INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ITALBA CORPORATION

Claimant

v.

ORIENTAL REPUBLIC OF URUGUAY

Respondent

ICSID Case No. ARB/16/9

COUNTER-MEMORIAL OF THE ORIENTAL REPUBLIC OF URUGUAY

January 30, 2017

The Spanish version of the Counter-Memorial dated 30 January 2017 is the original version. In the event of a discrepancy between the original text and the English translation, the original Spanish text prevails.

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I. INTRODUCTION

1. This is a completely fraudulent case.

2. It has been fabricated with forged signatures, falsified documents, unsupported assertions, and lies. There is nothing honest or honorable about it. There is no legitimate dispute here. To the contrary, it is a cynical effort to extort a vast sum of money from Uruguay, including by criminal means, without any justification in law or fact.

3. All of the Claimant's claims should be rejected. First, there is no jurisdiction. Second, there is no merit to any of its claims. Third, there is no evidence of compensable harm or damages.

A. LACK OF JURISDICTION

4. In this pleading, Uruguay asserts four separate jurisdictional objections, each of which is sufficient to require the dismissal of all claims.

5. ***First***, there is no evidence that Claimant Italba Corporation is the owner of Trigosul, S.A., its purported Uruguayan subsidiary. Absent evidence of ownership, Italba has no investment in Uruguay and no right to invoke the protections of the Bilateral Investment Treaty between Uruguay and the United States (the "Treaty").

6. No evidence of ownership was provided with the Request for Arbitration, nor with the Memorial. Nor was any such evidence produced in support of Italba's Application for Provisional Measures, where not even *prima facie* jurisdiction was established. Uruguay pointed

this out in its pleadings in opposition to that request and challenged Italba to come forward with real evidence that it owns Trigosul.[1] Italba failed to do so.

7. Italba relies instead entirely on the completely unsupported assertions of Dr. Gustavo Alberelli, its principal, and his longtime subordinate, Mr. Luis Herbón. Neither has demonstrated that his word can be taken at face value. Both are under investigation in Uruguay for forging signatures and falsifying documents that they fabricated specifically for this case.[2] They have refused thus far to present any corporate records of either Italba or Trigosul showing the ownership of the latter by the former, presumably because these do not exist.

8. Prior to this arbitration, they submitted nothing to Uruguayan governmental authorities showing that Italba owned Trigosul at any time.[3] To the contrary, they formally reported in Uruguay that 95% of the shares of Trigosul are owned by Dr. Alberelli, a national of Italy, in his personal capacity, and 5% are owned by his mother.[4] That evidence stands uncontradicted.

9. ***Second***, Italba is not entitled to the benefits of the BIT because it does not have substantial business operations in the United States, and none at all in the field of

[1] Response of the Oriental Republic of Uruguay to Claimant's Application for Provisional Measures and Temporary Relief (November 21, 2016) ("Response to the Application for Provisional Measures"), ¶ 74; Letter from the Oriental Republic of Uruguay to the Tribunal (November 28, 2016), pp. 2-3.

[2] *See, e.g.*, Response to the Application for Provisional Measures, ¶¶ 13-22.

[3] *See* Section II.A below.

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

telecommunications.[5] Furthermore, it is controlled by an Italian national, Dr. Alberelli.[6] In fact, Italba appears to be nothing more than "Alberelli, Inc.," a corporate label on what is effectively a one-man show. Italba's business address is none other than Dr. Alberelli's private home, which is located in a residential neighborhood in Miami.[7] The paper trail of its existence and revenue is limited at best. With Italba having such an insubstantial business presence in the United States, and being run by a non-U.S. national, Uruguay is entitled to deny it the benefits of the Treaty pursuant to Article 17(2).

10. ***Third***, all claims asserted by Italba in this arbitration concern alleged wrongs by Uruguay more than three years prior to the commencement of the arbitration, and, for that reason, are barred by the three-year limitations period stipulated in Article 26(1) of the Treaty. Because the arbitration was initiated on February 16, 2016, no claim can be based on actions by Uruguay prior to February 16, 2013.[8] Nor can any claim be based on actions taken before the Uruguay-United States BIT entered into force on November 1, 2006.[9]

11. Thus, Uruguay's alleged denial of an updated authorization or new license to Trigosul between 2003 and 2011 falls outside of the Treaty's protection, as do the 2011 revocations of Trigosul's operating authorization and assigned frequencies. Any claims based on those actions are clearly time-barred.

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[5] *See* Section II.B.2.a below.

[6] *See* Section II.B.2.b below.

[7] *See* Section II.B.2.a(2) below.

[8] Italba Corporation's Request for Arbitration (February 16, 2016) ("Request for Arbitration").

[9] Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment signed on November 4, 2005, which entered into force on November 1, 2006 ("United States of America-Uruguay BIT") (C-001).

12. Italba thus strains to find acts by Uruguay that occurred within three years of the commencement of this arbitration. It identifies two, but neither one saves its case from the effects of the limitations period under Article 26(1). The 2013 assignment of the frequencies revoked from Trigosul to another company, Dedicado, did not affect Trigosul, which had been stripped of its frequencies more than two years earlier and had no rights with respect to them at the time of the assignment.[10] In any event, even if the assignment to Dedicado were connected to the pre-2013 revocation of Trigosul's frequencies, under the terms of the Treaty as understood by both the United States and Uruguay, the assignment relates back to the first act of an alleged series of wrongs— the revocation of Trigosul's frequencies in 2011. Thus, the assignment also falls outside the three-year limitations period.

13. The same can be said of Italba's similarly artificial claim that Uruguay acted wrongfully in 2014 and 2015 by allegedly failing to comply with an administrative court judgment in Trigosul's favor. In the first place, Uruguay complied with the judgment, as even Italba admits, by offering to return the very same frequencies.[11] And, second, the judgment was a direct response to the 2011 revocation and, therefore, even as wrongly characterized by Italba, cannot be anything more than the last in a series of acts beginning with that revocation. Thus, it falls outside the three-year limitation period.[12]

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[10] Communication Services Regulatory Agency, Resolution No. 001/011 (January 20, 2011) (C-068); Communication Services Regulatory Agency, Resolution No. 220/013 (September 5, 2013), ¶ 2 (C-084).

[11] Claimant's Memorial (September 16, 2016) ("Memorial"), ¶ 83; Communication Services Regulatory Agency, Draft Resolution (May 9, 2016), p. 3 (C-098).

[12] *Tribunal de lo Contencioso Administrativo (TCA)*, Judgment No. 579 (October 23, 2014) ("TCA Judgment No. 579"), p. 2 (C-076) ("A petition for annulment has been filed against Resolution No. 001 of January 20, 2011, which ordered the release of sub-blocks K and M corresponding to the 3425-3450 MHz and 3525-3550 MHz sub-bands, which had been assigned to Trigosul S.A.").

14. ***Fourth***, there is no jurisdiction over Italba's claims because, even if Italba could show that it was the owner of Trigosul at the relevant times and that it has substantial business activities in the United States, and that at least one of its claims originated less than three years before it commenced this arbitration, its putative "rights" in Uruguay do not constitute a protected investment under the Treaty.

15. The Treaty, in Article 1, expressly excludes from coverage such licenses or permits that do not convey any vested legal rights under Uruguayan law.[13] That is precisely the status of the alleged "rights" held by Trigosul. Both the authorization to provide data transmission services and assignment of specific frequencies for these services were issued by Uruguay subject to the express conditions that they were revocable at any time and subject to cancellation without any right to indemnification whatsoever.[14] Under Uruguayan law, this means no rights vested in Trigosul. As such, the "rights" claimed by Italba, of which Trigosul was allegedly deprived, are expressly excluded from protection by Article 1 of the Treaty.

B. LACK OF MERIT

16. Assuming, *quod non*, that the Tribunal has jurisdiction over Italba's claims, and assuming, *quod non*, that they do not fall outside the limitations period, none of the alleged actions or inactions by Uruguay even remotely constitutes a violation of any of its legal obligations, or of any rights of Italba, under the Treaty.

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[13] United States-Uruguay BIT, art. 1, note 3 (C-001) ("Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that *do not create any rights protected under domestic law*.") (emphasis added).

[14] National Communications Directorate, Resolution No. 444/000 (December 12, 2000) ("Resolution No. 444/000") (C-012) ("1.- To allocate to TRIGOSUL S.A., on a provisional and revocable basis, without the right to claim or compensation of any type, the sub-blocks 'K' and 'M.'").

17. The plain fact is that Trigosul was never more than a phantom company.

18. In 2000, Trigosul received from Dr. Alberelli the authorization he was previously given, in his personal capacity, to provide specified data transmission services to private clients on frequencies of the radio spectrum.[15] However, despite holding this authorization for more than 10 years—and thereby preventing others from using the same frequencies—Trigosul virtually provided no such data transmission services between 2000 and 2011.[16]

19. This is confirmed by the reports Trigosul filed with the Uruguayan Communications Services Regulatory Agency ("URSEC", per its Spanish acronyms). They showed that Trigosul had no clients—zero—in any year between 2000 and 2004, or in 2009, 2010, or 2011.[17] Although Trigosul reported some clients in 2005-2008, the total never exceeded eight, and it is unclear how many of these, if any, paid for its services.[18] Since 2009, Trigosul never reported any annual revenue, which obviously would not have covered the fees it had to pay URSEC for the assigned frequencies, let alone the costs of equipment or infrastructure necessary for providing services.[19]

20. Because it is against public policy in Uruguay (as elsewhere) to allow a service provider to hold on to frequencies without using them, and thereby prevent public enjoyment of

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[15] Ministry of National Defense, Resolution No. 142/000 (February 8, 2000) (C-005).

