delay;
 - (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (“the date of expropriation”);
 - (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and
 - (d) be fully realizable and freely transferable.²¹⁵

105. As discussed above, Trigosl’s license to operate in the Spectrum constitutes an “investment” under the Treaty.²¹⁶ Thus, Article 6 of the Treaty applies to any taking of Trigosl’s license.²¹⁷

2) Uruguay’s Refusal To Comply With The TCA Judgment Reinstating Trigosl’s License Constituted An Expropriation Of That License.

106. As described above, in October 2014, the TCA rendered a judgment finding that the URSEC and MIEM resolutions revoking Trigosl’s rights to operate in the Spectrum and

215. Treaty (C-001), Art. 6.

216. *See supra* Section III.A.4.

217. Wholly apart from the Treaty, which is decisive here, it is well-established under international law that States are liable for takings of intangible property rights, such as licenses. Where an investor has acquired rights pursuant to a State license, abrogation of those rights amounts to expropriation. *See, e.g., Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)* (1926) P.C.I.J. Series A., No. 7 (CL-007) at 44 (“[I]t is clear that the rights of the Bayerische to the exploitation of the factory and to the remuneration fixed by the contract for the management of the exploitation and for the use of its patents, licenses, experiments, etc., have been directly prejudiced by the taking over of the factory by Poland.”).

provide wireless data services in Uruguay had no lawful basis and were therefore null and void.²¹⁸ The effect of the judgment was to nullify the prior revocation of Trigosul's rights, thereby immediately reinstating those rights.²¹⁹

107. Despite the existence of a legal obligation, pursuant to the judgment of its highest administrative court, to recognize Trigosul's rights to operate in the Spectrum as valid and in force, URSEC refused to act in conformity with the TCA Judgment and allow Trigosul's enjoyment of its license. Specifically, URSEC failed to respond to Trigosul's request to approve its equipment so that it could resume operations in the Spectrum²²⁰ and ignored a February 5, 2015 letter from Trigosul's attorney requesting that URSEC add Trigosul back to the Register of Data Transmission Services Providers (Registro de Prestadores de Servicios de Trasmisiones de Datos).²²¹

108. Most importantly, URSEC did not take immediate action to undo its transfer of the Spectrum to Dedicado and restore the Spectrum to Trigosul.²²² The transfer of Trigosul's rights — done without notice to Trigosul and while Trigosul's challenge to the wrongful termination of those rights was *sub judice* — although unlawful and wholly inappropriate, need not have been an impediment to Uruguay's fulfillment of its obligations to Italba under the Treaty. Instead of ignoring the TCA Judgment as it did, Uruguay could have revoked the transfer of Trigosul's rights to Dedicado and restored those rights to Trigosul in accordance with

218. TCA Judgment (Oct. 23, 2014) (C-076) at 17, 19, 21.

219. *Id.*

220. Alberelli Witness Stmt. ¶ 87; Herbon Witness Stmt. ¶ 47.

221. Alberelli Witness Stmt. ¶ 88; Herbon Witness Stmt. ¶ 48; Letter from L. Herbon to G. Lombide (Feb. 5, 2015) (C-082) at 2.

222. *See* Alberelli Witness Stmt. ¶¶ 87-91; Herbon Witness Stmt. ¶¶ 47-50.

the TCA Judgment, as Uruguay itself acknowledged by its recent offer to do just that.²²³

Because Uruguay chose to do nothing, it is responsible for the expropriation of Italba’s investments.²²⁴

109. Furthermore, as noted above, pursuant to Article 6 of the Treaty, an expropriation is unlawful if it (a) is not carried out with due process; (b) is discriminatory; (c) does not involve the payment of prompt, adequate, and effective compensation to the person or entity whose rights are being expropriated; or (d) has no public purpose. Under the plain language of the Treaty, an expropriation that lacks *any* of these elements is unlawful. Uruguay’s expropriation of Italba’s investment lacks all of them.

(a) *Uruguay Did Not Expropriate Italba’s License “In Accordance With Due Process Of Law.”*

110. As noted above, Article 6(d) of the Treaty mandates that any expropriation be conducted by Uruguay “in accordance with due process of law.” Tribunals have confirmed that, in the context of an expropriation, due process requires a “meaningful” legal procedure with “reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the

223. See Draft URSEC Resolution (May 9, 2016) (C-098); see also Alberelli Witness Stmt. ¶ 92.

224. For the avoidance of doubt, recent investment treaty arbitration cases have confirmed that interference with an investor’s license constitutes an expropriation of that license. See, e.g., *Khan Resources Inc Khan Resources B.V. and Cauc Holding Co. v. The Government of Mongolia*, UNCITRAL Award on the Merits (Mar. 2, 2015) (CL-008) at ¶¶ 307-08; *Tecmed v. México*, Award (CL-009), ¶ 117; *Metalclad v. Mexico*, Award (CL-010), ¶¶ 78, 85-89. Even where a State does not completely revoke a party’s rights under a license, modification of those rights, particularly where the modification would take away a party’s exclusive rights under a license, constitutes expropriation. For example, in *CME v. Czech Republic*, the tribunal found that the State expropriated the claimant’s television broadcasting license by interfering with the claimant’s exclusive rights under that license. *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award (Sept. 13, 2001) (CL-011), ¶¶ 607, 609; see also *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award (June 25, 2001) (CL-012) (considering whether the revocation of a license could rise to a treaty violation); *Mondev Int’l Ltd. v. United States*, NAFTA/ICSID Case No. ARB(AF)/99/2, Award (CL-013), ¶ 98 (“Moreover it is clear that the protection afforded by the prohibition against expropriation or equivalent treatment in [NAFTA] Article 1110 can extend to intangible property interests, as it can under customary international law.”).

actions in dispute.”²²⁵ A legal procedure is meaningful if it grants “an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard.”²²⁶

111. Uruguay violated Italba’s due process rights in two fundamental ways. *First*, without any notice to Trigosl or the TCA, URSEC re-allocated Trigosl’s license to operate in the Spectrum to a competitor company while Trigosl’s case in the TCA to restore its rights to that license was pending.²²⁷ *Second*, once the TCA had nullified Uruguay’s revocation of Trigosl’s license and reinstated Trigosl’s rights, URSEC refused to comply with that judgment.²²⁸

112. Uruguay’s conduct “shocks the conscience” and is manifestly beyond any basic conception of due process. Trigosl was not provided with any — let alone reasonable — advance notice or opportunity for a fair hearing with respect to the transfer of the Spectrum to Dedicado. Indeed, Trigosl did not even learn that the transfer had happened until 18 months

225. *See ADC Affiliate Ltd. et al. v. Republic of Hungary*, ICSID Case No ARB/03/16, Award (Oct. 2, 2006) (**CL-014**), ¶ 435:

“[D]ue process of law”, in the expropriation context, demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it. Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard.

226. *Id.*; *see also Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award (Sept. 16, 2015) (**CL-015**), ¶ 221 n.242 (citing *ADC v. Hungary* and finding that the revocation of the claimants’ concessions did not comply with minimum standards of due process).

227. Alberelli Witness Stmt. ¶ 89; Herbon Witness Stmt. ¶ 49; URSEC Resolution No. 220/013 (Sept. 5, 2013) (**C-084**).

228. Alberelli Witness Stmt. ¶¶ 86-88; Herbon Witness Stmt. ¶¶ 47-48; Executive Order IE 156 (Apr. 5, 2016) (**C-094**); URSEC Proposal (May 9, 2016) (**C-095**); Draft URSEC Resolution (May 9, 2016) (**C-098**).

after the fact.²²⁹ Moreover, while Trigosl was seeking to overturn URSEC’s revocation of its license, URSEC was undermining the efficacy of that appeal by transferring Trigosl’s license while the case concerning that license was *sub judice*. Finally, it is beyond cavil that Uruguay’s refusal to recognize and comply with the judgment of its own courts is a breach of due process under both Uruguayan and international law.²³⁰

113. Uruguay’s absurdly late attempt to comply with the TCA judgment, nearly 18 months after it was handed down and more than one month after this arbitration was registered only serves to highlight the defective nature of Uruguay’s actual reaction to the TCA Judgment and the ability that Uruguay had to act in a lawful manner at the relevant time, if it had only chosen to do so.²³¹ In addition, the fact that URSEC ultimately attempted to “comply” with the TCA Judgment and Executive Order by offering substandard spectrum is further evidence of the extreme lengths that administrative body will go to in order to avoid allowing Italba to enjoy the fruits of its investments.

(b) *Uruguay Did Not Expropriate Italba’s License “In A Non-Discriminatory Manner.”*

114. Article 6(b) of the Treaty mandates that Uruguay carry out its expropriation in a non-discriminatory manner. The tribunal in *Quiborax v. Bolivia* explained the content of such an obligation as follows:

229. Herbon Witness Stmt. ¶ 49; Alberelli Witness Stmt. ¶ 89 n.103.

230. *Waguieh Elie, George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (June 1, 2009) (CL-016), ¶¶ 454-55. An expropriatory act that violates domestic law is strongly indicative of a failure of due process. *See Total S.A. v. Republic of Argentina*, ICSID Case No ARB/04/1, Decision on Liability (Dec. 27, 2010) (CL-017), ¶ 307 (“a breach of domestic law may entail a breach of international law”).

231. *See* Executive Order IE 156 (Apr. 5, 2016) (C-094); URSEC Proposal (May 9, 2016) (C-095); Draft URSEC Resolution (May 9, 2016) (C-098).

State conduct is discriminatory, if (i) similar cases are (ii) treated differently (iii) and without reasonable justification. As to the third element, . . . there are situations that may justify differentiated treatment, a matter to be assessed under the specific circumstances of each case.²³²

Applying such a standard, tribunals have consistently held that, where a State unlawfully targets foreign investors for differential treatment, the taking is discriminatory and in breach of international law.²³³

115. In this case, Uruguay’s expropriation of Trigosl’s license was discriminatory because, while Italba’s case against URSEC was pending in the TCA, URSEC — without notifying Trigosl or the TCA — re-allocated Trigosl’s rights to the Spectrum to Dedicado, a telecommunications company in direct competition with Trigosl.²³⁴ Virtually identical conduct by Hungary was held to be a discriminatory expropriation in *ADC v. Hungary*.²³⁵ In that case, the tribunal found that Hungary’s unjustified transfer of the right to operate Budapest International Airport from a consortium of foreign investors to a Hungarian entity was discriminatory because it favored national over foreign investors.²³⁶

232. *Quiborax v. Bolivia*, Award (CL-015), ¶ 247 (finding Bolivia’s expropriatory measure to be discriminatory) (citing *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award (Mar. 17 2006) (CL-018) ¶ 313); see also *ADC v. Hungary*, Award (CL-), ¶¶ 441-43.

233. See, e.g., *ADC v. Hungary*, Award (CL-014), ¶¶ 441-43 (finding that Hungary had expropriated claimant’s investment by discriminating against claimant in favor of a national entity and transferring airport operations and related activities from claimant to State-appointed operator); *British Caribbean Bank Ltd. v. Government of Belize*, PCA Case No. 2010-18/BCB-BZ, Award (Dec. 19, 2014) (CL-019), ¶¶ 237-40 (holding that Belize’s expropriation of claimant’s investment was unlawful and discriminatory because Belize had made negative statements about the claimant, thereby suggesting that expropriation was motivated by “personal animus” rather than any public purpose).

234. Alberelli Witness Stmt. ¶ 89; Herbon Witness Stmt. ¶ 49; URSEC Resolution No. 220/013 (Sept. 5, 2013) (C-084) at 3-4.

235. *ADC v. Hungary*, Award (CL-014), ¶¶ 441-43.

236. *Id.* at ¶¶ 441-43, 476(d).

(c) Uruguay Did Not Provide Italba “Prompt, Adequate, And Effective Compensation.”

116. Article 6(c) of the Treaty plainly requires that Uruguay provide “prompt, adequate, and effective compensation” to any qualifying investor whose investment is expropriated. Most tribunals reflecting on similar requirements in other treaties have held that the failure to, at a minimum, make a good faith offer of prompt, adequate, and effective compensation renders an expropriation *per se* unlawful.²³⁷

117. Here, Uruguay did not offer *any* compensation to Italba in connection with the expropriation of Trigosl’s license. Thus, Uruguay’s expropriation of Trigosl’s license was unlawful.

237. See, e.g., *Crystallex Int’l Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (Apr. 4, 2016) (CL-020), ¶ 716 (“It is undisputed that no such compensation was either paid or offered to Crystallex. When a treaty cumulatively requires several conditions for a lawful expropriation, arbitral tribunals seem uniformly to hold that failure of any one of those conditions entails a breach of the expropriation provision”) (listing cases); *Rusoro Mining Ltd. and The Bolivarian Republic of Venezuela*, Award (Aug. 22, 2016) (CL-021), ¶¶ 410, 899 (failure to pay any compensation sufficient to support finding of unlawful expropriation); *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award (July 28, 2015) (CL-022), ¶ 498 (“As no compensation was paid, there is no need to decide whether the acquisition was for a public purpose, whether there was access to due process or, in the case of the Swiss BIT, whether the acquisition was non-discriminatory”); *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award (Apr. 22, 2009) (CL-022), ¶¶ 98-107 (because of a breach of the obligation to pay compensation under the BIT, there was no need to consider the breach of other conditions); *ConocoPhillips Petrozuata B.V. et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits (Sept. 3, 2013) (CL-023) ¶ 401 (failure to make good faith offer of compensation rendered expropriation unlawful); *Burlington Res. Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on Liability (Dec. 14, 2012) (CL-024), ¶¶ 543-45 (lack of compensation made Ecuador’s expropriation unlawful); *Marion & Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case Nos. ARB/08/1 & ARB/09/20, Award (May 16, 2012) (CL-025), ¶ 305 (“what makes the expropriation illegal is the failure in the duty to pay compensation”); *Gemplus SA et al. v. United Mexican States*, ICSID Case Nos. ARB(AF)/04/3 and ARB(AF)/04/4, Award (June 16, 2010) (CL-026), ¶¶ 8-25 (“The Tribunal concludes that these expropriations were unlawful under the BITs and international law, given the facts found by the Tribunal and the further fact that the Respondent did not meet the condition required by Article 5 of both treaties regarding the payment of adequate compensation”); *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award (July 29, 2008) (CL-027), ¶ 706 (finding expropriation to be unlawful because even if compensation was paid, it remained inadequate); *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentine Republic*, ICSID Case No. ARB/97/3, resubmitted case, Award (Aug. 20, 2007) (Vivendi II) (CL-028), ¶ 7.5.21 (lack of compensation makes an expropriation unlawful); *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1 Award (Feb. 17, 2000) (CL-029), ¶ 72 (no matter how laudable State environmental expropriatory measures are, they remain illegal if the State does not pay compensation).

118. As noted above, the fact that, nearly 18 months after the TCA handed down its judgment and more than one month after this arbitration was registered, Uruguay made a half-hearted attempt to provide Trigosl with (woefully inadequate) replacement spectrum or, perhaps, wrest the Spectrum away from Dedicado and return it to Trigosl is irrelevant to the analysis above: *First*, the replacement spectrum offered to Italba was neither adequate nor prompt compensation within the meaning of the Treaty. *Second*, the offer to, perhaps, return to Trigosl the Spectrum given to Dedicado was not prompt. Moreover, coming as it did, after nearly 18 months of inaction on the TCA Judgment and thirteen years of inaction on Trigosl’s entitlement to a license conforming to the 2003 License Regulations, Uruguay’s offer was plainly inadequate.²³⁸ *Finally*, the offers were plainly inadequate because neither offer included any attempt by Uruguay to make reparations for its egregious violations of the Treaty.²³⁹

(d) Uruguay Did Not Expropriate Trigosl’s License For Any “Public Purpose.”

119. Uruguay’s expropriation of Trigosl’s license was not done in service of any public purpose as required by Article 6(a) of the Treaty. As set forth in the Fourth Report by the Special Rapporteur on International Responsibility, to be lawful, a State expropriation must be “clearly justified” by the public interest:

[T]he least that can be required of the State is that it should exercise [its] power only when the measure is *clearly justified* by the public interest. Any other view would condone and even facilitate the abusive exercise of the power to expropriate and give

238. See, e.g., *ConocoPhillips v. Venezuela*, Decision on Jurisdiction and the Merits (CL-023) at ¶ 342 (noting that it is “commonly accepted” that an expropriating State must propose payment to the investor “at the outset” of an expropriation and, if that payment is not satisfactory to the investor, engage in good faith negotiations regarding appropriation compensation terms).

239. See, e.g., *id.* (finding that an offer of compensation that did not include compensation required under the applicable Treaty was *per se* an offer in bad faith).

legal sanction to manifestly arbitrary acts of expropriation. . . . It is accordingly sufficient to require that all States should comply with the condition or requirement which is common to all; namely, that the power to expropriate should be exercised only when expropriation is necessary and is justified by a genuinely public purpose or reason. If this *raison d'être* is plainly absent, the measure of expropriation is “arbitrary”²⁴⁰

120. A “defence that an expropriation was undertaken for a public purpose related to the internal needs of [the State] requires — at least — that the [State] set out the public purpose for which the expropriation was undertaken and offer a *prima facie* explanation of how the acquisition of the particular property was reasonably related to the fulfilment of that purpose.”²⁴¹ A tribunal must then determine whether the State’s actions were “reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation.”²⁴² A “government’s failure to advance a declared purpose at the time of the expropriation may serve as evidence that the measure was not taken in furtherance of [a public] purpose.”²⁴³

121. Here, Uruguay has not offered and cannot offer any public purpose for its measures against Italba’s investment and certainly has not satisfied its burden of articulating “a *prima facie* explanation of how the acquisition of the particular property was reasonably related to the fulfillment of that purpose.”²⁴⁴ To the contrary, Uruguay’s own judiciary ruled that URSEC and MIEM’s revocation of Trigosl’s license was illegal and unjustified. Uruguay’s

240. F.V. García Amador, *State Responsibility: Fourth Report by the Special Rapporteur on International Responsibility*, Y.B. Int’l L. Commission, Doc. A/CN.4/119 (1959) (CL-030), p. 16 ¶ 59 (emphasis added).

241. *British Caribbean v. Belize*, Award (CL-019), ¶ 241.

242. *Tecmed v. México*, Award (CL-009), ¶ 122.

243. *Vestey Grp. Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award (Apr. 15, 2016) (CL-031), ¶¶ 294-96.

244. *British Caribbean v. Belize*, Award (CL-019) at ¶ 241.

refusal to comply with the judgment of its own courts does not serve any public interest. It is contrary to any concept of the public interest for a regulator to refuse to abide by the decisions of the administrative courts charged with overseeing that regulator. Put simply, when a State overrides or repudiates its own courts' rulings, that is the antithesis of serving a public purpose.²⁴⁵

B. Uruguay Breached Its Obligation Under The Treaty To Accord Italba Fair And Equitable Treatment.

1) The Treaty Expressly Requires Uruguay To Provide Qualifying U.S. Investors With Fair and Equitable Treatment, Including Due Process And Justice.

122. Article 5 of the Treaty obligates Uruguay to treat qualifying U.S. investors fairly and equitably. The Treaty clarifies that fair and equitable treatment means “treatment in accordance with customary international law.” To further explain what the parties meant by their reference to “customary international law” the parties agreed, in the Treaty, as follows:

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

245. See *Siag v. Egypt*, Award (CL-016), ¶¶ 454-55; cf. *EnCana Corp. v. Republic of Ecuador*, LCIA Case No. UN 3481, Award (Feb. 3, 2006) (CL-032), ¶ 194 (noting that a state’s failure to follow its own courts’ rulings would amount to an expropriation); *Waste Management Inc. v. United Mexican States II*, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004) (CL-033), ¶ 174 (noting “the normal response by an investor faced with a breach of contract by its governmental counter-party (the breach not taking the form of an exercise of governmental prerogative, such as a legislative decree) is to sue in the appropriate court to remedy the breach. It is only where such access is legally or practically foreclosed that the breach could amount to an definitive denial of the right (i.e., the effective taking of the chose in action) and the protection of Article 1110 be called into play.”).

- (a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; . . .²⁴⁶

123. Based on this language alone, there are three types of conduct that would certainly breach Uruguay’s obligation to provide fair and equitable treatment: (a) conduct that results in a denial of justice (Article 5.2(a)); (b) conduct that results in a denial of due process (*id.*); and (c) conduct that is in bad faith (*Neer v. Mexico*).²⁴⁷ As set forth below, Uruguay failed on all three counts.²⁴⁸

124. At the same time, tribunals examining language that is substantially similar to the language in the Treaty — that is, language mandating that the fair and equitable treatment standard conform to the customary international law minimum standard for fair and equitable treatment — have consistently observed that the customary international law minimum standard is different from the formulation adopted in the *Neer v. Mexico* case 89 years ago.²⁴⁹ Those tribunals contend that the customary international law minimum has now effectively converged with the standard of fair and equitable treatment applicable in treaties that do not include a

246. Treaty (C-001). Art. 5.

247. *L. F. H. Neer & Pauline Neer (U.S.A.) v. United Mexican States*, Reports of Int’l Arb. Awards, Vol. IV at 60-66, Concurring Opinion of Americam Commissioner (Oct. 15, 1926) (CL-034).

248. See *infra* Sections IV.B.2.

249. See, e.g., *ADF Grp. Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Award (Jan. 9, 2003) (CL-035), ¶ 179 (“[W]hat customary international law projects is not a static photograph of the minimum standard of treatment of aliens as it stood in 1927 when the Award in the *Neer* case was rendered. For both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development.”); see also *RDC v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award (June 29, 2012) (CL-036), ¶ 218 (adopting the reasoning in *ADF* and sharing the conclusion that the minimum standard of treatment is “constantly in a process of development”); cf. *Neer v. Mexico*, Concurring Opinion of Americam Commissioner (CL-034).

reference to the customary international law minimum standard.²⁵⁰ For example, the tribunal in *Rusoro v. Venezuela* recently concluded that “the [customary international law minimum] Standard has developed and today is indistinguishable from the [fair and equitable treatment] standard and grants investors an equivalent level of protection as the latter.”²⁵¹

125. With this in mind, tribunals viewing provisions virtually identical to the provisions in the Treaty concerning fair and equitable treatment have held that the “legitimate expectations” inherent in any foreign investment include the expectation that the host state will act: (a) in a transparent manner; (b) in good faith; (c) in a manner that is not arbitrary, grossly

250. Thus, for example, the tribunal in *Crystallex v. Venezuela* concluded that the customary international law minimum standard no longer requires affirmative proof of bad faith. *Crystallex v. Venezuela*, Award (CL-020) at ¶¶ 534-36 (citing *SAUR International S.A. v. Republic of Argentina*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Merits (June 6, 2012), ¶ 491) (“This Tribunal agrees [with the tribunal in *SAUR v. Argentina*] and is further of the view that the public international law principles concerning the treatment of aliens have undergone considerable developments since the *Neer* case, on which the Respondent relies as the applicable benchmark to define FET. As a result of these developments, what is considered now “fair and equitable” is different and broader than what was considered as such at the beginning of the last century.”); see also, e.g., *Mondev v. United States*, Award (CL-013), ¶ 116 (“To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.”).

251. *Rusoro v. Venezuela*, Award (CL-021) at ¶ 520 (“The whole discussion of whether Art. II.2 of the BIT incorporates or fails to incorporate the [customary international law minimum] Standard when defining [fair and equitable treatment] has become dogmatic: there is no substantive difference in the level of protection afforded by both standard.”); *Rumeli v. Kazakhstan*, Award (CL-027), ¶ 611 (“The Arbitral Tribunal considers that this precision is more theoretical than real. It shares the view of several ICSID tribunals that the treaty standard of fair and equitable treatment is not materially different from the minimum standard of treatment in customary international law.”). Even if this Tribunal were to decline to join the many tribunals that have held that the customary international law minimum standard and the fair and equitable treatment standards have converged, and instead find that the Treaty’s provision is more limited than provisions in other treaties that make no mention of customary international law, the standard applicable in this case would be the broader treatment articulated in cases involving treaties with no limiting language applicable to the guarantee of fair and equitable treatment because the Most-Favored-Nation (MFN) provision articulated in Article 4 of the Treaty requires Uruguay to accord Italba and its investment “treatment no less favorable than that it accords, in like circumstances, to [investors and investments of investors] of any non-Party.” See Treaty, Art. 4 (C-001). This provision extends to substantive treaty protections accorded by Uruguay to investors of other countries. *Rumeli v. Kazakhstan*, Award (CL-027), ¶ 575. By virtue of the Treaty’s MFN provision, Italba is entitled to rely on the fair and equitable treatment standard provided in Article 3(2) of the Agreement between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection of Investments, signed October 7, 1988, entered into force April 22, 1991, which does not incorporate the customary international law minimum standard of treatment and provides in relevant part that “Each Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the investors of the other Contracting Party.” (CL-037).

unfair, unjust, idiosyncratic, or discriminatory; and (d) with respect for due process.²⁵²

2) Uruguay's Actions Have Breached The Guarantee In The Treaty That Italba Would Be Treated Fairly And Equitably.

126. As described more fully below, Uruguay's conduct in its dealings with Italba unquestionably breached Uruguay's obligation to treat Italba fairly and equitably under the standards set forth expressly in the Treaty. Taking Uruguay's specific breaches in reverse order:

- a) Uruguay denied Italba justice by refusing to comply with the TCA Judgment reinstating Trigosl's license to operate in the Spectrum;
- b) Uruguay failed to accord Trigosl due process by transferring Trigosl's right to operate in the Spectrum to a competitor without any notice to Italba or Trigosl and while those rights were the subject of a case pending in the TCA;
- c) Uruguay persistently concealed its intention never to issue a license conforming to the 2003 License Regulations to Trigosl and provided false grounds for revoking Trigosl's right to operate in the Spectrum — in violation of its obligation to act in good faith and/or transparently;
- d) Uruguay arbitrarily refused to comply with the 2003 License Regulations and issue to Trigosl a license conforming to those regulations, revoked Trigosl's license without any basis, and reassigned Trigosl's rights to operate in the Spectrum to a competitor while Trigosl's case against URSEC concerning the improper revocation of those rights was pending in the TCA; and
- e) Uruguay discriminated against Trigosl in favor of other wireless operators in Uruguay, including Dedicado, all of whom were issued the

252. See *Crystallex v. Venezuela*, Award (CL-020) at ¶¶ 540-43 (citing the decisions of the tribunals in *Rumeli v. Kazakhstan*, *Lemire v. Ukraine*, and *Bayindir v. Pakistan*). The tribunal in *Rumeli v. Kazakhstan* confirmed that “the State must respect the investor’s reasonable and legitimate expectations.” Award (CL-027), ¶ 609. Similarly, the tribunal in *Lemire v. Ukraine* noted that investors have a right to expect that host States will: (a) offer a stable and predictable legal framework; (b) honor specific representations to the investor; (c) accord investors due process; (d) act in a transparent manner; and (e) refrain from acting in bad faith or in a discriminatory manner. *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (Jan. 14, 2010) (CL-038), ¶ 284. The *Bayindir v. Pakistan* tribunal considered the list of factors “which emerge from decisions of investment tribunals . . . compris[ing] the obligation to act transparently and grant due process, to refrain from taking arbitrary or discriminatory measures, from exercising coercion or from frustrating the investor’s reasonable expectations with respect to the legal framework affecting the investment.” *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award (Aug. 27, 2009) (CL-039), ¶ 178; see also *Waste Management v. Mexico*, Award (CL-033) at ¶ 98.

same license conforming to the 2003 License Regulations that Trigosal never received.

127. Together and individually as independent breaches of the Treaty's fair and equitable treatment provision, Uruguay's actions frustrated Italba's legitimate expectations that Uruguay would follow the principles of "economic rationality, public interest . . . , reasonableness and proportionality."²⁵³

(a) Uruguay has denied Italba justice.

128. Article 5 of the Treaty expressly imposes on Uruguay "the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings."²⁵⁴ The denial of justice in this case stems from the frustration of a judgement of the TCA, Uruguay's highest administrative court.