[16] Witness Statement of Dr. Nicolas Cendoya (January 15, 2017) ("Dr. Cendoya's Witness Statement"), ¶¶ 39, 51-56, Section VII.

[17] Dr. Cendoya's Witness Statement, ¶ 56 (explaining that Trigosul had no operations between 1999 and 2005); Trigosul S.A. Statistical Table (2016) (R-54) (showing that Trigosul had no clients in 2009, 2010, and 2011).

[18] Trigosul S.A. Statistical Table (2016) (R-54).

[19] *Id.*; Dr. Cendoya's Witness Statement, ¶¶ 107-108.

scarce public good (the frequencies of the spectrum), Uruguay, in 2011, revoked Trigosul's authorization and assignment of frequencies.[20] Those revocations are the events that gave rise to this arbitration—five years after the relevant facts.

21. Italba's claims of Treaty violations by Uruguay fall into four categories: (1) the non-issuance of a new license to Trigosul after 2003; (2) the revocations of 2011; (3) the assignment of Trigosul's former frequencies to another company more than two years later; and (4) URSEC's alleged "noncompliance" with the 2014 judgment of the Uruguayan court. As a result of these actions, Italba claims that Uruguay violated its Treaty obligations relating to expropriation, fair and equitable treatment, national treatment, most favored nation treatment, and full protection and security. All of these claims are manifestly unsupportable.

1. Non-Issuance of a License

22. There is no merit to Italba's argument that Uruguay wrongfully denied Trigosul a license under the new regulations adopted in 2003. In the first place, contrary to Italba's assertions, Trigosul did not need a new license to provide the services it was previously authorized to provide.[21] Other companies with similar pre-2003 authorizations continued to operate as before, without receiving licenses under the new regulations.[22] In fact, none of Trigosul's competitors was issued a new license to provide the same data transmission services

[20] Dr. Cendoya's Witness Statement, ¶ 5 ("The radio spectrum is a publicly-owned asset and so it is State property. It is also a finite resource and thus the State is obliged to ensure that it is used efficiently."); Communication Services Regulatory Agency, Resolution No. 001/011 (January 20, 2011) (C-068).

[21] Dr. Cendoya's Witness Statement, Section III.D.1.

[22] *Id.*

they had been providing on the same frequencies before 2003.[23] Trigosul was thus treated no differently than anyone else.

23. The Claimant relies on Dr. Alberelli's statements that various URSEC officials promised that Trigosul would get a new license. But there is no documentary support for any of these statements. In particular, Italba has not produced a single document from URSEC stating that such a license would be issued to Trigosul. With this pleading, Uruguay submits statements from six former URSEC directors and officials with whom Dr. Alberelli claims to have met, in which they deny that they made any promises that Trigosul would receive a license.[24]

24. The reality is that Trigosul did not need a new license to perform the services it was already authorized to perform.[25] Further, in order to obtain a new license under the 2003 regulations, which would have authorized it to provide additional services, Trigosul would have had to submit an application showing that it had the technical, legal, and financial qualifications the regulations required.[26] Trigosul never submitted such an application.[27] There is thus no basis for Italba's allegations that Trigosul was treated arbitrarily, discriminatorily, or in bad faith, or less favorably than other domestic or foreign companies under similar conditions.

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[23] Dr. Cendoya's Witness Statement, ¶ 61 ("None of the corporations who provide services similar to those offered by Trigosul have had their authorizations updated yet.").

[24] Witness Statement of Ms. Alicia Fernández (December 28, 2016) ("Ms. Fernández's Witness Statement"), ¶ 4; Witness Statement of Mr. Fernando Pérez Tabó (December 30, 2016) ("Mr. Pérez's Witness Statement"), ¶ 4; Witness Statement of Ms. Elena Grauert (December 30, 2016) ("Ms. Grauert's Witness Statement"), ¶¶ 6-7; Witness Statement of Mr. Juan Piaggio (December 23, 2016) ("Mr. Piaggio's Witness Statement"), ¶¶ 4-6; Witness Statement of Mr. León Lev (December 28, 2016) ("Mr. Lev's Witness Statement"), ¶¶ 4-6; and Witness Statement of Mr. Gabriel Lombide (December 21, 2016) ("Mr. Lombide's Witness Statement"), ¶ 4.

[25] *See* Dr. Cendoya's Witness Statement, III.D.1; Expert Opinion of Dr. Santiago Pereira Campos (January 20, 2017) ("Dr. Pereira's Opinion"), ¶¶ 122, 127.

[26] Dr. Cendoya's Witness Statement, ¶ 66; Dr. Pereira's Opinion, ¶¶ 143, 151.

[27] Dr. Cendoya's Witness Statement, ¶ 66; Dr. Pereira's Opinion, ¶¶ 144-152.

2. The 2011 Revocations

25. By the end of 2010, it had become obvious that Trigosul either was incapable of providing the authorized services or had no intention of doing so. It was even in default on its fee obligations to URSEC.[28] As of that date, it had not reported any clients or revenue for two consecutive years.[29] Consequently, in furtherance of the goals of the national telecommunications policy, URSEC revoked its assignment of frequencies so that they could be reissued to a company that would actually use them to provide data transmission services to the Uruguayan market.[30] For the same reasons, this was followed by the revocation of Trigosul's authorization to provide services, carried out by the Ministry of Industry, Energy, and Mining.[31] There is no evidence that the revocations were arbitrary, discriminatory, or in bad faith, as Italba alleges, or that they led to less favorable treatment than that of other companies under similar circumstances.

26. Trigosul challenged the revocations before the *Tribunal de lo Contencioso Administrativo* (TCA) on the ground that URSEC's inspection of the company's premises to confirm that it was not operating was deficient because URSEC had erroneously inspected the former premises from which Trigosul had moved.[32] In October 2014, the TCA upheld Trigosul's challenge without denying Uruguay's authority to revoke the authorization and assignment of

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[28] *Id.*, ¶ 80 ("On several occasions, delays and irregularities in payment for use of the frequencies had been recorded against it.").

[29] Trigosul S.A. Statistical Table (2016) (R-54).

[30] *See* Communication Services Regulatory Agency, Resolution No. 001/011 (January 20, 2011), p. 2 (C-068) (revoking Trigosul's frequencies, "CONSIDERING: […] that for reasons of sound administration, the radioelectric spectrum cannot continue to be assigned without affecting the service for which the right to use it was granted.").

[31] Ministry of Industry, Energy, and Mining, Resolution No. 335/011 (July 8, 2011) (C-072).

[32] Trigosul, S.A., Action for Annulment (October 28, 2011), p. 5 (C-074).

frequencies for non-use.[33] URSEC ultimately complied with the judgment and offered to return to Trigosul frequencies equivalent to those that had been revoked, and then the very same frequencies that it had been assigned until 2011.[34] Trigosul rejected both offers.[35]

27. Therefore, Italba's claim of "denial of due process" or "discriminatory" treatment is plainly unsustainable, both legally and factually.

3. The 2013 Assignment to Dedicado

28. Italba's own evidence, submitted with its Memorial, shows that it was aware in early 2011, shortly after the revocation of its frequencies, that they would ultimately be assigned to another company.[36] That assignment took place two years later, when the frequencies were assigned to another provider of data transmission services, Dedicado, S.A.[37] Italba complains that the assignment to Dedicado—but not the 2011 revocation—constituted an "expropriation" in violation of its "rights" under Article 6 of the Treaty.[38] It also claims that the 2013 assignment to Dedicado was arbitrary, discriminatory, and in bad faith.[39] These arguments are flawed.

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[33] *See generally Tribunal de lo Contencioso Administrativo*, Judgment No. 579 (October 23, 2014) ("TCA Judgment No. 579") (C-076).

[34] Communication Services Regulatory Agency, Proposal No. 00352 (May 9, 2016) (C-095); Communication Services Regulatory Agency, Draft Resolution (May 9, 2016) (C-098); Memorial, ¶¶ 82-83.

[35] Memorial, ¶¶ 82, 84.

[36] Email from R. Gorter to G. Alberelli et al. (April 14, 2011) (C-071) (which contains an email from G. Alberelli to K. Skillin et al. dated March 29, 2011).

[37] Communication Services Regulatory Agency, Resolution No. 220/013 (September 5, 2013) (C-084).

[38] *See, e.g.*, Memorial, ¶ 111 ("Uruguay violated Italba's due process rights in two fundamental ways. First, without any notice to Trigosul or the TCA, URSEC re-allocated Trigosul's license to operate in the Spectrum to a competitor company"), ¶ 115 ("Uruguay's expropriation of Trigosul's license was discriminatory because, while Italba's case against URSEC was pending in the TCA, URSEC — without notifying Trigosul or the TCA— re-allocated Trigosul's rights to the Spectrum to Dedicado").

[39] *Id.*, ¶ 133 (violation of due process), ¶ 136 (e) (bad faith), ¶ 143 (arbitrary), ¶ 149 (discriminatory).

29. As indicated, Trigosul reported having no customers and earning no revenue in 2009, 2010, or 2011.[40] During the same three years, Dedicado, which, like Trigosul, had received its authorization to provide services and its assignment of frequencies prior to the 2003 regulations and did not receive a new license for such services thereafter, reported 15,712 customers in 2009, 16,479 in 2010, and 16,425 in 2011.[41] Its annual revenue during the same period averaged UYU 171,074,701 (approximately USD 8,297,489).[42] And its fixed assets (infrastructure) were valued at UYU 12,341,455 (approximately USD 638,978) in 2011, as compared to zero for Trigosul.[43] Moreover, Dedicado was operating successfully with high frequencies close to those previously assigned to Trigosul.[44] It was plainly reasonable and consistent with its public duty to ensure the efficient use of the radio spectrum for the URSEC to assign those frequencies to Dedicado. Since they did not belong to Trigosul in any sense after 2011, it is meaningless for Italba to call the reassignment an "expropriation," or an arbitrary or discriminatory act against it.

4. The TCA's Judgment

30. Italba also strains to characterize URSEC's alleged "noncompliance" with the judgment of the TCA as an "expropriation."[45] It calls this, as well, arbitrary and discriminatory,

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[40] Trigosul S.A. Statistical Table (2016) (R-54).

[41] Dedicado S.A. Statistical Table (2016) (R-52).

[42] *Id.* (179,343,129 + 177,412,809 + 156,468,164 = 513,224,102/3 = 171,074,701).

[43] Dedicado S.A. Statistical Table (2016) (R-52); Trigosul S.A. Statistical Table (2016) (R-54).

[44] *See* Dedicado S.A. Statistical Table (2016) (R-52); Dr. Cendoya's Witness Statement, ¶ 85 ("Dedicado was operating, providing a relevant service to numerous clients. The frequency sub-blocks on bands 3400 and 3500 were very useful to Dedicado: they provided Dedicado with an increased band width because these sub-blocks adjoined other sub-blocks already allocated to Dedicado.").

[45] Memorial, ¶ 108.

and a "denial of justice."[46] But all of these contrived claims fall by the wayside because URSEC, in fact, complied with the judgment of the TCA. As even Italba admits, URSEC offered Trigosul equivalent frequencies in the same range (because the former ones had been assigned to Dedicado)[47] and, following Trigosul's rejection of the offer, URSEC offered to restore the former frequencies after reclaiming them from Dedicado.[48]

31. URSEC's offer was rejected, putting into full relief Italba's—and at its core, Dr. Alberelli's—true motives. He had no interest in regaining the frequencies for Trigosul or in beginning to provide the services that Trigosul had previously spent more than 10 years not providing. His real interest was, and is, to use this arbitration to extort a massive and undeserved payment from Uruguay. That is the one and only purpose of this case.

C. LACK OF DAMAGES

32. The Tribunal has no reason even to consider Italba's claim for damages given its lack of jurisdiction and the absence of any violation of the Treaty. However, in the hypothetical case that it were to reach this issue, the Tribunal would find that Italba has failed entirely to prove that it suffered any compensable harm.

33. This is mainly because, in 2011, at the time its authorization and assignment of frequencies were revoked, Trigosul had no value—none—as a going concern.

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[46] *Id.*, ¶ 128 (denial of justice), ¶ 143 (arbitrary), ¶ 149 (discriminatory).

[47] Communication Services Regulatory Agency, Proposal No. 00352 (May 9, 2016) (C-095).

[48] Communication Services Regulatory Agency, Draft Resolution (May 9, 2016) (C-098).

34. Although it had by then held its authorization and assigned frequencies for more than a decade, it had no paying customers and no income. This is confirmed by its reports to URSEC.[49] Significantly, in a case in which USD 62.5 million is claimed in damages, Italba has not presented a single financial statement for Trigosul covering the years between 2000 and 2011, inclusive. Nor has it presented any documents showing profits and losses, assets and liabilities, or any other type of evidence from which the value of the company could be ascertained. Nor has it presented the name of a single paying customer or the amount of fees paid by such customer. Nor has any evidence been presented of its technical qualifications or equipment to provide the services.

35. It is not surprising, therefore, that Italba argues that Trigosul must be valued on a basis other than its worth in 2011, or on its discounted cash flow. Italba has no other choice. It is fully aware that valuation by any standard method would result in zero value for the enterprise.

36. Italba vainly attempts to explain away Trigosul's lack of customers or income with the fiction that it would have generated both if it had been issued a new license under the 2003 regulations. As demonstrated below, Trigosul did not require a new license to provide the services it was earlier authorized to provide, and it never submitted an application for a new, expanded license.[50] In any event, the prospective "deals" mentioned in the Memorial are entirely unreal. All would have required Trigosul to provide services it was never authorized, or never sought authorization, to provide (such as mobile telephony), and none had materialized or advanced to the point where any of the key financial aspects were agreed, as is clear from the

[49] Trigosul S.A. Statistical Table (2016) (R-54).

[50] Dr. Cendoya's Witness Statement, Section III.D.1., ¶ 66.

documents submitted with the Memorial.[51] The argument that these were lost business opportunities is as phony as the rest of Italba's case.

37. Italba's last resort at establishing any value for Trigosul is to look to prices paid for telecommunications rights by successful bidders at auctions held in Uruguay in 2013 and in Argentina in 2014 and 2015. But these examples have nothing in common with Trigosul for several critical reasons.

38. First, the rights auctioned by Uruguay and Argentina were fully vested rights that were irrevocable for periods of 15 to 20 years.[52] In contrast, Trigosul's authorization to provide services and assignment of frequencies had no fixed duration; instead, they were provisional and revocable and subject to cancellation at any time without payment of any indemnification.[53]

39. Second, the auctioned rights were not limited to point-to-point and point-to-multipoint data transmission with no connection to the public telephone network, as in the case of Trigosul. Rather, the auctioned rights were many orders of magnitude more valuable because they included, in addition to data transmission, the far more valuable 4G LTE mobile telephony services.[54] Their high value is based on the high demand for 4G LTE services that permit Internet access via mobile phones, which in turn is the result of the general market presence of smart phones. Trigosul never requested authorization to provide these services.

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[51] *See* Section IV.A.2 below.

[52] Report by Dr. Daniel Flores of Econ One Research (January 27, 2017) ("Econ One's Report"), ¶ 21.

[53] National Communications Directorate, Resolution No. 444/000 (December 12, 2000) ("Resolution No. 444/000"), p. 2 (C-012).

[54] Report by Dr. Daniel Flores of Econ One Research (January 27, 2017) ("Econ One's Report"), ¶ 144.

40. Third, the auctioned rights pertained to much lower frequencies—in the 1700 to 2100 MHz range—as compared to Trigosul's assigned frequencies in the 3425 to 3550 MHz range.[55] Lower frequencies are far more valuable than higher frequencies because higher frequencies have a weaker spread and cover a much smaller geographical area.[56]

41. Fourth, the Argentine market cannot be compared to that of Uruguay. Argentina's market is entirely privatized,[57] while Uruguay's is dominated by the state-owned ANTEL, which enjoys a legal monopoly over the provision of services via fiber optics.[58] As ANTEL continues to expand its highly desired fiber optic network beyond urban areas, the market for wireless data transmission continues to shrink. Other data transmission companies have seen their clients and revenues decline dramatically as a result. Dedicado, for example, had less than half the number of clients in 2015 (7,633) as it had in 2009 (15,712).[59]

42. If an analogous transaction is an appropriate measure of the value of Trigosul, the closest example is the 2013 assignment to Dedicado of the very same frequencies previously assigned to Trigosul under the same conditions. The price paid by Dedicado was zero.[60]

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43. In sum, this case is a flagrant abuse of the investor-state dispute settlement system. It is exactly the kind of case that gives the system a bad name and undermines its

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[55] Dr. Cendoya's Witness Statement, ¶ 143.

[56] *Id.*, ¶ 145.

[57] *Id.*, ¶ 137.

[58] *Id.*, ¶ 138.

[59] Dedicado S.A. Statistical Table (2016) (R-52).

[60] Communication Services Regulatory Agency, Resolution No. 220/013 (September 5, 2013) (C-084) (assigning frequencies to Dedicado without indicating any cost).

credibility. Dismissal is not enough. Italba should further be ordered to pay all of Uruguay's legal fees and costs, all of its expert and witness expenses and costs, and all of the administrative costs associated with this arbitration.

II. THERE IS NO JURISDICTION OVER THIS DISPUTE

44. Italba argues that Uruguay gave written consent to submit this dispute to arbitration pursuant to the ICSID Convention by way of the Treaty between Uruguay and the United States.[61] However, in order to be protected by this Treaty and, consequently, the ICSID Convention, Italba has the burden of proving that all prerequisites for Uruguay's consent to Italba's access to the Treaty's substantive and procedural protections have been met,[62] including:

- the existence of a protected investment in Uruguay pursuant to Article 1 of the Treaty;
- the existence of substantial business activities in the United States, as well Italba's ownership and control by United States nationals pursuant to Article 17(2); and
- the submission of its claims to arbitration within three years from the date on which it first acquired, or should have first acquired, knowledge of the alleged breaches and the alleged loss pursuant to Article 26(1).

45. As shown in the sections below, Italba fails dramatically at this task. There are four separate reasons why the Tribunal has no jurisdiction over any of Claimant's claims.

46. ***First***, Italba has submitted no evidence that it in fact owns or controls Trigosul, much less that it does so at 100%, as it has claimed. Not only that, the evidence also shows that it

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[61] Memorial, ¶¶ 96-98.