129. The failure of a State to enforce court judgments is widely recognized as a denial of justice under international law. In an Advisory Opinion requested by the Government of Uruguay, the Inter-American Court of Human Rights provided the following interpretation of Article 25 of the American Convention on Human Rights concerning the "Right to Judicial Protection:"

253. See *Total v. Argentina*, Decision on Liability (CL-017), ¶ 333.

254. Treaty, (C-001) Art. 5(2)(a); see *Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt*, ICSID Case No ARB/04/13, Award (Nov. 6, 2008) (CL-040), ¶ 187; *Rumeli v. Kazakhstan*, Award (CL-027), ¶ 651 ("[T]he duty not to deny justice arises from customary international law and can also be considered to fall within the scope of treaty provisions provided for 'fair and equitable treatment.'"). The tribunal in *Siag v. Egypt* observed that the "concepts of 'due process' and 'denial of justice' are closely linked" because a "failure to allow a party due process will often result in a denial of justice." *Siag v. Egypt*, Award (CL-016), ¶ 452. Similarly, the tribunal in *Loewen v. United States* remarked that denial of justice implies "[m]anifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety." See *Loewen Grp. Inc. v. United States*, ICSID Case No. ARB(AF)/98/3 (NAFTA), Award (June 26, 2003) (CL-041), ¶ 132; see also *Grand River Enterprises Six Nations, Ltd., et al. v. United States*, UNCITRAL, Award (Jan. 12, 2011) (CL-042), ¶ 223 n.61 (the concept of denial of justice "involves a duty to create and maintain a *system of justice* which ensures that unfairness to foreigners either does not happen, *or is corrected*") (emphasis in original).

A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective. That could be the case, for example, when practice has shown its ineffectiveness: when the Judicial Power lacks the necessary independence to render impartial decisions or the means to carry out its judgments; or in any other situation that constitutes a denial of justice, as when there is an unjustified delay in the decision; or when, for any reason, the alleged victim is denied access to a judicial remedy.²⁵⁵

130. Investment tribunals have likewise found that frustration by a State of judgments rendered by its own domestic courts can result in a denial of justice. For example, the *Siag v. Egypt* tribunal found an “egregious denial of justice” where the claimants had obtained several judgments in their favor from Egyptian courts, but the government had failed to comply with those judgments.²⁵⁶ Italba’s case is on all fours with *Siag*. Here, as in *Siag*, Italba litigated its rights in the local courts, believing that a favorable ruling would correct URSEC’s wrongful termination of Trigosul’s license, only to find that URSEC not only would not comply with the ruling, but had attempted to render compliance impossible by placing the Spectrum in the hands of a third party while the claims before the TCA were *sub judice*. Further, there can be no defense of exhaustion of remedies with respect to this matter²⁵⁷ because the judgment to which Uruguay failed to give effect was final, binding, and not subject to appeal.²⁵⁸ In short, just like Egypt’s failure to give effect to the rulings of its own courts in the *Siag v. Egypt* case, Uruguay’s

255. Inter-American Court of Human Rights, Advisory Opinion OC-9/87 (Oct. 6, 1987) (CL-043), ¶ 24.

256. *Siag v. Egypt, Award* (CL-016), ¶¶ 454-55.

257. Rudolph Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford 2d ed., 2012) (CL-044), p. 384 (“[u]nlike other aspects of investment protection, it is generally accepted that a claim for denial of justice is conditioned on a prior exhaustion of local remedies”).

258. *See, e.g.*, Constitution of the Oriental Republic of Uruguay of 1967 (as amended in 2004) (C-108), Art. 309 (bestowing on the TCA final jurisdiction to “hear pleas for the nullification of definitive administrative acts performed by the Administration in the exercise of its functions which are contrary to a rule of law or which are a distortion of authority.”).

frustration of and failure to comply with the TCA Judgment in this case amounts to an “egregious denial of justice.”

(b) *Uruguay failed to respect due process.*

131. A State violates its obligation to treat investors fairly and equitably when it denies procedural propriety and due process to an investor.²⁵⁹

132. Here, Uruguay’s decision to reassign Trigosal’s right to operate in the Spectrum to Dedicado without providing any notice to Trigosal, even as those rights were subject to pending litigation before the TCA “offends judicial propriety” and constitutes a breach of Uruguay’s obligation to accord due process.²⁶⁰ Basic notions of administrative due process entail notice of impending acts affecting a legal or property right.²⁶¹ Similarly, the tribunal in *Waste Management v. Mexico (II)* remarked that “a complete lack of transparency and candour in an administrative process” would result in a lack of due process in violation of the fair and equitable treatment standard.²⁶²

133. Indeed, it is worth noting that Uruguay’s conduct violates the standard of due process enshrined in its own administrative law. Article 91 of Decree No. 500/991 requires that any administrative resolutions that give rise to irreparable harm shall be notified *personally* to the interested party.²⁶³ In this case, there is no question that URSEC’s resolution to reassign to Dedicado Trigosal’s right to operate in the Spectrum could have — and indeed did — cause

259. *Jan de Nul v. Egypt, Award (CL-040)*, ¶ 187.

260. *See id.*

261. *See Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award (Apr. 12, 2002) (CL-045), ¶ 143; *Tecmed v. México, Award (CL-009)*, ¶ 162; *Metalclad v. Mexico, Award (CL-010)* at ¶ 91.

262. *Waste Management, Inc. v. Mexico II, Award (CL-033)* at ¶ 98.

263. *See infra* n.274.

irreparable harm to Trigosul, and that URSEC knew Trigosul's right to the Spectrum was the subject of a proceeding in the TCA. Despite these facts, URSEC never provided notice to Trigosul of the reallocation of its rights.²⁶⁴

134. Accordingly, Uruguay has breached its obligation to accord due process to Italba.

(c) Uruguay failed to act in good faith or transparently.

135. As discussed above, a host State violates the fair and equitable treatment standard if it fails to act in a transparent manner.²⁶⁵ The tribunal in *Nordzucker v. Poland* attempted to describe the types of conduct that fall short of the obligation to act transparently.²⁶⁶ In particular, the tribunal observed that:

[T]he lack of information regarding the actual reasons of [the Polish Ministry of the Treasury's] possible refusal of consent, in combination with the lack of open and frank communication by the Ministry . . . about what was [holding up] the sales constitutes a lack of transparency which Poland was under the BIT obliged to show in its dealings with a prospective investor²⁶⁷

136. Uruguay's conduct fails to live up to even the lowest threshold of transparency.

Not only did Uruguay fail to communicate transparently with Italba or Trigosul, it also perpetrated a scheme of active concealment that manifested itself in several ways, and only

264. A host state's failure to abide by its own legal system can also result in a breach of fair and equitable treatment. See *Total v. Argentina, Decision on Liability (CL-017)*, ¶ 333.

265. See *supra* Section IV.B.1; *Crystallex v. Venezuela, Award (CL-020)* at ¶¶ 579, 581 (a host State would "incur liability under the [bilateral investment treaty] if the treatment of the investor in the process leading to the denial was unfair and inequitable, because it was arbitrary, lacking transparency or consistency"); see also *Rumeli v. Kazakhstan, Award (CL-027)*, ¶ 609 (same); *Lemire v. Ukraine, Decision on Jurisdiction and Liability (CL-038)*, ¶ 284 (same); *LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006) (CL-046)*, ¶ 128 (same); *Saluka v. Czech Republic, Partial Award (CL-018)* at ¶¶ 307-09 (same).

266. *Nordzucker A.G. v. Republic of Poland, UNCITRAL, Second Partial Award (Jan. 28, 2009) (CL-047)*, ¶¶ 9, 85.

267. *Id.* at ¶ 85.

became apparent years after it began:

- a) Uruguay never informed Trigosul of its decision never to issue to Trigosul a license conforming to the 2003 License Regulations, even though it is evident now that this decision was made years before URSEC revoked Trigosul's right to operate in the Spectrum;²⁶⁸
- b) Uruguay repeatedly provided false assurances to Trigosul that it would issue Trigosul its license conforming to the 2003 License Regulations;²⁶⁹
- c) Uruguay knowingly provided false reasons for revoking Trigosul's right to operate in the Spectrum:
 - i) In a December 28, 2010 memorandum, URSEC's General Counsel falsely claimed (a) that Trigosul was no longer operating in the Spectrum, on the basis of an inspection conducted by URSEC at Trigosul's previous address, even though URSEC had been notified of Trigosul's change of address; and (b) that Trigosul had failed to pay the required fees for its operation in the Spectrum;²⁷⁰ and
 - ii) On January 19, 2011, URSEC issued a report reiterating the false reasons articulated in the December 28, 2010 memorandum and further falsely alleging that Trigosul had allowed another company, SEI, to operate in the Spectrum without URSEC's approval, despite Trigosul having supplied evidence refuting the reasons provided by the General Counsel, and despite SEI having never commercially operated in the Spectrum;²⁷¹
- d) Following URSEC's decision to revoke Trigosul's right to operate in the Spectrum, Uruguay never responded to Trigosul's March 1, 2011 formal appeal of URSEC's decision;²⁷²
- e) Uruguay never notified Trigosul that it had assigned to Dedicado the right to operate in the Spectrum, even as those rights were subject to pending litigation

268. See *supra* Sections II.B.2-4 and II.B.8.

269. Alberelli Witness Stmt. ¶¶ 31, 33, 38, 61; Herbon Witness Stmt. ¶¶ 15, 30.

270. URSEC Memorandum (C-066) at 2-3; Jan. 12, 2011 Letter (C-026) at 2-6; Herbon Witness Stmt. ¶ 36; Alberelli Witness Stmt. ¶¶ 71-72.

271. URSEC Report (Jan. 19, 2011) (C-067) at 2; Alberelli Witness Stmt. ¶ 74; Herbon Witness Stmt. ¶ 38.

272. Alberelli Witness Stmt. ¶¶ 76-77; Herbon Witness Stmt. ¶¶ 39, 42.

before the TCA.²⁷³ This lack of transparency, in addition to constituting a breach of the FET standard, was also contrary to Uruguay’s domestic law.²⁷⁴

137. Taken as a whole, Uruguay’s failure to communicate to Trigosl that its license conforming to the 2003 License Regulations would never be issued, Uruguay’s active concealment of its decision never to issue a conforming license, and its revocation of Trigosl’s license on the basis of facts that it knew to be false amounts to a “complete lack of transparency and candour in an administrative process” that “offends judicial propriety”²⁷⁵ and constitutes a violation of Uruguay’s obligation under the Treaty to treat Italba fairly and equitably.

138. The same conduct evinces a clear failure to act in good faith toward Italba. Good faith is a necessary element of fair and equitable treatment. Indeed, the tribunal in *Tecmed v. Mexico* observed that fair and equitable treatment “is an expression and part of the *bona fide* principle recognized in international law.”²⁷⁶

139. The expectation that a host State will act in good faith is fundamental to a foreign investor’s decision to invest. Indeed, no investor would invest in a foreign nation with the expectation that the host State would act in bad faith. The tribunal in *Saluka v. Czech Republic* remarked that “[t]he expectations of foreign investors certainly include the observation by the host State of such well-established fundamental standards as good faith, due process, and

273. Alberelli Witness Stmt. ¶ 88; Herbon Witness Stmt. ¶ 49.

274. Decree No. 500/991 (Sept. 27, 1991) (C-109), Art. 91 (“Las resoluciones que . . . causen gravamen irreparable . . . serán notificadas personalmente al interesado. La notificación personal en la oficina se practicará mediante la comparecencia del interesado, su apoderado, o persona debidamente autorizada para estos efectos.”) (“Resolutions. . . resulting in irreparable damage . . . shall be notified personally to the interested party . . . The personal notification shall take place in the office [of the issuing authority] through the appearance of the interested party, its representative, or a person duly authorized for that purpose.”).

275. *Waste Management, Inc. v. Mexico II*, Award (CL-033) at ¶ 98.

276. *Tecmed v. México*, Award (CL-009), ¶ 153.

nondiscrimination.”²⁷⁷ Similarly, the *Total v. Argentina* tribunal held that a foreign investor’s expectations that the host State will follow the basic principles of economic rationality, public interest, reasonableness, and proportionality “are reasonable and hence legitimate, even in the absence of specific promises by the government.”²⁷⁸

140. An examination of the circumstances of this case as described above reveals that Uruguay’s conduct not only lacked good faith, but evidenced bad faith. Indeed, that bad faith is so ingrained in Uruguay’s conduct towards Italba that even after the Executive issued an order mandating that URSEC comply with the TCA Judgment, URSEC’s first offer to Italba was to assign Trigosl worthless frequencies instead of the frequencies that URSEC had actually taken away and to which Trigosl was entitled under the TCA Judgment.²⁷⁹

(d) *Uruguay acted inconsistently and arbitrarily.*

141. As discussed above, a host State violates the fair and equitable treatment standard if its conduct is inconsistent or arbitrary.²⁸⁰ In international law, the most widely recognized definition of arbitrary conduct comes from the International Court of Justice in the *ELSI* case. In that case, the Court held that “[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.”²⁸¹ In the investment treaty context, the *Lemire v. Ukraine* tribunal described arbitrariness as, among other things, “founded

277. *Saluka v. Czech Republic, Partial Award (CL-018)*, ¶ 303.

278. *See Total v. Argentina, Decision on Liability (CL-017)*, ¶ 333.

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

280. *See supra* Section IV.B.1; *see also Rumeli v. Kazakhstan, Award (CL-027)*, ¶ 609; *Lemire v. Ukraine, Decision on Jurisdiction and Liability (CL-038)*, ¶ 284.

281. *Elettronica Sicula SpA (ELSI) (United States v. Italy)*, Judgment (July 20, 1989) ICJ Reporter 15 (CL-048), ¶ 128.

on prejudice or preference rather than on reason or fact.”²⁸² It went on to quote with approval Professor Schreuer’s definition of “arbitrary,” which he had put forth as an expert in the *EDF v. Romania* dispute and which that tribunal had accepted:

- a) a measure that inflicts damage on the investor without serving any apparent legitimate purpose;
- b) a measure that is not based on legal standards but on discretion, prejudice or personal preference;
- c) a measure taken for reasons that are different from those put forward by the decision maker;
- d) a measure taken in willful disregard of due process and proper procedure.²⁸³

142. The *Crystallex* tribunal embraced a similar definition:

In the Tribunal’s eyes, a measure is for instance arbitrary if it is not based on legal standards but on excess of discretion, prejudice or personal preference, and taken for reasons that are different from those put forward by the decision maker.²⁸⁴

143. Uruguay’s decisions to refuse to issue a license conforming to the 2003 License Regulations to Trigosl, to revoke Trigosl’s right to operate in the Spectrum, to ignore the TCA Judgment reinstating Trigosl’s license, and to transfer Trigosl’s rights to the Spectrum to Dedicado while TCA proceedings were ongoing were taken for purely arbitrary and capricious reasons and had no legitimate basis.

144. *First*, under the 2003 License Regulations, URSEC was required to issue updated

282. *Lemire v. Ukraine, Decision on Jurisdiction and Liability (CL-038)*, ¶ 262.

283. *Id.* (citing *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award (Oct. 8, 2009) (CL-049), ¶ 303).

284. *Crystallex v. Venezuela, Award (CL-020)*, ¶ 578.

licenses in conformity with the new regulations.²⁸⁵ Yet, thirteen years after Uruguay enacted those regulations, URSEC still has not issued to Trigosul a license conforming to the 2003 License Regulations and has never provided any explanation for its failure to do so. Uruguay's conduct demonstrates that the decision to deny Trigosul its conforming license was not based on any "legal standard," but rather on "discretion, prejudice or personal preference" and a blatant disregard of applicable rules.²⁸⁶

145. *Second*, Uruguay's revocation of Trigosul's license was arbitrary and capricious, as evidenced by the false reasons Uruguay put forward to justify it. While, at the time of the revocation, Italba had no basis to believe that revocation was arbitrary, as opposed to simply based on a misapprehension of the relevant facts,²⁸⁷ it has since become clear that Uruguay in fact understood the facts perfectly, but ignored them — and the documentary evidence that Trigosul put forward to support them²⁸⁸ — in order to take away Trigosul's rights. Indeed, the TCA ruled that the URSEC and MIEM resolutions revoking Trigosul's license lacked any legal basis and were "irremediably" null and void.²⁸⁹ Once the TCA corrected any purported mistake of fact on Uruguay's part, it was incumbent upon Uruguay to reinstate Trigosul's rights — but it did not. Instead, Uruguay ignored the TCA Judgment, further proving that the reasons it gave for the revocation of Trigosul's license were merely pretextual.

146. *Third*, Uruguay's refusal to comply with the TCA Judgment is wholly arbitrary.

285. *Reglamento De Administracion Y Control Del Espectro Radioelectrico* (Mar. 25, 2003); Decree No. 114/003 (Mar. 25, 2003); Decree No. 115/003 (Mar. 25, 2003) (C-017).

286. *EDF v. Romania*, Award (CL-049), ¶ 303; *see also Lemire v. Ukraine, Decision on Jurisdiction and Liability* (CL-038), ¶ 385; *Total v. Argentina, Decision on Liability* (CL-017), ¶ 333.

287. Alberelli Witness Stmt. ¶¶ 74, 76-78; Herbon Witness Stmt. ¶¶ 36-41, 47, 49-50.

288. *See, e.g.*, Jan. 12, 2011 Letter (C-026).

289. TCA Judgment (Oct. 23, 2014) (C-076) at 19.

The TCA is Uruguay’s highest administrative court, and its judgment is final and non-appealable.²⁹⁰ Uruguay has not — and cannot — provide any legitimate reason for its deliberate decision to ignore a binding decision of its own courts. While Uruguay has now made a belated and insufficient effort to comply with that judgment, it did not make that effort until nearly a year and a half after the entry of the judgment and only after ICSID registered this arbitration.²⁹¹ Furthermore, Uruguay provided no explanation for its delay. This recent attempt to comply with the TCA Judgment is a thinly-veiled attempt to stave off this arbitration, and, most importantly, it is an acknowledgement by Uruguay that it had an obligation all along to comply with the TCA Judgment and simply chose not to do so.

(e) Uruguay unfairly discriminated against Italba in favor of other investors.

147. Most tribunals agree that discriminatory conduct is *per se* a breach of the fair and equitable treatment standard;²⁹² and any measure that might involve “discrimination is in itself contrary to fair and equitable treatment.”²⁹³

148. Several ICSID tribunals have discussed the standard applied to claims of discrimination. Generally, “[d]iscrimination necessarily implies that the state benefited or

290 Constitution of the Oriental Republic of Uruguay of 1967 (C-108), Art. 309.

291. See *supra* Section II.D.3.

292. See *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award (Dec. 7, 2011) (CL-050), ¶ 324. Discriminatory treatment is also independently actionable under Treaty Articles 3 (“National Treatment”) and 4 (“Most-Favored-Nation Treatment”). Italba advances its claim of discrimination as part of its claim of unfair and inequitable treatment under Article 5 of the Treaty, as a discrete breach of the National Treatment provision under Article 3 of the Treaty, and as a discrete breach of the MFN provision under Article 4 of the Treaty.

293. *CMS Gas Transmission Co v. Argentine Republic*, ICSID Case No ARB/01/8, Award (May 12, 2005) (CL-051), ¶ 290.

harmed someone more in comparison with the generality.”²⁹⁴ The tribunal in *Rumeli v. Kazakhstan* stated that “[a] measure is discriminatory when it provides the foreign investment with a treatment less favorable than the domestic investment or than other foreign investment.”²⁹⁵ More specifically, as the tribunal in *Lemire v. Ukraine* held:

Discrimination, in the words of pertinent precedents, requires more than different treatment. To amount to discrimination, a case must be treated differently from similar cases without justification.²⁹⁶

149. A successful claim of discrimination requires Italba to show that: (a) Italba’s investment was treated less favorably than the comparable investment; (b) its investment is in like circumstances with another comparable investment; and (c) there was no justification for the less favorable treatment.²⁹⁷ As discussed in further detail in Section IV.C of this Liability section, each of these elements is satisfied in this case. In particular, Uruguay, without reasonable justification, discriminated against Trigosul in favor of various competing telecommunications companies when it issued licenses conforming to the 2003 License Regulations to those companies but never issued one to Trigosul, and in favor of Dedicado when it assigned to Dedicado Trigosul’s right to operate in the Spectrum, even as this right was *sub judice* before the TCA.²⁹⁸

150. In sum, Uruguay’s conduct in this case falls far short of any concept of fair and

294. *AES Summit Generation Ltd. v. Republic of Hungary*, ICSID Case No. ARB/07122, Award (Sept. 23, 2010) (CL-052), ¶ 10.3.53.

295. *Rumeli v. Kazakhstan*, Award (CL-027), ¶ 672.

296. *Lemire v. Ukraine*, Decision on Jurisdiction and Liability (CL-038), ¶ 261 (emphasis added); see also *Total v. Argentina*, Decision on Liability (CL-017), ¶ 210 (“In order to determine whether treatment is discriminatory, it is necessary to compare the treatment challenged with the treatment of persons or things in **a comparable situation**” (emphasis added)).

297. See *Total v. Argentina*, Decision on Liability (CL-017) at ¶ 212.

298. See *infra* Section IV.C.

equitable conduct. Uruguay has denied Italba justice and acted in bad faith, inconsistently, arbitrarily, non-transparently, in violation of due process, and discriminatorily towards Italba and its investments.

C. Uruguay Failed To Accord Italba Treatment No Less Favorable Than The Treatment Accorded In Like Circumstances To Other Investors.

151. The Treaty requires Uruguay to treat U.S. investors and their investments in Uruguay in a manner no less favorable than it treats Uruguay investors and their investments or other foreign investors and their investments. Specifically, Article 3 (“National Treatment”) provides, in relevant part:

(1) Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

(2) Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

152. Similarly, Article 4 (“Most-Favored Nation Treatment”) provides:

(1) Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

(2) Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

153. Uruguay has taken on the obligation to extend national treatment and most-

favoured nation (*MFN*) treatment to nationals and legal entities of the United States who have invested in Uruguay.

154. The Treaty’s requirement of national and MFN treatment aims to provide a level-playing field for foreign investors and extends such protection to pre- and post-establishment operations of the foreign investor.²⁹⁹ To establish a breach of the national and MFN treatment standard,³⁰⁰ *Italba* need only present a *prima facie* case that it “has been treated in a different and less favorable manner” than other investors in like circumstances, and that there is no rational basis justifying the disparity in treatment.³⁰¹ Once *Italba* presents *prima facie* evidence raising a presumption in favor of its claim (as it does below), the burden to disprove the claim shifts to Uruguay.³⁰²

299. Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration* (Oxford International Arbitration Series 2007) (CL-053), §§ 7.31-33, 7.152.

300. *Cargill, Inc., v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (Sept. 18, 2009) (CL-054), ¶ 228 (“As Claimant points out, the requirement for MFN treatment tracks that of the national treatment requirement.”).

301. *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award (Nov. 21, 2007) (CL-055), ¶ 196 (“Pursuant to the ordinary meaning of Article 1102, the Arbitral Tribunal shall: (i) identify the relevant subjects for comparison; (ii) consider the treatment each comparator receives; and (iii) consider any factors that may justify any differential treatment.”); *Total v. Argentina, Decision on Liability* (CL-017), ¶ 212 (“a claimant complaining of a breach by the host State of the BIT’s national treatment clause: (i) has to identify the local subject for comparison; (ii) has to prove that the claimant-investor is in like circumstances with the identified preferred national comparator(s); and (iii) must demonstrate that it received less favourable treatment in respect of its investment, as compared to the treatment granted to the specific local investor or the specific class of national comparators”); *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (Dec. 16, 2002) (CL-056), ¶ 170. Similarly, the *S.D. Myers, Inc. v. Canada* tribunal found that a determination of “likeness” initiates “an inquiry into whether the different treatment of situations found to be ‘like’ is justified by legitimate public policy measures that are pursued in a reasonable manner.” *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL/NAFTA, Partial Award, (Nov. 13, 2000) (CL-057), ¶ 246.

302. *Feldman v. Mexico*, Award (CL-056), ¶¶ 176-78, 187 (“Here, the Claimant in our view has established a presumption and a *prima facie* case that the Claimant has been treated in a different and less favorable manner than several Mexican owned cigarette resellers, and the Respondent has failed to introduce any credible evidence into the record to rebut that presumption.”).

1) Uruguay Treated Italba's Investment Less Favorably Than It Treated Other Investors' Investments.

155. Uruguay violated the Treaty's national treatment and MFN treatment standards by giving preferential treatment to a group of domestic and foreign investors (other than Italba) with respect to their telecommunications licenses. Specifically, while URSEC never granted a license to Trigosul that conformed with the 2003 License Regulations — despite URSEC's obligation to do so,³⁰³ and despite Trigosul making numerous formal and informal requests for such a license over a period of years³⁰⁴ — URSEC issued licenses conforming to the 2003 License Regulations to numerous Trigosul competitors:

- a) On December 27, 2007, URSEC issued a resolution that, among other things, conformed the license of Telefonica Moviles del Uruguay S.A. to the provisions of the 2003 License Regulations.³⁰⁵
- b) On March 25, 2010, URSEC issued a resolution that, among other things, conformed Dedicado's license to the provisions of the 2003 License Regulations.³⁰⁶
- c) On October 29, 2010, URSEC issued a resolution that, among other things, conformed Telstar's license to the provisions of the 2003 License Regulations.³⁰⁷
- d) On March 16, 2011, URSEC issued a resolution conforming Rinytel S.A. license to the provisions of the 2003 License Regulations.³⁰⁸

156. In sharp contrast with Uruguay's treatment of these foreign and domestic investors, Uruguay forced Trigosul to undergo a lengthy, costly, and ultimately futile process to

303. *See Reglamento De Administracion Y Control Del Espectro Radioelectrico* (Mar. 25, 2003); Decree No. 114/003 (Mar. 25, 2003); Decree No. 115/003 (Mar. 25, 2003) (**C-017**) at 18, 32 (Art. 38).

304. *See supra* Section II.B.2-4.

305. URSEC Resolution No. 611/007 (Dec. 27, 2007) (**C-041**) at 1-3.

306. URSEC Resolution No. 157/010 (Mar. 25, 2010) (**C-053**) at 1, 3.

307. URSEC Resolution No. 544/010 (Oct. 29, 2010) (**C-054**) at 2.

308. URSEC Resolution No. 053/011 (Mar. 16, 2011) (**C-055**) at 1-3.

obtain the same type of resolution conforming Trigosul's license to the provisions of the 2003 License Regulations. From March 2003 until the revocation of its license in 2011, Trigosul repeatedly requested, via written correspondence and in-person meetings, that URSEC issue it a license conforming to the 2003 License Regulations, and Trigosul consistently received the same answer: that its conforming license was being processed and would be issued in due course. Yet URSEC never issued to Trigosul a license conforming to the 2003 License Regulations.

157. Instead of issuing to Trigosul a license conforming to the 2003 License Regulations, as it had done with Trigosul's competitors, an URSEC official requested that Trigosul pay a bribe in July 2006 in order to "expedite" the issuance of its conforming license, and URSEC and MIEM unlawfully revoked Trigosul's license in 2011.³⁰⁹ Uruguay's dilatory and discriminatory conduct with respect to Trigosul stands in marked contrast to its reaction to similar requests from other telecommunications companies whose existing licenses conformed to the 2003 License Regulations. Simply put, other telecommunications companies operating in Uruguay received their license conforming to the 2003 License Regulations, whereas Trigosul did not.

158. At the same time, Uruguay cannot now *ex post facto* argue that there was a legitimate basis for it to distinguish between Trigosul and other investors in like circumstances with respect to the issuance of licenses conforming to the 2003 License Regulations because it never articulated such a reason at the time. To the contrary, the only message that Italba received from URSEC at the time was either silence or an oral confirmation that the license

309. See Alberelli Witness Stmt. at ¶ 39; Herbon Witness Stmt. ¶ 22; URSEC Resolution No. 001/011 (Jan. 20, 2011) (C-069) at 3; MIEM Resolution No. 335/011 (July 8, 2011) (C-073) at 2-3.

would issue “soon.”³¹⁰

159. Uruguay subjected Trigosal to additional discriminatory treatment when, in September 2013, URSEC reallocated Trigosal’s frequencies to Dedicado, a domestic company in direct competition with Trigosal, while administrative proceedings before the TCA concerning those same frequencies were *sub judice*. The reallocation of Trigosal’s frequencies to Dedicado marks a deliberate attempt by Uruguay to discriminate against Trigosal in favor a domestic company.