[62] *See, e.g., Abaclat and Others v. Argentine Republic (formerly Giovanna a Beccara and Others v. The Argentine Republic)*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (August 4, 2011) (Tercier, Abi-Saab, van den Berg), ¶ 678 (RL-87) ("[I]t is Claimants who bear the burden to prove that all conditions for the Tribunal's jurisdiction and for the granting of the substantive claims are met.") (emphasis added). This burden of proof is not affected by the jurisdictional objections presented by the respondent. As the tribunal in *National Gas v. Egypt* emphasized, "[a]lthough it is the Respondent which has here raised specific jurisdictional objections, *it is not for the Respondent to disprove this Tribunal's jurisdiction* […] it is for the *Claimant* to discharge the burden of proving *all* essential facts required to establish jurisdiction for its claims.". *National Gas S.A.E. v. Arab Republic of Egypt*, ICSID Case No. ARB/11/7, Award (April 3, 2014) (Veeder, Fortier, Stern), ¶ 118 (RL-107) (emphasis added). *See also Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue (March 5, 2013) (Griffith, Jaffe, Knieper), ¶ 48 (RL-98).

has not owned or controlled Trigosul during the time relevant to the Tribunal's jurisdiction. If Italba cannot prove the existence of a protected investment in Trigosul, it cannot claim alleged rights to a license or any other right through Trigosul.

47. ***Second***, Italba has no substantial business activities in the United States and is controlled by a "person of a non-Party," that is, Dr. Gustavo Alberelli, an Italian citizen. These two facts give Uruguay the right to deny it the benefits of the Treaty under Article 17(2) of the Treaty.

48. ***Third***, Italba's claims were already time-barred before Italba filed its Request for Arbitration with ICSID on February 16, 2016. The same evidence submitted by Italba shows it was aware of the alleged breach and the resulting loss or damages no later than March 29, 2011, that is, approximately two years before the critical date for the purposes of the limitations clause of the Treaty set forth in Article 26(1) (February 16, 2013).

49. ***Fourth***, Claimant cannot base its claims on "rights to a license" it alleges it holds "through Trigosul." Any right arising from Trigosul's authorization to provide services and its assignment of frequencies does not give rise to "rights protected under domestic law" under the definition of "investment" contained in Article 1 of the Treaty. Because Claimant has alleged Treaty breaches only with respect to its alleged rights to an unprotected license, all of its claims must be dismissed.

50. Uruguay's objections to the Tribunal's jurisdiction are elaborated below.

A. ITALBA HAS FAILED TO PROVE IT IS OR HAS BEEN THE OWNER OF TRIGOSUL

51. Italba seeks to avail itself of the protections of the Treaty by alleging that "Italba's business activities in Uruguay qualify as 'investments' under the language of the Treaty."[63] The alleged investments are "100% ownership and control of Trigosul";[64] "a license under Uruguayan law" which it held "[t]hrough Trigosul"; and "telecommunications equipment, office equipment, commercial leases, and other tangible property and related property rights that allow Trigosul to run its operations in Uruguay."[65]

52. The only evidence Italba has presented in an attempt to prove it is the owner of Trigosul—a fundamental issue in this arbitration—are the statements made by its two witnesses, Dr. Gustavo Alberelli and Mr. Luis Herbón, which were prepared for the purposes of this arbitration, as well as an Advocacy Questionnaire submitted by Mr. Herbón to the Embassy of the United States in Uruguay, which purports to identify Italba as Trigosul's parent company.[66] This cannot be considered proof that Italba has an investment in Uruguay. The statements of Dr. Alberelli and Mr. Herbón with respect to Italba's alleged ownership of Trigosul, in addition to being baseless, were prepared by individuals who were "interested in the outcome of the proceedings."[67] The Advocacy Questionnaire does not prove that Italba is the owner of Trigosul;

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[63] Memorial, ¶ 91.

[64] *Id.*, ¶ 93.

[65] *Id.*, ¶¶ 93-94.

[66] *Id.*, ¶ 93 and note 196; Advocacy Questionnaire Submitted to the Embassy of the United States in Uruguay (June 11, 2001) (C-102).

[67] *See Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment (October 8, 2007), ICJ Rep. 2007, p. 659 at ¶ 244 (RL-64) (stating that, as a general rule, "witness statements produced in the form of affidavits should be treated with caution" and identifying among the relevant factors for evaluating the evidence value of an affidavit, whether it "is made by […] persons not interested in the outcome of the proceedings.").

the self-interested testimony of its witnesses does not do so either.[68] In other investment treaty arbitration cases, far stronger evidence than this *ipse dixit* has been considered insufficient to establish the existence of a valid and effective purchase of shares in a host State company.[69] There is no reason to apply a different standard in this case.

53. It is noteworthy that Italba has failed to submit corporate, financial, or business records, of either Italba or Trigosul, that show that Trigosul is owned by Italba. Nor has it submitted government records or copies of documents filed with government agencies or contemporaneous correspondence demonstrating that Italba is the owner of Trigosul. Apart from the unfounded and thoroughly self-serving assertions made by Dr. Alberelli and Mr. Herbón, nothing has been submitted to the Tribunal evidencing such ownership.

54. Uruguay has pointed this out on two separate occasions in opposition to Italba's application for provisional measures.[70] For example, in its pleading dated November 21, Uruguay argued that Italba's application should be denied because, among other reasons, Italba had failed to demonstrate that the Tribunal had *prima facie* jurisdiction in this case.[71] Uruguay specifically focused on the fact that Italba had not submitted any evidence that it owned Trigosul apart from the baseless statements made by its principals, Dr. Alberelli and Mr. Herbón. Uruguay

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[68] Uruguay also notes that typically these questionnaires are submitted with supplemental materials attached in order to establish the veracity of the assertions therein. *See* "The Advocacy Questionnaire and the Anti-Bribery Agreement," *available at* http://2016.export.gov/advocacy/eg_main_092202.asp (last visited on January 11, 2017) (R-8). The Claimant has submitted no supplemental materials.

[69] *See, e.g.*, *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award (September 17, 2009) (Tercier, Lalonde, Thomas), ¶¶ 114, 149 (RL-78); *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Bizkaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction (December 19, 2012) (Bucher, Martinez-Fraga, McLachlan), ¶ 281 (RL-96).

[70] Response to the Application for Provisional Measures, ¶¶ 70-74; Letter from the Oriental Republic of Uruguay to the Tribunal (November 28, 2016), pp. 2-4.

[71] Response to the Application for Provisional Measures, ¶¶ 70-74.

again emphasized the absence of evidence regarding Trigosul's owner and the lack of *prima facie* jurisdiction in its communication to the Tribunal dated November 28, 2016.

55. Italba responded to Uruguay's submissions in writing, but at no time did it state it had submitted (or was in possession of) any evidence that it was the owner of Trigosul, other than the baseless assertions contained in the self-serving statements of Dr. Alberelli and Mr. Herbón. Even when faced with Uruguay's objection to the Tribunal's *prima facie* jurisdiction, Italba was unable to submit any evidence that it owns Trigosul. Italba clearly has not met its burden of proof in this regard—an even heavier burden at this stage of the proceedings, where demonstrating *prima facie* jurisdiction is not sufficient to overcome Uruguay's jurisdictional objections.

56. In fact, the Claimant cannot meet its burden of proof concerning its ownership of Trigosul due to the existence of evidence demonstrating that Italba was *not* the owner of, nor did it control, Trigosul. According to the Memorial, *after* Italba allegedly acquired Trigosul, Dr. Alberelli requested the transfer of the authorization, which was in his name, to Trigosul.[72] It is true that Dr. Alberelli requested the transfer of the authorization on August 9, 1999.[73] What is not true is that Trigosul was owned or controlled by Italba at that time. On November 4, 1999, three months after the transfer request, Mr. Luis Herbón wrote to the National Telecommunications Directorate (URSEC's predecessor) stating that the owners of Trigosul

[72] Memorial, ¶ 17 ("Thus, once Italba had acquired Trigosul, Dr. Alberelli applied to the Uruguay National Communications Authority (UNCA) to transfer his license to operate in the PCS Spectrum to Trigosul."); *see also* Dr. Alberelli's Witness Statement, ¶¶ 16-17.

[73] Letter from G. Alberelli (Italba) to the National Telecommunications Directorate (August 9, 1999) (R-14).

were *Dr. Alberelli* (95% stake) *and his mother* (5% stake).[74] This fact is also backed by a notarial certification dated November 5, 1999 accompanying Mr. Herbón's letter. It stated that based on the nominative stock certificates of Trigosul, the owners of Trigosul as of that date (November 5, 1999) were, again, Gustavo Alberelli Caravetta and Carmela Caravetta Durante (the mother of Dr. Gustavo Alberelli).[75] None of these documents mentions Italba.

57. Moreover, according to Uruguayan law, "licenses, authorizations, frequency allocations and other necessary components of the provision of telecommunications services cannot be freely transferred or passed on."[76] To the contrary, licenses and authorizations are granted specifically to the licensee or authorized party and, therefore, "any transfer requires prior authorization by the Uruguayan Government."[77] This is required under Article 15 of Decree No. 115/003, which includes the following among the obligations of licensees: "[o]btain authorization from the Executive or the Regulatory Unit for Communications Services, as applicable, with regard to any shareholding change in a corporate license holder" and "prior to transferring or assigning the License."[78] However, there is no evidence in the Trigosul file at URSEC, or at its predecessor, indicating that Trigosul acquired ownership of Italba at any time.

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

[75] Notarial Certification No. 603627 (November 5, 1999) (R-20).