2) Trigosal Was In Like Circumstances With Other Investors.

160. The *S.D. Myers, Inc. v. Canada* tribunal acknowledged that the phrase “like circumstances” is open to a “wide variety of interpretations,”³¹¹ but the primary factor is whether the compared investors are in the same economic or business sector.³¹²

161. In *S.D. Myers*, a U.S. company, S.D. Myers, Inc., and its Canadian affiliate, Myers Canada, were found to be in “like circumstances” with other Canadian operators because they were all in the same “business sector” and were all “engaged in providing [Polychlorinated Biphenyl] waste remediation services.”³¹³ Similarly, in *Feldman v. Mexico*, the tribunal held that the foreign investor, a Mexican company owned by a U.S. national, was in “like

310. See, e.g., *Feldman v. Mexico*, Award (CL-056) at ¶ 182 (fact that domestic reseller was *ex post facto* audited only after the foreign investor initiated arbitration against Mexico raises “very strong suspicion” of discrimination against foreign investor); see also *Vestey v. Venezuela*, Award (CL-031), ¶¶ 294-96 (government’s failure to advance a declared purpose at the time of expropriation may serve as evidence that the measure was not legitimate); *ADC v. Hungary*, Award (CL-014), ¶ 262 (rejecting Hungary’s *ex post facto* justifications for the contractual termination).

311. *S.D. Myers, v. Canada*, Partial Award (CL-057) at ¶ 243.

312. See *id.* at ¶ 250; see also *id.* at ¶ 248 (citing the June 21, 1976 Declaration on International and Multinational Enterprises of the Organization for Economic Cooperation and Development (OECD), which states that investors and investments should receive treatment that is “no less favorable than that accorded in like situations to domestic enterprises,” and noting that the OECD defined the “like situation” test as the comparison between foreign-controlled enterprises with firms operating in the “same sector”).

313. *S.D. Myers, v. Canada*, Partial Award (CL-057), ¶ 251.

circumstances” with the domestic company, as both entities were in the business of purchasing and exporting cigarettes.³¹⁴ In *Cargill v. Mexico*, the tribunal found “like circumstances” between Cargill and Cargill de Mexico, which sold high-fructose corn syrup, and Mexican suppliers of cane sugar, because though the products sold were not the same, the foreign investors were nonetheless in “like circumstances” with the Mexican sugar suppliers, with respect to Mexico’s tax provisions and import permit requirements.³¹⁵

162. In the present case, Trigosul was in “like circumstances” with Dedicado, Rinytel, Telefonica, and Telstar because all of these entities operated in the same economic sector — the Uruguayan telecommunications industry. Specifically, the domestic company Dedicado provided wireless Internet service, telephony, and data transmission services;³¹⁶ Rinytel was organized to provide, among other things, telecommunications, and television services;³¹⁷ Telefonica was organized to provide telecommunications services, audio, data, Internet, and telephony, including cellular, long distance, and satellite transmissions and receptions;³¹⁸ and Telstar, the Uruguayan subsidiary of Mexican telecommunications company Telmex, was organized to provide telecommunications services and technologies.³¹⁹ Similarly, Trigosul’s

314. *Feldman v. Mexico*, Award (CL-056), ¶ 172.

315. *Cargill v. Mexico*, Award (CL-054), ¶¶ 219-23; *Archer v. Mexico*, Award (CL-055), ¶¶ 197-98 (finding foreign-owned and domestic-owned companies were in like circumstances as they were competing in supplying sweeteners to the soft drinks and processed food markets); *see also Feldman v. Mexico*, Award (CL-056), ¶ 171 (“the ‘universe’ of firms in like circumstances are those foreign-owned and domestic-owned firms that are in the same business”).

316. Dedicado Homepage (C-110).

317. Rinytel SA Bylaws, IMPO Resolution No. 16167/999 (Apr. 8, 1999) (C-111) at 1.

318. Telefónica Moviles Del Uruguay SA Bylaws, IMPO Resolution No. 22739/006 (July 6, 2006) (C-112), at 1; *see also* Company Overview of Telefónica Móviles del Uruguay, S.A., Bloomberg (Aug. 24, 2016) (C-113).

319. IMPO Resolution No. 455/001 (Apr. 17, 2001) (C-114) at 1; *see also* Telmex Uruguay Inc. SA Bylaws, IMPO Resolution No. 27266/006 (Aug. 29, 2006) (C-115), at 1.

business was the provision of wireless data transmission services.³²⁰

163. Trigosl and Dedicado were not only operating in the same telecommunications industry, they were also in direct competition as providers of wireless data transmission services in similar frequencies. Trigosl was licensed to install and operate a network in the Spectrum for the provision of wireless digital dedicated lines for point-to-point and point-to-multipoint data transmission.³²¹ Similarly, Dedicado is licensed to install and operate, at specific frequencies in the 3400-3700 MHz bandwidth, a wireless broadband network through multipoint distribution technology and services for the non-exclusive provision of data transmission services.³²² In September 2013, URSEC re-allocated Trigosl's right to operate in the Spectrum to Dedicado, further demonstrating the similarity between the functions and services of both companies.³²³

164. In addition to working in the same business sector, offering the same services, and operating in the same frequencies, both Trigosl and Dedicado, as well as the other companies mentioned above, were subject to URSEC's regulatory authority and to the provisions of the 2003 License Regulations. Accordingly, Trigosl is in "like circumstances" with Dedicado, Rinytel, Telefonica, and Telstar.

3) Uruguay's Differential Treatment Of Italba's Investment Lacked Any Rational Basis.

165. Disparities in the treatment of a particular investor versus other investors in like circumstances will "presumptively violate" national treatment and MFN provisions of a Treaty

320. UNCA Resolution No. 444/000 (Dec. 12, 2000) (C-012) at 2; Articles of Incorporation of Mareland Sociedad Anonima (Dec. 19, 1994) (C-116).

321. UNCA Resolution No. 444/000 (Dec. 12, 2000) (C-012) at 2.

322. URSEC Resolution No. 220/013 (Sept. 5, 2013) (C-084) at 1-2.

323. *Id.* at 2.

“unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or *de facto*, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of [that Treaty].”³²⁴

166. In the present case, Uruguay’s failure to issue to Trigosul a license conforming to the 2003 License Regulations while it issued conforming licenses to Trigosul’s competitors, and its reallocation of Trigosul’s frequencies to Dedicado while administrative proceedings about those frequencies were *sub judice* before the TCA, are unjustified measures that do not reasonably relate to any rational, legitimate, and widely practiced governmental policy. Accordingly, Uruguay’s more favorable treatment of other telecommunications companies operating in Uruguay — including Dedicado, Rinytel, Telefonica, and Telstar — breach Uruguay’s national treatment and MFN treatment obligations under the Treaty.

D. Uruguay Failed To Provide Italba’s Investment With Full Protection and Security.

1) The Standard of Full Protection And Security

167. Article 5 of the Treaty states as follows:

(1) Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

(2) . . . The obligation in paragraph 1 to provide:

...

324. *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits of Phase 2 (Apr. 10, 2001) (CL-058), ¶ 78; *see also Bilcon of Delaware Inc. et al. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability (Mar. 17, 2015) (CL-059), ¶¶ 722-25 (following the *Pope & Talbot* test that differential treatment will presumptively violate NAFTA’s national treatment clause unless justified by reasonable and non-discriminatory domestic policies, shifting the burden to the host state to show that the measure was justified, and holding Canada liable for discriminatory treatment); *Feldman v. Mexico*, Award (CL-056), ¶ 184 (applying the *Pope & Talbot* test and holding Mexico liable for discriminatory treatment); *Archer v. Mexico*, Award (CL-055), ¶¶ 196, 213 (holding Mexico liable for denying national treatment).

(b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.³²⁵

168. Article 4 of the Treaty also contains an MFN clause that requires Uruguay to extend to U.S. investors, such as Italba, the same benefits that it grants to investors from third States. Article 4(2) provides: “Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”³²⁶

169. MFN clauses like that contained in Article 4 of the Treaty not only ensure that a host State’s actions and policies do not favor some investors over others, but also imports substantive guarantees made in bilateral treaties between the host State and other States. The MFN standard guarantees the beneficiary that it will receive all benefits within its scope that the host State grants any third-State investor and its investments. As such, the MFN standard “forms one of the basic standards of international law” and can be “traced back to the dawn of international law.”³²⁷

170. MFN clauses are interpreted broadly, and “this approach has led arbitrators routinely to accept the ‘importation’ of substantive rights into an applicable investment treaty from treaties that the host State has ratified with other countries.”³²⁸ As Dolzer and Schreuer confirm, “[t]he weight of authority clearly supports the view that an MFN rule grants a claimant

325. Treaty (C-001), Art. 5.

326. *Id.* at Art. 4(2).

327. Georg Schwarzenberger, *The Most-Favoured-Nation Standard in British State Practice*, 22 Brit. Y.B. Int’l L. 96 (1945) (CL-060) at 97.

328. Noah D. Rubins and N. Stephen Kinsella, *International Investment, Political Risk and Dispute Resolution: A Practitioner’s Guide* (Oceana Publications, Inc. 2005) (CL-061) at 232.

the right to benefit from substantive guarantees contained in third treaties.”³²⁹ Tribunals have thus permitted claimants to use MFN clauses to import obligations of “full protection and security,”³³⁰ among others.

171. Uruguay has entered into the Venezuela-Uruguay *Acuerdo Para La Promoción y Protección Recíproca de Inversiones*, which offers protections to a third-State investor (Venezuela) that are more favorable than those offered under the Treaty. Specifically, Article 4 of the Venezuela-Uruguay BIT mandates that:

Cada Parte Contratante, de conformidad con las normas y criterios del Derecho Internacional, acordará a las inversiones de inversores de la otra Parte Contratante en su territorio, un trato justo y equitativo, les garantizara seguridad y **protección jurídica plenas** y se abstendrá de obstaculizar con medidas arbitrarias o discriminatorias su administración, gestión, mantenimiento, uso, disfrute, ampliación, venta o liquidación.³³¹

The “full legal protection and security” provision of the Venezuela-Uruguay BIT does not limit that phrase to refer only to police protection. Because Uruguay has expressly guaranteed

329. Rudolph Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford 1st ed., 2008) (CL-062) at 190-91.

330. *See Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL, Final Award (Dec. 15, 2014) (CL-063), ¶ 630 (importing full protection and security provision from UK-Indonesia BIT); *Rumeli v. Kazakhstan*, Award (CL-027), ¶ 575 (importing full protection and security provision from UK-Kazakhstan BIT); *see also Crystallex v. Venezuela*, Award (CL-020) at ¶ 632 n.862 (considering, but declining to, import more favorable full protection and security provision from Belarus-Venezuela BIT because language of applicable BIT offered the same protection); *Impregilo SpA v. Argentine Republic*, ICSID Case No. ARB/07/17, Award (June 21, 2011) (CL-064), ¶ 334 (considering, but declining to, import more favorable full protection and security provision from Argentina-US BIT into the Italy-Argentina BIT because, having found a breach of the FET standard, it was unnecessary to examine whether there had also been a failure to ensure full protection and security).

331. Venezuela-Uruguay *Acuerdo Para La Promoción y Protección Recíproca de Inversiones*, (CL-065) Art. 4 (May 20, 1997) (emphasis added) (“Each Contracting Party shall, in accordance with the norms and standards of International Law, accord investments by investors of the other Contracting Party in its territory fair and equitable treatment, and shall guarantee them full security and legal protection and shall refrain from obstructing, through arbitrary or discriminatory measures, their administration, management, maintenance, use, enjoyment, development, sale or liquidation.”).

Venezuelan investors “full legal protection and security,” U.S. investors in Uruguay are entitled to the same treatment pursuant to the MFN clause in Article 4 of the Treaty.

172. At the same time, even the Treaty’s full protection and security provision imposes an “obligation of vigilance” on the State, requiring it to “take all measures necessary to ensure the full enjoyment of protection and security of its investments.”³³² While early interpretations of “full protection and security” focused primarily on physical security, “the standard . . . has evolved to include, more generally, the rights of investors.”³³³

173. As the tribunal in *Frontier Petroleum v. Czech Republic* further explained: “[I]t is apparent that the duty of protection and security extends to providing a legal framework that offers legal protection to investors — including both substantive provisions to protect investments and appropriate procedures that enable investors to vindicate their rights.”³³⁴ Similarly, in *CME Czech Republic v. Czech Republic*, private actors colluded with government agencies to oust a foreign investor from a broadcasting joint venture. In that case, the tribunal held that the government’s “actions and inactions . . . were targeted to remove the security and legal protection of the Claimant’s investment” and were thus in breach of its obligation to provide full protection and security.³³⁵

174. Accordingly, the full protection and security standard obliges States to exercise due diligence and vigilance to ensure both the physical and legal protection and security of

332. *American Manufacturing & Trading Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award (Feb. 21, 1997) (CL-066), ¶ 6.05.

333. *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award (Feb. 26, 2014) (CL-067), at ¶ 406; see also *VivendiII*, Award, (CL-028) at ¶ 7.4.15 (Aug. 20, 2007) (finding that full protection and security extended beyond physical security).

334. *Frontier Petroleum Servs. Ltd. v. Czech Republic*, UNCITRAL, Final Award (Nov.12, 2010) (CL-068), ¶ 263.

335. *CME Czech Republic v. Czech Republic*, Partial Award (CL-011), ¶ 613.

investments by foreign investors, including taking all reasonable steps to prevent harmful actions of third parties and preventing a State's own authorities from acting to the detriment of a foreign investor's assets.

2) Uruguay Undermined the Security of Italba's Investment.

175. Uruguay did not act with the required due diligence and vigilance to protect the legal security of Italba's investment, whether viewed in terms of the full protection and security provision in the Treaty or the full protection and legal security provision incorporated through the treaty between Venezuela and Uruguay. To the contrary, Uruguay failed to take active measures to protect Italba's investment from unfair and discriminatory conduct by its agency URSEC and failed to implement appropriate procedures that would have enabled Italba to vindicate its rights. Specifically, Uruguay permitted its agency URSEC to destroy Italba's investment by: (a) refusing to issue to Trigosl a license conforming to the 2003 License Regulations even though it was required to do so under the same 2003 License Regulations, (b) revoking Trigosl's license without any legal basis, (c) reassigning Trigosl's rights to a competitor while administrative proceedings concerning those rights were pending before the TCA, and (d) ignoring the judgment of the TCA reinstating those rights.³³⁶ Accordingly, Uruguay has denied full protection and security to Italba's investment.

V. QUANTUM AND REMEDIES

176. As a result of Uruguay's breaches of the Treaty, Italba suffered significant damages, including years of lost profits and, ultimately, the permanent deprivation of the entire value of Italba's investment. Under the Treaty, Italba is entitled to full compensation for the damages it suffered as a result of Uruguay's Treaty breaches leading up to the final expropriation

336. See *supra* Sections II.B.2-4, II.B.6, II.C.2 and II.D.2.

of its investments as well as the value of the investments taken as of March 2015.³³⁷ As of September 16, 2016, the independent expert retained by Italba, Santiago Dellepiane of Compass Lexecon, has calculated those damages to be approximately USD \$62.5 million (including pre-award interest based on Italba's cost of capital).

A. Italba Is Entitled To “Full Reparation” Wiping Out The Consequences Of Uruguay’s Breaches Of The Treaty.

177. The Treaty does not specify the standard of compensation owed for any form of Treaty breach other than a lawful expropriation.³³⁸ In the absence of a *lex specialis*, tribunals have used the customary international law standard for compensation best enunciated in the *Chorzów Factory* case, *i.e.*, the “full reparation” standard for compensation.³³⁹ In particular, in *Chorzów Factory*, the Permanent Court of International Justice stated that:

The essential principle contained in the actual notion of an illegal act . . . is that **reparation must, as far as possible, wipe out all**

337. A “substantial and irreversible deprivation of [the claimant’s] assets” (*Yukos Universal Ltd. v. Russian Federation*, PCA Case No. AA 227, Final Award (July 18, 2014) (CL-069), ¶ 1762) occurs when a State’s actions result in “actual[,] and permanent damages . . . [that] ma[ke] it impossible for [c]laimant[.] to continue with [its] investments.” *See also Yukos v. Russia*, Final Award (CL-069), ¶ 1762 (finding a “substantial and irreversible diminution” of the investment at the point when claimants “lost the power to govern the financial and operating policies of Yukos so as to obtain the benefits from its activities” and became “incapable of operating as a business”) (internal quotations omitted).

338. Treaty, (C-001) Art. 6(1)-(2). *See, e.g., ConocoPhillips v. Venezuela, Decision on Jurisdiction and the Merits* (CL-023) at ¶ 342 (“The Tribunal, coming back to the terms of the BIT, does not consider that the extent of the compensation payable in respect of an unlawful taking of an investment . . . is to be determined under Article 6(c); that provision establishes a condition to be met if the expropriation is in all other respects in accordance with Article 6. So, in the *Chorzów Factory* case, the Court did not determine reparation in accordance with the provisions of the Convention before it, because it was concerned with a dispossession in breach of those provisions.”).

339. *Rusoro v. Venezuela, Award* (CL-021) at ¶ 640 (“The compensation provided for in Article VII only covers cases of expropriation. In all other breaches, absent any specific Treaty language, damages must be calculated in accordance with the rules of international law. The relevant principle was originally formulated in the seminal judgement of the Permanent Court of International Justice in the *Chorzów* case: reparation must wipe-out the consequences of the breach and re-establish the situation as it is likely to have been absent the breach. This well-established principle complements those found in the ILC Articles, and particularly in Article 31, to make full reparation for injury caused as a consequence of a violation of international law.”); *Crystallex v. Venezuela, Award* (CL-020) at ¶¶ 841-53.

the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it³⁴⁰

178. The “full reparation” principle has more recently been codified in the International Law Commission Articles (*ILC Articles*), which reflect customary international law on State responsibility.³⁴¹ ILC Article 31 embodies *Chorzów*’s holding that the “responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.”³⁴² ILC Article 34 (“Forms of reparation”) gives further guidance to the form that “full reparation” may take by providing that “[f]ull reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination.”³⁴³

340. *Case Concerning The Factory at Chorzów (Claim for Indemnity)*, Permanent Court of International Justice, PCIJ Series A, No 17, Judgment on the Merits (Sept. 13, 1928) (**CL-070**) at 29 (emphasis added); *Vivendi II, Award (CL-028)* at ¶ 8.2.7 (“Based on these principles, and absent limiting terms in the relevant treaty, it is generally accepted today that, regardless of the type of investment, and regardless of the nature of the illegitimate measure, the level of damages awarded in international investment arbitration is supposed to be sufficient to compensate the affected party fully and to eliminate the consequences of the state’s action.”); *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (Sept. 22, 2014) (**CL-071**), ¶¶ 678-81.

341. *See, e.g., ConocoPhillips v. Venezuela, Decision on Jurisdiction and the Merits (CL-023)*, ¶ 339 (listing and concurring with a number of tribunals and authorities declaring the ILC Articles to codify or declare customary international law).

342. *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, Report of the International Law Commission on the work of its fifty-third session, 2001, (*ILC Articles*), (**CL-072**), Part 2, Ch. 1, Art. 31.

343. *Id.* at Art. 34.

179. Compensation is defined by ILC Article 36, which provides:

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.³⁴⁴

180. Thus, where a host State unlawfully deprives an investor of its entire investment, tribunals will consistently grant an award of compensation equal to the “fair market value” of the investment and any damages incurred in connection with unlawful conduct leading up to the unlawful taking.³⁴⁵

344. *Id.* at Art. 36. Restitution in kind would not be an appropriate remedy in this case. As stated in Dr. Alberelli’s Witness Statement, after suffering years of deliberate targeting for discriminatory and illegal conduct by URSEC and its officials, Italba cannot accept a simple return of Trigosul’s frequencies and has no interest in returning to do business in Uruguay and subject itself to the unbridled whims of URSEC. *See, e.g., Occidental Petroleum Corp. and Occidental Exploration and Production Co. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Provisional Measures (Aug. 17, 2007) (CL-073), ¶ 79 (“It is well established that where a State has, in the exercise of its sovereign powers, put an end to a contract or a license, or any other foreign investor’s entitlement, specific performance must be deemed legally impossible.”).

345. *See, e.g., Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award (Nov. 18, 2014) (CL-074), ¶¶ 747-48 (“Y en una expropiación la reparación íntegra equivale al valor de mercado del bien expropiado, valor que el titular podría haber obtenido, si lo hubiera enajenado justo antes de la fecha en que el Estado realizó la desposesión.... Por valor de mercado debe entenderse el precio en dinero que estaría dispuesto a pagar un hipotético comprador a un hipotético vendedor, [i] estando ambos interesados en realizar la transacción, pero sin obligación de hacerlo, [ii] actuando de buena fe y de acuerdo con las prácticas del Mercado, [iii] en un mercado abierto y sin restricciones, y [iv] disponiendo ambos de un conocimiento razonable del objeto del contrato y de las condiciones de mercado.”) (“In an expropriation, full restitution equals the market value of the expropriated asset, which is the value the owner could have obtained if it had been sold right before the date the State took possession. . . . Market value must be understood as the price in money that a hypothetical buyer would be willing to pay to a hypothetical seller, [i] both being interested in carrying out the transaction, but without obligation to do so, [ii] acting in good faith and according to market practice, [iii] in an open, unrestricted market, and [iv] both having a reasonable knowledge of the purpose of the contract and market conditions.”); ILC Articles Commentary to Art. 36, (CL-072) ¶¶ 21-22 (“The reference point for valuation purposes is the loss suffered by the claimant whose property rights have been infringed. This loss is usually assessed by reference to specific heads of damage relating to (i) compensation for capital value; (ii) compensation for loss of profits; and (iii) incidental expenses. . . . Compensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act is generally assessed on the basis of the “fair market value” of the property lost. . . .”).

B. The Most Appropriate Valuation Date Is March 1, 2015.

181. The appropriate valuation date to be applied in this case is a question of fact for the Tribunal to determine with reference to the particular circumstances here.³⁴⁶ As discussed above, in early March 2015, almost five months had passed since the TCA Judgment had reinstated Trigosl's license with retroactive effect — yet URSEC had done nothing to enable Trigosl to take advantage of that ruling. At the same time, Italba learned for the first time that Uruguay had re-allocated Trigosl's rights to the Spectrum and had no intention of complying with the TCA Judgment.³⁴⁷ Thus, for purposes of choosing a date for valuation, March 1, 2015 is appropriate.³⁴⁸

182. Any date prior to March 1, 2015 cannot, and should not, be recognized as the appropriate valuation date. While URSEC's failure from 2007 to 2011 to issue a license conforming to the 2003 License Regulations disrupted Trigosl's joint venture opportunities and its ability to expand its business, that negative impact was neither complete nor irreversible. Over the years, URSEC representatives repeatedly reassured Trigosl that its license was being processed and would issue in due course.³⁴⁹ In the meantime, Trigosl had the ability to do a limited amount of business and understood that, once it received its license conforming to the 2003 License Regulations, it would be able to enter into strategic partnerships to grow that

346. See, e.g., *Rumeli v. Kazakhstan*, Award (CL-027), ¶ 788.

347. URSEC Resolution No. 220/013 (Sept. 5, 2013) (C-084) at 2-4.

348. Though most bilateral investment treaties contain language indicating that an expropriated asset must be valued as of the day immediately preceding the expropriation date, where the value of an investment *increases* following an unlawful expropriation (or any other form of Treaty breach), tribunals have found that full reparation can only be achieved if the investment is valued at a date other than the date immediately preceding the expropriation date. *ConocoPhillips v. Venezuela*, *Decision on Jurisdiction and the Merits* (CL-023), ¶¶ 342-43; *ADC v. Hungary*, Award (CL-014), ¶¶ 499, 518. Italba reserves the right to update Mr. Dellepiane's calculation at or before the hearing on the merits.

349. Alberelli Witness Stmt. ¶¶ 31, 33, 38, 61; Herbon Witness Stmt. ¶¶ 15, 30.

business.³⁵⁰ Similarly, Uruguay's revocation of Trigosul's license in 2011 was neither final nor irreversible, as evidenced by the fact that the TCA reversed it. Even the transfer of the Spectrum to Dedicado in 2013 was not irreversible because Uruguay had the power to take the Spectrum back from Dedicado if it so chose — as Uruguay itself acknowledged when it offered to do just that in May 2016.³⁵¹ The deprivation became permanent in early March 2015 because it was at that time that Italba realized that, even though it had won its case in the TCA, Uruguay would not comply with the TCA Judgment or reinstate Trigosul's rights and, more fundamentally, would never allow Italba's investments in Uruguay to succeed. Accordingly, March 1, 2015 is the most appropriate date for the purposes of calculating compensation due to Italba for Uruguay's unlawful measures.

C. Quantum of Damages

183. Applying the principles of full reparation described above, Italba seeks the following damages (as of September 16, 2016):

- a. The fair market value of Trigosul's license as of March 1, 2015, as quantified by Italba's damages expert, Santiago Dellepiane, in the amount of no less than USD \$41.9 million, as well as pre-award interest on that amount through September 16, 2016;³⁵²
- b. Historical losses incurred prior to the valuation date associated with the loss of business opportunities as a result of URSEC's failure to issue a license conforming to the 2003 License Regulations, in the amount of no less than USD \$13 million, as of March 1, 2015, as well as pre-award interest on that amount through September 16, 2016;³⁵³ and
- c. Costs of this arbitration, including Italba's legal and expert fees, translation and

350. Alberelli Witness Stmt. ¶ 44.

351. Draft URSEC Resolution (May 9, 2016) (**C-098**).

352. Expert Report of Santiago Dellepiane Avellaneda (Sept. 16, 2016) (*Expert Report*) at ¶¶ 59, 108 (Tables I, III and XI).

353. *Id.* at ¶¶ 104, 108 (tables IX and XI).

other related fees and expenses of this arbitration.

184. The quantification of the losses caused to Italba as a result of Uruguay's unlawful conduct is set out in detail in Mr. Dellepiane's expert report.

1) Compensation For The Fair Market Value of Trigosl's License

185. As noted above, Italba realized in early March 2015 that the deprivation of its investment was permanent and complete, when it learned that Uruguay had given away Trigosl's rights to the Spectrum and would not comply with the TCA Judgment.

186. To calculate how to wipe out the consequences of that unlawful act, Italba's expert Mr. Dellepiane assessed the fair market value of Trigosl's license using the "comparable transactions" method of valuation, also known as the "market transaction" method. This is a well-accepted methodology for the valuation of frequency spectra in the telecommunications market³⁵⁴ and in investment arbitrations,³⁵⁵ and Mr. Dellepiane is a leading expert in the field, having conducted similar benchmarking studies for local and regional telecommunications operators in Argentina and Uruguay when they were seeking to auction off frequency spectra in 2002.³⁵⁶

187. Mr. Dellepiane concluded that the comparable transactions methodology is the most appropriate to assess the fair market value of Trigosl's license, given the availability of

354. *See id.* at ¶ 44. Antel also applies a benchmarking approach in order to value spectra. *See id.* at ¶ 44.

355. *See, e.g.,* Mark Kantor, *Valuation for Arbitration, Chapter 2: Basic Valuation Approaches*, International Arbitration Law Library, Vol. 17 (Kluwer Law Int'l 2008) (CL-075) at 8 ("If a valuation professional is seeking to determine the Market Value of a business or an ownership interest in that business, three approaches are commonly accepted: . . . – The Market-Based Approach, using methods that compare the business or business interest to similar businesses or business interests."); *see also id.* at 10-15; *National Grid P.L.C. v. Argentina Republic*, UNCITRAL, Award (Nov. 3, 2008) (CL-076), ¶¶ 285-90 (supplementing DCF analysis with the comparable transaction method of valuation); *Siag v. Egypt, Award* (CL-016), ¶¶ 572-76 (accepting valuation of expropriated investment based on comparable sales method).