[76] Dr. Cendoya's Witness Statement, ¶ 15.

[77] *Id.*, ¶ 15.

[78] Dr. Cendoya's Witness Statement, note 13 (citing the Ministry of National Defense, Decree No. 114/003 and Decree No. 115/003 (March 25, 2003) (C-017)).

58. If Italba were the owner of Trigosul, this "fact" should be on file with Uruguayan government agencies other than URSEC. Uruguay has not found any mention of Italba in such records. For example, as explained by Dr. Pablo Maqueira, Director of Constitutional, Legal, and Registry Matters, in his answer to the request for information issued by the Office of the President of the Republic:

> In our country, a company may only be formed as a subsidiary of a foreign company if it is registered as a branch of said foreign company. In this case, as can be gathered from the certification issued by the General Directorate of Registries and the report prepared by the Director General of Registries, the company TRIGOSUL S.A. is registered as a company that was originally formed in our country, *without any information whatsoever registered for ITALBA CORPORATION*.
>
> *Therefore, TRIGOSUL S.A. is not a subsidiary of ITALBA CORPORATION that can do business as such in the Oriental Republic of Uruguay*.[79]

59. Additionally, the aforementioned report by the Director of Public Registries indicates that "[t]here is no information registered by the company ITALBA CORPORATION. Therefore, we conclude that it was not filed at the office of Public Registries, Commerce Department."[80] This report summarizes the information on Trigosul on file with the public registries, and it is clear that no notarial instrument contains a reference to Italba.[81]

60. Additionally, the Internal Revenue Service states that "[o]ur records provide no evidence that this company is a subsidiary of ITALBA CORPORATION."[82] Trigosul's minutes

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[79] Letter from P. Maqueira (Office of Constitutional, Legal, and Registry Matters) to M. Toma (Office of the President of the Republic) (December 19, 2016) (R-75) (emphasis added).

[80] Report by A. Orellano Cancela (Director of Public Registries) (December 19, 2016), p. 1 (R-76).

[81] *Id.*

[82] Letter from J. Serra (Internal Revenue Service) to the Office of the President of the Republic (December 16, 2016) (R-74).

also make no reference to Italba, and much less to an alleged parent-subsidiary relationship with Trigosul.[83]

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61. Since it has not proven that it is and has been the owner of Trigosul at all times relevant for establishing the Tribunal's jurisdiction, Italba cannot seek protection under the Treaty or the ICSID Convention.

[83] Minutes of Commercial Companies (Trigosul S.A.) (November 1, 2002) (R-26); Minutes of Commercial Companies (Trigosul S.A.) (February 4, 2011) (R-42).

B. ITALBA HAS NO RIGHT TO ENJOY THE BENEFITS OF THE TREATY BETWEEN URUGUAY AND THE UNITED STATES

62. Even if Italba could prove it is the owner of Trigosul, Italba has no right to enjoy the benefits of the Treaty between Uruguay and the United States. This is because it has no substantial business activity in the United States and is owned or controlled by an Italian citizen, Dr. Alberelli. These two facts give Uruguay the right to deny it the benefits of the Treaty under Article 17(2).

1. Applicable Legal Standard

63. Uruguay has accepted this Treaty subject to the existence of the Denial of Benefits clause, which authorizes Uruguay to deny Italba the benefits of the Treaty if the requirements of Article 17(2) are met. The article states the following:

> A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no *substantial business activities* in the territory of the other Party and persons of a non-Party, or of the denying Party, *own or control* the Enterprise. (emphasis added).

64. Investment treaty clauses like Article 17(2) are generally designed to ensure that protections available under a treaty are only available to investors with a sufficient economic connection to the States parties.[84]

[84] R. Dolzer & C. Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2008), p. 55 (RL-66); *see also Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC, and Mr. David Fischer v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction (February 1, 2016) (Fortier, McLachlan, Orrego Vicuña), ¶ 125 (RL-112) ("Denial-of-benefits clauses in investment treaties are generally designed to exclude from Treaty protections nationals of third States which claim rights through so-called 'mailbox' or 'shell' companies that have no economic connection to the state whose nationality is invoked.").

65. Tribunals that have applied this type of clause have determined that "substantial business activity" is a requirement that is "of substance, and not merely of form;"[85] that, while activities need not be "large," they must be material and related to the investment in question;[86] and that such activities must involve the employment of permanent staff[87] and must be carried out by the relevant entity (and not by a related, but different, legal entity).[88] Other indicators that tribunals take into consideration when assessing the magnitude of an investor's activities in the home State include the leasing of office space[89] and the existence of bank accounts. Finally, simply holding stock in a subsidiary in a host State is not considered a substantial business activity.[90]

66. Tribunals have also emphasized that being an owner or having control are "alternatives" for the purposes of denial of benefits clauses.[91] In other words, only one of the two alternatives must be present in order to satisfy the second part of Article 17(2). Tribunals have also decided that "control" means "control in fact, including an ability to exercise substantial influence over the legal entity's management, operation and the selection of members of its

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[85] *Limited Liability Company AMTO v. Ukraine*, SCC Case No. 080/2005, Final Award (March 26, 2008) (Cremades, Soderlund, Runeland), ¶ 69 (RL-70).

[86] *Id.*

[87] *Id.*; *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdictional Objections (June 1, 2012) (Tawil, Stern, Veeder), ¶ 4.66 (RL-91).

[88] *See Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (February 8, 2005) (Salans, van den Berg, Veeder), ¶ 169 (RL-49); *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdictional Objections (June 1, 2012) (Tawil, Stern, Veeder), ¶¶ 4.68-4.69 (RL-91).

[89] *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdictional Objections (June 1, 2012) (Tawil, Stern, Veeder), ¶¶ 4.68-4.69 (RL-91).

[90] *Id.*, ¶¶ 4.68-4.69, 4.74.

[91] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (February 8, 2005) (Salans, van den Berg, Veeder), ¶ 170 (RL-49).

board of directors or any other managing body."[92] The requirement that the company be owned or controlled by nationals of the home State (the United States, in this case) cannot be met "by adducing mere US postal addresses for shareholders" of that company.[93]

67. Finally, the Treaty does not set a period of time for one Party to choose to deny benefits pursuant to Article 17(2). According to tribunals' interpretation and application of Article 10.12.2 of CAFTA-DR,[94] whose language is similar to that of the clause in question, this means that a host State has no obligation to deny an investor benefits under the Treaty *before* a request for arbitration is filed.[95] The government of the United States shares this interpretation. In its non-disputing party submission in *Pac Rim v. El Salvador*, the United States stated that, with respect to Article 10.12.2 of CAFTA-DR, a party has no obligation to invoke the denial of benefits clause prior to the commencement of arbitration and that it may do so as part of a jurisdictional defense after an arbitration claim has been filed.[96]

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[92] *Id.*

[93] *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdictional Objections (June 1, 2012) (Tawil, Stern, Veeder), ¶ 4.81 (RL-91).

[94] The article states: "Subject to Articles 18.3 (Notification and Provision of Information) and 20.4 (Consultations), a Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of any Party, other than the denying Party, and persons of a non-Party, or of the denying Party, own or control the enterprise." The Dominican Republic-Central America FTA (CAFTA-DR) (August 5, 2004), art. 10.12.2 (RL-48). The only difference between Article 10.12.2 of the CAFTA-DR and Article 17(2) of the Uruguay-United States Treaty is that the latter article requires no notice be given to the other Party to the Treaty (in this case, the United States).

[95] *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdictional Objections (June 1, 2012) (Tawil, Stern, Veeder), ¶ 4.84 (RL-91); *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award (January 31, 2014) (Júdice, Conthe, Vinuesa), ¶ 376 (RL-105).

[96] *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdictional Objections (June 1, 2012) (Tawil, Stern, Veeder), ¶ 4.56 (RL-91) (summarizing the submission of the United States).

68. Additionally, pursuant to the text of Article 17(2), Italba already knew it was possible that Uruguay would deny it the benefits of the Treaty (of course, provided the requirements of Article 17(2) were met). The very acceptance of Uruguay's offer to arbitrate this dispute served as concurrent acceptance of such a risk.[97] Therefore, Uruguay may invoke Article 17(2) in this Counter-Memorial and deny Italba the benefits of the Treaty.

2. The Requirements for Invoking the Denial of Benefits Clause Are Met in This Case

69. Based on the above, the only questions remaining regarding the application of Article 17(2) to Italba are the following: (a) did Italba have substantial business activities in the United States and (b) is it owned or controlled by U.S. nationals? The evidence that Uruguay has been able to obtain on Italba demonstrates that the answer to both questions is "no."

70. As a result, based on this provision, Italba cannot benefit from the Treaty between Uruguay and the United States, including the availability of international arbitration to resolve disputes included under section B, as well as the rights included in section A of the Treaty.

a. Italba Has No Substantial Business Activities in the United States

71. As indicated, in order to determine the existence of "substantial business activities," tribunals have used criteria such as the materiality and relationship of such activities

[97] *See Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award (January 31, 2014) (Júdice, Conthe, Vinuesa), ¶ 373 (RL-105).

to the investment, the leasing of office space, and the employment of permanent staff. As indicated below, Italba does not possess these attributes.

(1) Italba's sales volume is not substantial with respect to its alleged investment in Uruguay

72. Under no criterion may Italba be considered as having substantial business activities in the United States. For example, a public report prepared by the company Experian in 2016 indicates that the most recent real annual sales reported by Italba amount to USD 99,000.[98] Neither the volume nor the nature of the sales reflects activities related to the services that Italba argues it was prepared to provide in Uruguay. A report on Italba only mentions that the company is a wholesaler of textile products.[99] There is no mention of investment or activity by Italba concerning telecommunications.