356. Expert Report at ¶ 10.

data concerning actual sales of directly comparable licenses in the region.³⁵⁷ The advantage of this method is that it is based upon actual real-world transactions including similar sales in the same geographic region, thereby reflecting similar market conditions and reducing the uncertainty that are necessary for other available valuation methods such as the discounted cash flow (*DCF*) method.

188. Where the results of arms-length transactions between a willing buyer and a willing seller are available, leading commentators agree that the prices paid in those transactions are the “best evidence” of an expropriated asset’s fair market value. Thus, Mark Kantor’s treatise on *Valuation for Arbitration* notes:

The best evidence of a company’s value, or course, may be the actual price received in an arm’s-length transaction for the sale of an interest in that very business. . . . The best evidence of fair market value may be the price agreed between a willing buyer and a willing seller, each with knowledge of the relevant facts, in a recent arm’s-length transaction.³⁵⁸

189. Numerous arbitration tribunals have endorsed this approach, including the tribunals in *Enron v. Argentina*, *Crystallex v. Venezuela*, and *Siag v. Egypt*.³⁵⁹ *Crystallex* is particularly relevant here. In that case, the tribunal used the market multiples approach to obtain market data applicable to similar assets to determine the market value of the *Crystallex*

357. *Id.* at ¶¶ 38-41.

358. Kantor, *Valuation for Arbitration, Chapter 2: Basic Valuation Approaches*, (CL-075) at 16-17.

359. *Enron Corporation and Ponderosa Assets, L.P. v. Republic of Argentina*, ICSID Case No. ARB/01/3, Award (May 22, 2007) (CL-077), ¶¶ 387-88 (supplementing expert’s DCF valuation of company with data from actual transactions involving the sale of shares in that company); *Crystallex v. Venezuela*, Award (CL-020) at ¶¶ 901-05 (finding that the market multiples approach yielded appropriate and reliable results in determining the fair market value of expropriated property); *Siag v. Egypt*, Award (CL-016), ¶¶ 548, 551, 572-74 (relying on market comparables to assess fair market value of expropriated asset); *see also Tenaris S.A. and Talta - Trading E Marketing Sociedade Unipessoal LDA. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award (Jan. 29, 2016) (CL-078), ¶¶ 550-570 (relying on an earlier sale of the plant at issue to determine the fair market value of the expropriated asset at a later date); *National Grid v. Argentina*, Award (CL-076), ¶¶ 285-90 (supplementing DCF analysis with the comparable transaction method of valuation).

investments.³⁶⁰ Here, Italba's expert has used actual, observed results from spectrum auctions in Uruguay and Argentina for the deployment of LTE (Long Term Evolution) networks and the provision of 4G high-speed data to mobile devices, which, as described below, are appropriate proxies for the valuation of Italba's investment.³⁶¹

190. As explained in Mr. Dellepiane's expert report, following recommended industry practices, he carried out a fair market value valuation based on two sets of comparable transactions that took place in Uruguay and Argentina.

191. In March 2013, Uruguay auctioned off frequencies in the 900 MHz, 1900 MHz and the AWS (1700-2100 MHz) bandwidths for the provision of standard voice services, but most importantly for the development of a 4G LTE network to service mobile devices.³⁶² As a result of the auction, 130 MHz were assigned for the 4G LTE development, with Antel, Movistar, and Claro obtaining portions of the AWS bandwidth to develop 4G LTE services in Uruguay.³⁶³

192. Similarly, in 2014 and 2015, Argentina auctioned off 180 MHz in two stages for the development of its 4G LTE network.³⁶⁴

193. The amounts paid in Uruguay's and Argentina's bidding processes are indicated in the following table reproduced from Mr. Dellepiane's expert report:

360. *Crystallex v. Venezuela, Award (CL-020)* at ¶¶ 901-05.

361. Expert Report at ¶¶ 43-62.

362. *Id.* at ¶¶ 43-46, 148.

363. *Id.* at ¶¶ 45, 57 (Table II).

364. *Id.* at ¶¶ 45-46, 146.

Table III. Valuation of Trigosul's license based on the results of the Argentinian and Uruguayan spectrum auctions³⁶⁵

#	Mobile Operator / Bandwidth	Value/MHz/ Per capita - DoV (US\$)	Uruguay		Trigosul
			Population Size	Value/MHz - DoV (US\$)	Value of Trigosul's license - DoV (MM US\$)
		[a]	[b]	[c] = [a] * [b]	[d] = [c] * 50
Auction base prices (UY)					
[1]	AWS	0.22	3.4	0.76	38.2
[2]	1900 MHz	0.22	3.4	0.76	38.2
[3]	Digital Dividend	0.29	3.4	1.00	50.0
Auction base prices (ARG)					
[4]	AWS	0.22	3.4	0.75	37.3
[5]	Digital Dividend	0.23	3.4	0.78	39.0
Auction Results (UY & ARG)					
Antel (UY)					
[6]	AWS	0.23	3.4	0.77	38.5
Movistar (UY)					
[7]	1900 MHz	0.24	3.4	0.81	40.5
Claro (UY)					
[8]	AWS	0.23	3.4	0.77	38.5
[9]	1900 MHz	0.23	3.4	0.77	38.4
Personal (ARG)					
[10]	AWS	0.27	3.4	0.93	46.7
[11]	Digital Dividend	0.28	3.4	0.97	48.4
Movistar (ARG)					
[12]	AWS	0.24	3.4	0.83	41.4
[13]	Digital Dividend	0.25	3.4	0.86	42.8
Claro (ARG)					
[14]	AWS	0.26	3.4	0.91	45.3
[15]	Digital Dividend	0.27	3.4	0.94	47.0
Arlink (ARG)					
[16]	AWS	0.22	3.4	0.74	37.0
[17]	Digital Dividend	0.23	3.4	0.77	38.7
Value of Trigosul's license based on average auction results (US\$ MM)					41.9

194. As further explained by Mr. Dellepiane, the values derived from the Uruguay and

365. *Id.* at ¶ 59.

Argentina auctions are directly comparable to the value of Trigosul's license because: (a) the frequencies held by Trigosul, like those held by the licensees in the Uruguay and Argentina auctions, are suitable for the development and deployment of 4G LTE networks;³⁶⁶ (b) the auctions are virtually contemporaneous to the valuation date in this case (*i.e.*, March 1, 2015);³⁶⁷ (c) the Uruguayan and Argentinian telecommunications markets share similar features;³⁶⁸ and (d) there is increasing demand to use Trigosul's frequencies for the development of 4G LTE technology, so it is appropriate to assess the value of those frequencies by reference to auctions of other 4G LTE spectra.³⁶⁹ Accordingly, the prices mobile operators paid in Argentina and Uruguay are reasonable surrogates for the value of Trigosul's frequencies.

195. Thus, based on all of the auction results in Argentina and Uruguay, Mr. Dellepiane computed the value of Trigosul's license at USD \$41.9 million as of March 1, 2015.³⁷⁰

2) Compensation For Historical Lost Profits

196. As described above,³⁷¹ several joint ventures and business projects that Italba diligently worked to develop and finalize failed because of URSEC's unjustified refusal to issue to Trigosul a license conforming to the 2003 License Regulations. The permanent and irreversible damages suffered by Italba in the form of lost business opportunities were the direct and foreseeable result of Uruguay's breaches of the Treaty.

366. *Id.* at ¶¶ 138-45.

367. *Id.* at ¶¶ 146-47.

368. *Id.* at ¶¶ 148-49.

369. *Id.* at ¶¶ 50, 138-46.

370. *Id.* at ¶ 59 (Table III).

371. *See supra* Sections II.B.6, II.C.1-1.

197. As a consequence, Uruguay now must compensate Italba for the historical damages that it suffered.³⁷² Italba's independent damages expert, Santiago Dellepiane, has calculated these historical damages based upon the sum of the lost stream of free cash flows deriving from Italba's business ventures with Phinder, Telmex, Dr. Garcia's Radiology Clinics, Canal 7, and Grupo Afinidad Mary that failed to materialize solely as a result of Uruguay's conduct, and capitalized those losses based on the applicable capitalization rate from 2007 up to the date of valuation.³⁷³

- a. In the case of the Phinder transaction, in February 2007, the parties executed a joint venture agreement and, by May 2007, had incorporated Zupintra, the joint venture entity contemplated in that agreement. By June 2007, Zupintra had completed initial construction on its Latin American network and conducted tests to deploy that network in Argentina and Uruguay. The transaction could not go any further, however, because Phinder and Zupintra required Trigosul to have a license conforming to the 2003 License Regulations, and URSEC failed to issue that license to Trigosul.³⁷⁴
- b. In the case of the Telmex transaction, Italba and Telmex had exchanged a business plan setting forth the terms of a proposed joint venture and were at an advanced stage of negotiations. That transaction failed to materialize solely because Telmex believed it was too risky to invest in Trigosul, given that URSEC had not issued Trigosul a license conforming to the 2003 License Regulations and had revoked Telmex's DTH license.³⁷⁵
- c. In the case of the transaction with Dr. Garcia's radiology clinics, the parties executed a contract in December 2010, pursuant to which Trigosul began providing services to Dr. Garcia. While Trigosul waited for URSEC to approve its operations in Punta del Este, it provided those services free of charge. In the end, Trigosul was unable to profit from or continue its contract with Dr. Garcia

372. Even Uruguayan law recognizes Italba's right to damages for lost profits arising from the wrongful termination of Trigosul's license. *See* Constitution of the Oriental Republic of Uruguay of 1967 (C-108), Art. 312 (establishing a cause of action for "reparation for harms caused by administrative acts" that the TCA subsequently annuls). However, given that Uruguay has demonstrated that it does not respect the decisions of its own courts, bringing suit in Uruguay for these damages would have been pointless, and Italba elected to seek damages via this international arbitration.

373. Expert Report at ¶¶ 63-105.

374. *See supra* Section II.B.6(a).

375. *See supra* Section II.B.6(b).

because URSEC improperly revoked Trigosul's license.³⁷⁶

- d. In the case of Canal 7, Trigosul began providing wireless data transmission services to Canal 7 in December 2010, again free of charge pending URSEC's approval of its operations in Punta del Este. Trigosul was not able to profit from that arrangement either because URSEC revoked its license the following month. In March 2011, Trigosul made a business proposal to Canal 7 for a lease of Trigosul's frequencies. The parties entered into advanced negotiations, but Canal 7 ultimately backed out of the deal because of the uncertainty surrounding URSEC's revocation of Trigosul's license.³⁷⁷
- e. In the case of the U.S. expatriate retirees at Grupo Afinidad Mary, there was serious interest from that community in Trigosul's plan to offer a wide range of services, including Internet and telemedicine services. That opportunity, too, died on the vine because URSEC improperly revoked Trigosul's license.³⁷⁸
- f. In addition, while Italba is not claiming damages related to its negotiations with DirecTV — simply because those negotiations were at an earlier stage at the time Uruguay's conduct forced them to end — the transaction that Italba and DirecTV were discussing would have been extremely profitable for Trigosul. Italba lost that opportunity because of URSEC's baseless revocation of Trigosul's license.³⁷⁹

198. As Mr. Dellepiane explains, the free cash flows of all of these business ventures can be summed up and combined because Trigosul's bandwidth was sufficiently large to allow for the possibility to monetize all of these business ventures simultaneously:

Given their geographic locations, services targeted and uses of Trigosul's spectrum, these ventures were independent from one another, and could have operated simultaneously.³⁸⁰

199. The historical losses so calculated are then brought forward in time to the valuation date using an actualization rate that reflects the passage of time and considers the risks

376. See *supra* Sections II.C.1(a), II.C.1(b).

377. See *supra* Section II.C.1.(b).

378. See *supra* Section IIC.1(d).

379. See *supra* Section II.C.1(c).

380. Expert Report at ¶ 64.

inherent to the specific businesses and locations of the investment.³⁸¹ In the case of Italba, the appropriate actualization rate is the weighted average cost of capital, which “is composed of the cost of equity, the cost of debt, and the relative weights of equity and debt.”³⁸² Applying this actualization rate, Italba’s expert determined that the updated stream of cash flows lost from 2007 to March 1, 2015 results in a total loss of USD \$13 million, as set forth in the following table reproduced from Mr. Dellepiane’s expert report:

Table IX. Italba’s lost historical free cash flows per business venture, updated to March 1st, 2015³⁸³

Business Ventures (US\$)	Lost Historical Profits 2007-DoV (US\$)	
	Nominal Value	As of DoV, updated with WACC
Zupintra	441,365	470,911
Telmex	2,945,984	3,438,129
Fernando Garcia	2,985,179	3,395,703
Canal 7	403,572	440,374
Grupo Afinidad Mary	4,594,828	5,210,309
Historical Lost Profits	11,370,929	12,955,426

D. The Tribunal Should Award Compound Interest Based On Italba’s Cost Of Capital Or, In The Alternative, Uruguay’s Borrowing Rate.

1) Interest Must Be Awarded Under The “Full Reparation” Standard.

200. It is well-settled under international law,³⁸⁴ as well as under the Treaty,³⁸⁵ that

381. *Id.* at ¶¶ 93-101.

382. *Id.* at ¶ 110; *see also id.* App’x B.

383. *Id.* at ¶ 104 (Table IX).

384. *See, e.g.*, ILC Articles (CL-072), Art. 38(1) (“Interest on any principal sum due . . . shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculations shall be set so as to achieve that result.”); *see also* J. Y. Gotanda, *Awarding Interest in International Arbitration*, 90 Am. J. of Int’l Law (1996) (CL-079), at 41-42, 57; *Crystallex v. Venezuela*, Award (CL-020) at ¶ 930 (“The

interest is an integral component of “full reparation.” This follows from the fact that the payment of interest is a key element in restoring an injured party to the position it would have been in had there been no breach. Because the duty to compensate arises immediately after the harm occurs, interest provides compensation for the cost of money until payment of the award.³⁸⁶

201. Thus, the principle of full reparation must guide all aspects of an interest award, including the determination of: (a) the applicable interest rate; (b) the compounding of interest; and (c) the periodicity of compounding.

202. In this case, and to achieve that end, Italba is entitled to both (a) compounded pre-award interest at a rate based on Italba’s weighted average cost of capital from the valuation date — *i.e.*, March 1, 2015 — until the date of the Tribunal’s award, or, in the alternative, at Uruguay’s borrowing rate from the date of the expropriation until the date of the Tribunal’s award; and (b) compounded post-award interest, again based on Italba’s weighted average cost of capital or Uruguay’s borrowing rate on any amount of damages awarded by the Tribunal, until the date in which payment of such an award is made.