73. Italba also lacks professional licenses, not even from the Federal Communications Commission of the United States (FCC),[100] and it is not registered in the System for Award Management database of United States government service providers.[101]

74. There is no credit report, which normally corresponds to businesses in good standing. The only debt report on the UCC (Uniform Commercial Code) files corresponds to December 11, 2015, only two months prior to the commencement of this arbitration, when Italba

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[98] Business Reports by Experian, *Italba Corp* (March 7, 2016) (R-61).

[99] D&B Business Information Reports, *Italba Corporation* (1997-2016) (R-57).

[100] Federal Communications Commission, "License Search: Results," *available at* http://wireless2.fcc.gov/UlsApp/UlsSearch/searchLicense.jsp (last visited on January 17, 2017) (R-79) (showing the database contains no results when searching for "Italba" by name).

[101] System for Award Management, "Results," *available at* http://sam.gov (last visited on January 17, 2017) (R-80) (showing the database contains no results when searching for "Italba" by name under the Search Records section).

incurred a debt to Security Finance LLC, a lending agency.[102] The Experian report indicates that Italba's only credit card has a credit limit of only USD 9,900.[103]

75. It seems that Italba has no connection at all to the United States in the relevant sector that would allow it to enjoy the benefits of the Treaty with respect to its alleged investment in Uruguay.

(2) Italba operates out of the home of Dr. Gustavo Alberelli and his wife, with no evidence of employees

76. Italba leases no office space in the United States. Instead, it appears to be operated from the private residence of Dr. Alberelli. According to the information provided by Italba in its Notice of Arbitration, the physical address of Italba is 8540 SW 132nd Ct., Miami, FL 33183. This address corresponds to a house located in a residential zone, as shown below in an aerial photograph:

[102] Accurint Comprehensive Business Report, *Italba Corporation* (May 4, 2016), p. 3 (R-65).

[103] Business Reports by Experian, *Italba Corp* (March 7, 2016) (R-61).

77. According to publicly available information, the house is located in a residential zone, and not in a commercial zone. The house's owners are Dr. Gustavo Alberelli and his wife, Beatriz.[104] There is no evidence that Italba owns or is leasing other office space in the United States.

78. Since Italba is located in the Alberelli home, which, in turn, is located in a residential zone, it could not legally employ people to work out of this home. There is no evidence that employees have been hired other than Dr. Alberelli himself and his wife.

79. It is clear that Italba has no substantial business activity in the United States.

[104] Miami-Dade Property Appraiser, "Property Search," *available at* http://www.miamidade.gov/propertysearch/, (last visited on December 22, 2016) (R-77).

b. Italba Is Controlled by an Italian National, Dr. Alberelli

80. Italba is owned and controlled by "persons of a non-Party": Dr. Alberelli, who has at all times relevant to jurisdiction been an Italian national.[105]

81. According to Italba's statements in its Memorial, the owners of Italba are Dr. Alberelli and his wife, in equal shares, that is, 50% each.[106] Dr. Alberelli is an Italian national, and his wife is an American citizen.[107] Therefore, an Italian national, Dr. Alberelli, owns half of Italba's stock.

82. Moreover, although pursuant to Italba's Articles of Incorporation, this 50% means that formally Dr. Alberelli has the same amount of control over Italba as his wife does,[108] there is no doubt that Dr. Alberelli, and not his wife, has de facto control over Italba. *First*, article VII of Italba's Articles of Incorporation designates Dr. Alberelli as "President"[109] and "Registered Agent" of the company, and his wife as "Secretary/Treasurer."[110] *Second*, while Dr. Alberelli has acted together with Mr. Luis Herbón in all or almost all purported business activity in Uruguay and in attempts to procure business with other companies in Uruguay, the name

[105] Dr. Alberelli has had a Uruguayan ID (number 11816529), though he is not a Uruguayan citizen. Even if Dr. Alberelli were a Uruguayan citizen, Uruguay would be entitled under Article 17(2) to refuse Italba the benefits of the Treaty because it is controlled by a person of "the denying Party." United States of America-Uruguay BIT, art. 17(2) (C-001).

[106] Articles of Incorporation of Italba Corporation, art. VIII (C-002).

[107] Memorial, ¶ 12.

[108] Articles of Incorporation of Italba Corporation, art. III.c (C-002).

[109] Articles of Incorporation of Italba Corporation, art. VII (C-002).

[110] *Id.*, [PDF] pp. 5, 7.

Beatriz Alberelli has only played a passive role in the activities described by Italba in its Memorial. For example, it seems Beatriz Alberelli has not signed any of the documents submitted by Italba in her role as an officer of the company. Therefore, Dr. Alberelli, an Italian national, controls Italba, thereby satisfying the conditions necessary for invoking the Treaty's Denial of Benefits clause.

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83. In sum, Italba has no substantial business activities in the United States. It is also owned by and subject to *de facto* control by a "person of a non-Party," Dr. Alberelli, who is an Italian national. Even if Italba had a protected investment in Trigosul, which it does not, these two facts entitle Uruguay to deny it the protections of the Treaty. As a result, the Tribunal has no jurisdiction over Italba's claims.

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

84. Aside from the objections to jurisdiction presented above, an additional, sufficient and independent reason to determine that there is no jurisdiction to decide Italba's claims is that they were already time-barred before the Notice of Arbitration was filed.

1. Applicable Legal Standard

85. Article 26 (1) of the Treaty, "Conditions and Limitations on Consent of Each Party," provides as follows:

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

86. From the text of the Treaty, and in view of the circumstances in this case and other decisions of arbitral tribunals that have interpreted and applied clauses with identical wording, the following five principles emerge:

87. ***First,*** it is clear in this provision that Uruguay's consent to submit this dispute to arbitration in accordance with the Treaty is contingent on strict compliance with this limitations period of three years.[111] In the words of the tribunal in *Spence Investments v. Costa Rica*, Article

[111] *See also, e.g.*, *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award (May 31, 2016) (Dupuy, Mantilla-Serrano, Thomas), ¶ 189 (RL-114).

26(1) is "a legitimate legal mechanism to limit the proliferation of historic claims, with all the attendant legal and policy challenges and uncertainties that they bring."[112]

88. ***Second,*** the critical date for the purposes of the three-year limitations period is determined by counting back from the date on which the claimant filed the claim, i.e. the date on which the claimant filed the request for arbitration, [113] and not the date on which the notice of dispute was sent, as Italba wrongly asserts.[114] Since Italba filed its Request for Arbitration on February 16, 2016, the critical date in this case for the purposes of applying the three-year limitations period is February 16, 2013.

89. ***Third***, to establish whether the breach alleged by the claimant meets this condition for consent, the relevant date is the date on which the claimant, *for the first time*, had or should have had knowledge of the alleged breach of the Treaty *and* that it incurred damage as a result of such breach. In this regard, Italba's home State (the United States) has recognized, in connection with Article 10.18.1 of CAFTA-DR, the wording of which is identical, that when

> a "series of similar and related actions by a respondent state is at issue, an investor cannot evade the limitations period by basing its claim on "the most recent transgression of that series". Accordingly, once a claimant first acquires (or should have acquired) knowledge of the breach and loss, subsequent transgressions by the State Party arising from a continuing

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[112] *Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (October 25, 2016) (Bethlehem, Kantor, Vinuesa), ¶ 208 (RL-117).

[113] *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award (May 31, 2016) (Dupuy, Mantilla-Serrano, Thomas), ¶ 199 (RL-114); *Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (October 25, 2016) (Bethlehem, Kantor, Vinuesa), ¶ 163 (RL-117).

[114] *See, e.g.*, Memorial, ¶¶ 99, 101.

> course of conduct, as opposed to a legally distinct injury, do not renew the limitations period […].[115]

90. ***Fourth***, since the Treaty states that the claimant, "acquired, or should have first acquired, knowledge" of the alleged breach of the Treaty and that it incurred damage as a result of such breach, the knowledge can be actual or constructive. According to the courts in *Spence Investments v. Costa Rica* and *Grand River v. United States,* "'Constructive knowledge' of a fact is imputed to a person if by exercise of reasonable care or diligence, the person would have known of that fact."[116]

91. ***Fifth***, the three-year limitations period applies in conjunction with the principle of non-retroactivity of the application of the Treaty, expressed in Article 2(3). In this case, the three-year limitations period begins to run only with respect to measures that give rise to claims that have occurred after the Treaty entered into force, i.e., after November 1, 2006. Before this date, there was no obligation under this Treaty regarding which a breach could be claimed.

92. In view of the above, if the date on which Italba first acquired actual or constructive knowledge of the alleged breach and of the resulting damage precedes the critical date, the Tribunal would have to conclude that Italba's Request for Arbitration was filed after the limitations period had expired, and, therefore, the Tribunal would not have jurisdiction to hear its claims.

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[115] *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award (May 31, 2016) (Dupuy, Mantilla-Serrano, Thomas), ¶ 173 (RL-114) (citing the submission of the United States in connection with Article 10.20.2 of CAFTA-DR).

[116] *Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (October 25, 2016) (Bethlehem, Kantor, Vinuesa), ¶ 209 (RL-117) (citing *Grand River Enterprises Six Nations Ltd., Jerry Montour, Kenneth Hill, and Arthur Montour, Jr. v. United States*, NAFTA/UNCITRAL, Award (January 12, 2011) (Nariman, Anaya, Crook), ¶ 59 (RL-86)).

2. Italba's Claims Were Already Time-Barred

93. Italba has filed claims based on four measures taken by Uruguay. First, it alleges that URSEC unjustifiably refused to issue a new license to Trigosul to operate in accordance with the 2003 Regulations.[117] According to Italba, the lack of such a license caused it to lose major business opportunities during the years 2006-2011.[118] Second, it claims that in 2011 URSEC revoked Trigosul's authorization to operate in the spectrum, thus impeding Trigosul's business operations.[119] Third, Italba alleges that the reallocation to another company, in 2013, of the frequencies revoked from Trigosul in 2011, completed an "expropriation" from Trigosul.[120] And fourth, Italba alleges that Uruguay refused to comply with the Judgment of the *Tribunal de lo Contencioso Administrativo* (TCA) dated October 23, 2014, which annulled the resolutions of URSEC and MIEM that revoked the authorization to provide services and the frequencies allocated to Trigosul.[121]

94. According to Italba, these four measures constitute breaches of the protections of the Treaty. As will be explained below, Italba has misrepresented the facts, and it is also completely false that Uruguay's actions have breached the Treaty. But, in any event, Italba's claims are already time-barred.

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[117] Memorial, Section II.B.

[118] *Id.*, Section II.B.6.

[119] *Id.*, Section II.C.2.

[120] *Id.*, Section IV.A.2.

[121] *Id.*, Section II.D.

a. URSEC's Alleged Failure to "Update" Trigosul's Authorization for Provision of Services

95. In its Memorial, Italba presents claims based on the alleged unjustified refusal by URSEC to grant a new license to "update" Trigosul's authorization to operate, which URSEC was allegedly obligated to do pursuant to the Regulations of March 25, 2003 (Decrees 114/003 and 115/003).[122] These claims, however, are already time-barred, as confirmed by the facts presented by Italba in its own Memorial.

96. According to Italba, in April 2003, just days after the Regulations were issued, Mr. Herbón began visiting URSEC's offices weekly and Dr. Alberelli called URSEC almost daily, with the sole purpose of requesting an "update" of its authorization to provide data transmission services, which they allegedly considered necessary to finalize a joint venture with the company EPIC.[123] But, according to Italba, since Trigosul did not receive the updated authorization they requested, EPIC decided not to finalize the joint venture, and so that business opportunity was lost.[124] Consequently, by its own account, in 2003 Italba was already certain that the failure to update its authorization cost it, and could continue costing it, business opportunities.

97. And, in fact, as Italba recounts, in the years following the entry into force of the Treaty in November 2006, it allegedly had other experiences that again confirmed that the failure to update its authorization would have a negative economic impact on Trigosul. According to Italba, its negotiations with the companies Phinder, in 2007-2008, and Telmex, in 2007-2011,

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[122] *Id.*, Section II.B, ¶ 26.

[123] *Id.*, ¶ 27; Witness Statement of Mr. Herbón, ¶ 15; Witness Statement of Dr. Alberelli, ¶¶ 28-31.

[124] Memorial, ¶ 29.

were frustrated by the failure to update the authorization.[125] It is clear then, from Italba's own account, that during the period of 2006-2011, Italba already had full knowledge of an alleged breach of the treaty (the failure to update the authorization) and the alleged damage incurred as a result. Naturally, with the revocation in January 2011, it lost any right to an updated authorization that it might have had. Therefore, any claim based on the failure to update the authorization is time-barred, since the alleged wrongdoing ended in 2011, well before the critical date, and, in any case, Italba was already aware of it well before 2011.[126]

98. Italba attempts to justify its inaction by alleging that Uruguay deliberately concealed the fact that Italba would not be granted the alleged updated license to which it believed it was entitled. According to Italba, "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."[127] This is irrelevant and false.

99. *First*, as explained above, during the period of 2006-2011, Italba already had full knowledge of the alleged breach (the failure to update the authorization) and the alleged damage

[125] *Id.*, ¶¶ 42-47 (Phinder), 48-52 (Telmex).

[126] It would be impossible for Italba to argue that the facts related to the TCA Judgment revive its claims on the alleged failure of URSEC to update Trigosul's authorization for provision of services. The TCA Judgment was related solely to the matter of revocation and did not address the matter of the license adjustment. Therefore, any attempt to circumvent the limitations period based on the alleged failure to update the authorization would be completely unsuccessful.

[127] Memorial, ¶ 102.

incurred as a result. Uruguay clearly did not withhold any information that Italba could have needed to initiate an arbitration under the Treaty.

100. *Second*, by simply reading the 2003 Regulations, Italba could have known that these regulations did not require Trigosul to obtain a new authorization or license, that they also did not obligate URSEC to grant Trigosul a new authorization or license, and that, in fact, the new regulatory framework did not even affect Trigosul's ability to provide data transmission services through its allocated frequencies without the need to obtain additional permits, authorizations or licenses.[128] Of course, Decrees 114/003 and 115/003 were available to the public, and Uruguay could not have hidden them from Italba.

101. *Third,* Italba's assertion that it was assured that "URSEC was processing the license and would issue it in due course" completely lacks documentary evidence.[129] Italba has not presented a single document in which a government official has assured it that its license would be updated. It is not enough to assert that verbal promises were made to Italba. As Dr. Nicolás Cendoya explains, "[t]he verbal assurances that it says that it obtained from various officials cannot be the basis of any solid and valid claim. There are no assurances unless they are in writing. The attempt to base rights on allegations that it received "promises" reveals ignorance of the most basic rules of Uruguayan administrative procedure and of the legal rules for administrative acts in general."[130] Italba's accusation that information was deliberately withheld

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[128] *See infra* Section III.A.1 and III.A.2.

[129] Memorial, ¶ 102. The witness statements of Nicolás Cendoya, Elena Grauert, Juan Piaggio, Gabriel Lombide, Alicia Fernández, León Lev and Fernando Pérez Tabó contradict the accusation that URSEC officials have promised to update Trigosul's license. *See* Witness Statement of Dr. Cendoya, II.D.1; Witness Statement of Mr. Piaggio, ¶¶ 4-6; Witness Statement of Mr. Lombide, ¶ 4; Witness Statement of Ms. Grauert, ¶¶ 6-7; Witness Statement of Ms. Fernández, ¶ 4; Witness Statement of Mr. Pérez Tabó, ¶ 4; Witness Statement of Mr. León Lev, ¶ 4-6.

[130] Witness Statement of Dr. Cendoya, ¶ 65.

from it is simply an unfounded claim. In addition, the lack of any written communication from URSEC should have made it clear to Italba that its license would not be updated as it had requested.

102. *Fourth*, in January 2011, URSEC revoked Trigosul's frequencies. Therefore, it is undeniable that by January 2011 the Claimant knew that URSEC was not going to grant it a new license. One of the exhibits submitted by Italba, an email dated March 29, 2011 sent by Dr. Alberelli, discussed at length below, even expressly refers to the possibility of resorting to arbitration under the Treaty in response to URSEC's actions.[131] Based on the pleadings and evidence submitted by Italba itself, it is clear that it was already aware of the alleged breach of the Treaty and the resulting damage before February 16, 2013. Consequently, the claims are time-barred.

b. Revocation of the Frequencies Allocated to Trigosul

103. Italba also bases claims on the January 2011 revocation of the frequencies allocated to Trigosul. However, the Memorial makes it clear that Italba had full knowledge of the revocation and its consequences well before the critical date for the limitations period (February 16, 2013).

104. Italba acknowledges that URSEC revoked the frequencies previously allocated to Trigosul by resolution dated January 20, 2011. Trigosul was notified of the revocation a few days later, on January 26, 2011.[132] There is no question that in January 2011, Italba, which claims

[131] Email from R. Gorter to G. Alberelli et al. (April 14, 2011) (C-071).

[132] Trigosul S.A., Action for nullification (October 28, 2011), p. 1 (C-074) ("the report states that notice was served by fax on January 26, 2011").

to be the owner of Trigosul, already had knowledge, through Dr. Alberelli, of the revocation and the economic consequences it would have for Trigosul. Assuming, *quod non*, that Italba enjoyed the rights of an investor under the Treaty, it had knowledge as of that date of the alleged breach of the Treaty by Uruguay.

105. It is also clear from the record that in 2011 Trigosul (and, therefore, also its alleged owner, Italba) already considered the revocation to be unlawful. On March 1, 2011, Trigosul filed an administrative appeal challenging the revocation.[133] In that appeal, it objected to all of URSEC's arguments on which the revocation was based.[134] A few months later, in October 2011, Trigosul filed a challenge to the revocation of its frequencies with the TCA.[135] In March 2012, Italba filed another complaint against the Executive Branch [Ministry of Industry, Energy and Mining (MIEM)], requesting the annulment of the resolution dated July 8, 2011 that revoked the authorization to provide services in Uruguay.[136]

106. These facts, accepted by Italba, are sufficient in themselves to demonstrate that Italba was aware of the alleged breach of the Treaty and the alleged resulting damage as of early 2011. But there is another piece of conclusive evidence demonstrating, beyond a shadow of a doubt, that Italba was aware that there was a dispute under the Treaty since, at the latest, March 29, 2011, i.e., approximately *five years* before it filed the Request for Arbitration.

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[133] Letter from A. Durán Martínez to G. Lombide (March 1, 2011) (C-069).