203. Pre-award interest is necessary to compensate Italba for the lost opportunity of

substantive international legal obligation to pay interest on monies due is well established. An authoritative statement of the position is to be found in Article 38(1) of the ILC Articles[.]”); *Ioan Micula and others v. Romania*, ICSID Case No ARB/05/20, Award (Dec. 11, 2013) (CL-080), ¶ 1265.

385. Treaty (C-001) Art. 6(3) (“If the fair market value is denominated in a freely usable currency, the compensation referred to in paragraph 1(c) shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.”).

386. *See Ioan Micula v. Romania, Award (CL-080), ¶ 1265* (“Having found a breach of the BIT, the Tribunal must ensure that the Claimants are restored to the position they would have been had the breach not occurred. This includes awarding interest on the sums that the Claimants would have had if the breach had not occurred in order to compensate for the cost of money until the full payment of the Award.”); *see also Vivendi II, Award (CL-028)* at ¶¶ 9.2.3, 9.2.8 (confirming that “[t]he object of an award of interest is to compensate the damage resulting from the fact that, during the period of non-payment by the debtor, the creditor is deprived of the use and disposition of that sum he was supposed to receive” and determining that the appropriate interest rate should be “[a] reasonable proxy for the return Claimants could otherwise have earned on the amounts invested and lost [...]”); *Ioan Micula v. Romania, Award (CL-080), ¶ 1270* (“the appropriate rate is that which would compensate [the claimants] for their cost of borrowing money during the relevant period”).

investing the revenue it would have accrued but for Uruguay's illegal conduct.³⁸⁷ Post-award interest is needed to protect Italba from any delay by Uruguay in payment of the award and is expressly contemplated under Article 6(3) of the Treaty and international law.³⁸⁸ Both pre- and post-award interest contribute to the achievement of the "full reparation" standard of compensation required under international law.³⁸⁹

204. In awarding compound pre- and post-award interest at a rate corresponding to the cost of equity, the tribunal in *ConocoPhillips v. PDVSA* explained that:

[W]hile interest rates may serve different purposes, the purpose of such rates with regard to compensation of damages for contractual breach is generally to ensure full compensation of a claimant by restoring it to the position it would have enjoyed if the contractual breach he suffered had not occurred. In the present case, Claimant 2 is a supplier of capital for a project from which it expected to receive certain cash flows, from which it also expected to obtain a rate of return. Under such circumstances, the interest rate to be applied should measure the opportunity cost of capital, i.e. the cash flows Claimant 2 was deprived of as a result of Respondent's

387. Treaty (C-001), Art. 6(3) (specifying that compensation "shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment"). In Italba's case, because the expropriation was unlawful, the Treaty's standard for interest at "a commercially reasonable" rate does not apply. *Tenaris v. Venezuela*, Award (CL-078), ¶¶ 584-86. At the same time, the use of the weighted average cost of capital to calibrate pre- and post-award interest is commercially reasonable because that rate would compensate Italba at the contemporaneous cost of capital for its inability to invest the amounts that Uruguay unlawfully took from it. See, e.g., *Santa Elena v. Costa Rica*, Award (CL-029), ¶ 104 (awarding an amount of interest reflecting "the additional sum that [the claimant's] money would have earned, had it, and the income generated by it, been reinvested each year at generally prevailing rates of interest"). This well-recognized approach of "opportunity cost" or "investment alternatives" represents "the amount that the successful claimant would have been in a position to have earned if it had been paid in time and thus had the funds available to invest in a form of commercial investment in common use in its own country." *Sylvania Technical Systems, Inc. v. The Government of the Islamic Republic of Iran*, Award No. 180-64-1 (June 27, 1985), 8 Iran-US CTR 298 (CL-081) at 320. Many investor-state tribunals have adopted this approach. See, e.g., *Santa Elena v. Costa Rica*, Award (CL-029), ¶ 104; *EDF International S.A., SAUR Int'l S.A. Leon Participaciones Argentinas S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/23, Award (June 11, 2012) (CL-082), ¶ 1325.

388. See Treaty (C-001), Art. 6(3); see also ILC Articles, Part 2, Ch. 1, Art. 38(2) (CL-072) ("Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled").

389. See, e.g., *Ioan Micula v. Romania*, Award (CL-080), ¶ 1269 ("[T]he Tribunal does not see why the cost of the deprivation of money (which interest compensates) should be different before and after the Award Both are awarded to compensate a party for the deprivation of the use of its funds.").

contractual breach which, had they been timely received by Claimant 2, it would have had the opportunity to apply them to the Project or some alternative productive use.³⁹⁰

205. Therefore, Italba's lost historical cash flows should be capitalized up to the date of the award on the basis of its cost of capital. Cash flows that would have been generated from its business projects and ventures would have earned returns at that rate had they been reinvested.

206. At the same time, a failure properly to compensate Italba for its opportunity cost would not only undermine the principle of full reparation, but would also lead to Uruguay's unjust enrichment. By not paying compensation to Italba for its Treaty breaches, Uruguay has had free access to the funds that it wrongfully appropriated.

207. For this reason, the tribunal in *Tenaris S.A. and Talta - Trading E Marketing Sociedade Unipessoal LDA. v. Bolivarian Republic of Venezuela*, in the case of an unlawful expropriation, used the "borrowing rate" interest. In *Tenaris*, the tribunal found that the appropriate rate of interest in that case was the interest rate that the State would have had to pay to borrow money from the claimants at the time of the expropriation.³⁹¹

208. The reasoning underlying the "borrowing rate" approach to interest is that, in the case of an unlawful expropriation where the State has not compensated the claimant, the State has essentially "borrowed" the value of the claimant's investment, and the claimant, as an unwilling creditor of the State, has been forced to loan that money to the State. Accordingly, the claimant should be compensated at the same rate the State would pay to willing creditors, *i.e.*, the

390. *Phillips Petroleum Company Venezuela Limited & ConocoPhillips Petrozuata B.V. v. Petroleos de Venezuela, S.A.*, ICC Case No. 16848/JRF/CA (C-16849/JRF), Award (Sept. 17, 2012) (CL-083), ¶ 295(ii).

391. *Tenaris v. Venezuela*, Award (CL-078), ¶¶ 584-86. As discussed in his expert report, Mr. Dellepiane considers Italba's weighted average cost of capital to be the most appropriate rate for the calculation of pre-award interest; however, in light of the holding in *Tenaris*, counsel for Italba instructed Mr. Dellepiane to consider Uruguay's cost of borrowing as an alternative. Expert Report at ¶¶ 97, 108.

rate of interest the State pays on short-term sovereign bonds.³⁹²

209. Thus, applying the opportunity cost rate or, in the alternative, the borrowing rate not only ensures full reparation to Italba based on the amount of interest it would have earned had it loaned the value of its investment to Uruguay, but also neutralizes any windfall that Uruguay received as the result of its wrongdoing.

2) Interest Should Be Compounded Semi-Annually.

210. To fully reflect the time value of Italba's losses, any award of interest should be compounded semi-annually.³⁹³ The award of compound interest reflects the economic reality of modern investment and therefore represents the applicable "commercial rate" contemplated under the Treaty.³⁹⁴ Arbitral tribunals have consistently applied compound interest, concluding that a presumption now exists in favor of the award of compound interest.³⁹⁵ Further, denying

392. See, e.g., Aaron Dolgoff and Tiago Duarte-Silva, *Prejudgment Interest: An Economic Review of Alternative Approaches*, J. Int'l Arb. (Kluwer Law Int'l 2016) (CL-084) at 102 ("the rate on the respondent's traded debt securities or other measures of the respondent's cost to borrow"); see also T. J. S  n  chal & J. Y. Gotanda, *Interest as Damages*, 47 Colum. J. Transnat'l L. 491 2008-2009 (CL-085) at 496 ("The second reason for awarding interest is to prevent unjust enrichment of the respondent. Respondents that retain and use the money owed to the claimants during the resolution of the dispute enjoy an unfair benefit. They are receiving the earning capacity of the borrowed money without compensating the claimants for the loss of its use. Pursuant to this rationale, the respondents should be liable for at least 'the reasonable cost the [respondent] would have incurred in borrowing the amount in question for the relevant period.'").

393. See, e.g., *Siag v. Egypt, Award* (CL-016), ¶¶ 595-98 (compounding interest rate semi-annually).

394. See, e.g., *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Award (Nov. 27, 2013), (CL-017) ¶ 261 ("[T]he standard of full reparation would not be met if an award were to deprive a Claimant of compound interest which would have been available on the sums awarded had they been paid in a timely manner."); *Gold Reserve v. Venezuela*, Award (CL-071), ¶ 854 (compound interest better reflects current business and economic realities and therefore the actual damage suffered by a party); J.Y. Gotanda, *Awarding Interest in International Arbitration*, 90 Am. J. of Int'l Law 1996 (CL-079) at 61 ("In the modern world of international commerce, almost all financing and investment vehicles involve compound, as opposed to simple, interest. If the claimant could have received compound interest merely by placing its money in a readily available and commonly used investment vehicle, it is neither logical nor equitable to award the claimant only simple interest.").

395. See, e.g., *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award (June 16, 2010) Part XVI (CL-026), ¶ 26; *Siag v. Egypt, Award* (CL-016), ¶ 595 ("[T]he Tribunal is certain that in recent times compound interest has indeed been awarded more often than not, and is becoming widely accepted as an appropriate and necessary component of

Italba an award of compound interest would contradict bedrock international law principles of valuation, as it would allow Uruguay to profit from its unlawful conduct.³⁹⁶

211. For all of the foregoing reasons, Italba should be awarded: (a) pre-award interest at an annual rate of 8.77% compounded semi-annually from the date of the expropriation until the date of the Tribunal's award, or, in the alternative, an annual rate of 4.39% compounded semi-annually from the date of the expropriation until the date of the Tribunal's award; and (b) post-award interest at the rate of 8.77% from the date in which an award is issued by the Tribunal until the date of payment, or, in the alternative, an annual rate of 4.39% compounded semi-annually from the date in which an award is issued by the Tribunal until the date of payment.³⁹⁷

E. Total Damages Due To Italba

212. Adding the historical lost profits that Italba would have earned prior to the valuation date, Mr. Dellepiane projects total damages for Italba's investment of USD \$54.9 million as of March 1, 2015. Capitalized to the date of his report, Mr. Dellepiane calculated total damages at USD \$62.5 million applying pre-award interest at the cost of capital rate and, in the alternative, USD \$58.7 million applying pre-award interest at Uruguay's borrowing rate. His calculation is summarized in the chart below, reproduced from his expert report:

compensation for expropriation."); *Ioan Micula v. Romania, Award (CL-080)*, ¶ 1266 ("The overwhelming trend among investment tribunals is to award compound rather than simple interest. The reason is that an award of damages (including interest) must place the claimant in the position it would have been in had it never been injured.").

396. Sénéchal and Gotanda, *Interest as Damages*, Colum. J. Transnat'l L., Vol 47 (2009) (CL-080) at 505; (explaining that an award of compound interest "reflects the majority of commercial realities in that a loss of value by a company, active in normal trading operations, implies the loss of use of that value. Not recognizing these 'realities' would also lead to awarding a windfall to the Respondent.").

397. Expert Report ¶¶ 101, 108.

Table XI. Total Damages to Italba³⁹⁸

Concept	US\$ MM	
	Estimated Pre-Award Interest with Cost of Capital	Estimated Pre-Award Interest with Uruguay's Cost of Borrowing
Fair Market Value as of March 1, 2015		41.9
Historical Lost Profits as of March 1, 2015		13.0
<i>Zupintra</i>		0.5
<i>Telmex</i>		3.4
<i>Radiological Clinic</i>		3.4
<i>Canal 7</i>		0.4
<i>Grupo Afinidad Mary</i>		5.2
Total Damages as of March 1, 2015		54.9
<i>Pre-award Interest through September 16, 2016</i>	7.6	3.8
Total Damages as of September 16, 2016	62.5	58.7

213. Applying these principles to Italba's damages and assuming an award date of January 1, 2019, Italba's total damages with pre-award interest calculated using the cost of capital would equal approximately USD \$75.82 million.³⁹⁹

VI. PRAYER FOR RELIEF

214. On the basis of the foregoing, without limitation and reserving Italba's rights to supplement these prayers for relief, including without limitation in the light of further action by Uruguay, Italba respectfully requests that the Tribunal:

- a. DECLARE that Uruguay has breached:
 - i. Article 6 of the Treaty by unlawfully expropriating Italba's investments in Uruguay and/or taking measures equivalent to unlawful expropriation with respect to Italba's investments in Uruguay;
 - ii. Article 5 of the Treaty by failing to accord Italba's investments in Uruguay fair and equitable treatment;

398. *Id.* at ¶¶ 8, 106-08.

399. Alternatively, using Uruguay's borrowing rate to calculate pre-award interest, Italba's damages to January 2019 would be USD \$64.75 million.

- iii. Articles 3 and 4 of the Treaty by failing to accord Italba treatment no less favorable than it accorded to other investors in like circumstances; and
 - iv. Article 5 of the Treaty by failing to afford Italba's investments in Uruguay full protection and security.
- b. ORDER Uruguay to pay damages to Italba for its breaches of the Treaty in the amount of USD \$62.5 million, which includes compound interest at Italba's weighted average cost of capital accrued from March 1, 2015, the date of expropriation, to September 16, 2016, or, in the alternative, USD \$58.7 million, which includes compound interest at Uruguay's borrowing rate from March 1, 2015 to September 16, 2016, together with payment of compound interest at the same rate until full payment has been made in accordance with Articles 6(3) and 34 of the Treaty;
 - c. AWARD such other relief as the Tribunal deems appropriate; and
 - d. ORDER Uruguay to pay all of the costs, attorneys' fees, and expenses of this arbitration, including Claimant's legal and expert fees, the fees and expenses of any experts appointed by the Tribunal, the fees and expenses of the Tribunal, and ICSID's other costs, in accordance with Article 34(1) of the Treaty.

DATED: September 16, 2016

Respectfully submitted,

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