[134] Memorial, ¶ 68.

[135] Trigosul S.A., Action for nullification (October 28, 2011) (C-074); *Tribunal de lo Contencioso Administrativo*, Judgment No. 579 (October 23, 2014), p. 7 (C-076) ("The petitions for annulment were filed correctly on October 28, 2011 (file No. 728/2011) and on March 23, 2012 (File No. 148/2012)").

[136] Trigosul S.A., Action for nullification (March 22, 2012) (C-075);

107. On that date, Dr. Alberelli acknowledged, in his own words, that he could have invoked the Treaty and filed a claim against Uruguay on account of the revocation. On March 29, 2011, Dr. Alberelli sent an email to Kevin Skillin and Robert Gorter of the United States Embassy in Uruguay,[137] in relation to Trigosul's protest to URSEC concerning the revocation of its frequencies, the failure of URSEC to respond, and the information it had received that URSEC planned to auction the frequencies that were revoked from Trigosul. In this email, Dr. Alberelli requested the Embassy officials' help to schedule a meeting with the president of URSEC to determine whether the situation could be settled peacefully or whether he should "put the investment treaty into practice."[138]

108. Dr. Alberelli's email, dated March 29, 2011, reads verbatim as follows:

> *Dear Kevin and Robert*
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> *I am sending you a copy of the response from our lawyer to the URSEC. There has been no response from them since it was submitted. Through personal contacts I have found out that the URSEC's intention is to put the frequencies up for public auction.*
>
> *I would be infinitely grateful if you could request a meeting with the president of the URSEC to see if this situation can be resolved amicably, of whether we will need to put the investment treaty into practice. Thank you for all of your help*
> *Thanks, Gustavo.*[139]

109. Italba (through Dr. Alberelli) was clearly aware since at least March 29, 2011 that there was a dispute with Uruguay that was subject to the provisions of the Treaty. In view of

[137] The email was submitted as part of exhibit C-071 of Italba's Memorial. This exhibit is mentioned in paragraph 71 of the Memorial (n. 160) and paragraph 79 of the Witness Statement of Dr. Alberelli.

[138] Email from R. Gorter to G. Alberelli et al. (April 14, 2011) (C-071).

[139] Email from R. Gorter to G. Alberelli et al. (April 14, 2011) (C-071) (errors in the original) (emphasis added).

this communication, there can be no argument about conduct that was "*unknown and unknowable* to Italba until March 2015"[140] or about the alleged fact that Uruguay withheld information from Italba until that date.

110. Nor is it possible to say that it was not until 2015 that "Italba [saw] for the first time that URSEC's failure between 2006 and 2011 to issue Trigosul a license […] and its improper termination of Trigosul's license in 2011 were […] the product of bad faith and a pattern of discriminatory conduct," [141] an assertion that, of course, is also false. What is relevant here is not the date on which Italba "could see" the reasons behind the alleged misconduct, but rather the date on which it had or should have had knowledge of the alleged breach of the Treaty and that it incurred damage as a result of that breach. The evidence presented by Italba shows that this date can be no later than March 29, 2011, *approximately five years before the filing of the Request for Arbitration.*

c. Allocation of Frequencies to Dedicado

111. In an attempt to base its claims on an event subsequent to the critical date of February 16, 2013, and thus attempt to prevent its claims from being time-barred, Italba focuses on the allocation of frequencies to Dedicado in September 2013.

112. Italba's emphasis on the "reallocation" of frequencies to Dedicado is nothing more than a distraction. It was the revocation of January 20, 2011, and not the allocation of frequencies in 2013, that made it impossible for Trigosul to continue its business activities. For purposes of the limitations period clause, the date on which Italba became aware of the allocation

[140] Memorial, ¶ 101.

[141] *Id.*, ¶ 101.

of frequencies to Dedicado is irrelevant. These are subsequent events closely related to the revocation that cannot be considered events that are independent therefrom. As such, they are part of "series of similar and related actions" and, therefore, "an investor cannot evade the limitations period by basing its claim on 'the most recent transgression of that series.'"[142]

113. In any event, the evidence presented by Italba itself shows that it is completely false that Italba did not become aware of what would happen to its revoked frequencies until March 2015. In the March 29, 2011 email, Dr. Alberelli stated that he had become aware that the frequencies whose allocation was revoked from Trigosul were going to be auctioned to another company.[143] In other words, Italba was aware of a possible allocation of frequencies *four years before* what it admits. For the purposes of the limitations period clause, it is completely irrelevant that the frequencies were not put up for sale at public auction but rather directly reallocated (as is done with this type of provisional and revocable allocation and authorization).[144] What is relevant is that *in 2011* Dr. Alberelli was already aware that the frequencies that had been revoked from Trigosul were going to be allocated to another company.

114. Uruguay reiterates that the crucial criterion established by the Treaty is when the Claimant "*first acquired,* or should have first acquired, knowledge of the breach alleged […] and knowledge that [it] […] has incurred loss or damage."[145] And, as explained in the previous

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[142] *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award (May 31, 2016) (Dupuy, Mantilla-Serrano, Thomas), ¶ 173 (RL-114) (citing the submission of the United States in connection with Article 10.20.2 of CAFTA-DR).

[143] Email from R. Gorter to G. Alberelli et al. (April 14, 2011) (C-071) ("Through personal contacts I have found out that the URSEC's intention is to put the frequencies up for public auction.").

[144] *See* Witness Statement of Dr. Cendoya, note 5, Section V.

[145] BIT between Uruguay and the United States, Article 26(1) (C-001) (emphasis added).

section, in 2011 Italba was already fully aware of the revocation, understood the effects it would have on Trigosul, and considered it to be an unlawful act.[146] However much Italba tries to distract the Tribunal with references to the "reallocation" of frequencies to Dedicado, the inescapable reality is that its claims have become time-barred, as shown by the evidence that Italba itself has presented in this arbitration.

d. Claims Relating to Compliance with the TCA Judgment

115. In another attempt to escape the three-year limitations period contained in the Treaty, Italba has also fabricated Uruguay's alleged noncompliance with the Judgment of the TCA, claiming that it caused the alleged expropriation because the TCA Judgment explicitly annulled the revocations of 2011 with retroactive effect.[147]

116. This is another irrelevant and false assertion. Despite the fact that Uruguay complied with the TCA Judgment, and its actions in this regard were not acts of expropriation, these facts are irrelevant for the purposes of determining whether there is jurisdiction.[148] Once again, what matters is the date on which Italba "*first acquired,* or should have first acquired, knowledge of the breach alleged […] and knowledge that [it] […] has incurred loss or damage."[149] There can be no doubt that the alleged breach occurred in January 2011, when

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[146] *See supra* Section II.C.2.b.

[147] Memorial, ¶ 100.

[148] *See infra* Section III.D; *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award (May 31, 2016) (Dupuy, Mantilla-Serrano, Thomas), ¶ 173 (RL-114) (citing the submission of the United States in connection with Article 10.20.2 of CAFTA-DR). (stating that when "a series of similar and related actions by a respondent state is at issue, an investor cannot evade the limitations period by basing its claim on 'the most recent transgression of that series.'").

[149] BIT between Uruguay and the United States, Article 26(1) (C-001) (emphasis added).

Trigosul's frequencies were revoked in a manner that Italba, notified through Dr. Alberelli, then considered unlawful and in violation of the Treaty.[150]

117. Moreover, the proceedings before the TCA, including the TCA Judgment, was the process chosen by Italba to resolve the dispute on the revocation of the allocation of frequencies. The TCA Judgment cannot be the basis for separate claims of breach of the Treaty because it is an integral part of the dispute on the revocation of the allocation of frequencies, which took place in January 2011.

118. Indeed, the alleged noncompliance of Uruguay with the TCA Judgment cannot be considered anything other than, in the words of the United States cited above, "the most recent transgression"[151] in a series of actions by the Uruguayan authorities that Italba has presented to the Tribunal. As the very State that Italba affirms is its own has acknowledged, with respect to the CAFTA-DR clause with identical wording, such conduct cannot serve as the basis to circumvent the limitations period of the Treaty.[152]

119. This conclusion is analogous to the situation in *Corona Materials v. Dominican Republic*, in which the tribunal issued an award rejecting jurisdiction on account of the effect of the limitations period clause of the CAFTA-DR. In *Corona Materials*, the claimant also attempted to circumvent the effects of the limitations period clause of the treaty, arguing that the government authority's failure to answer a request for reconsideration of the denial of an

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[150] URSEC, Resolution No. 001/011 (January 20, 2011) (C-068).

[151] *Supra* ¶¶ 89, 112.

[152] *See Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award (May 31, 2016) (Dupuy, Mantilla-Serrano, Thomas), ¶ 173 (RL-114) (citing the submission of the United States in connection with Article 10.20.2 of CAFTA-DR).

administrative request constituted a separate measure giving rise to separate claims that were within the three-year limitations period. The tribunal rejected this attempt to fabricate the claim so as to escape the limitations period.[153]

120. In particular, the tribunal agreed with the analysis of the respondent that the claim for failure to answer the request for reconsideration was "relate[d] to the same theory of liability" as the other claims.[154] According to this theory of liability, the State "refused to permit Corona Materials to proceed with its mining project for reasons that are not legitimate and which are unrelated to the merits of that project" and "[d]ue to the refusal of the Environmental License by the Respondent, the Claimant cannot enjoy any meaningful benefit from the Exploitation Concession."[155] The tribunal also favorably cited the United States' position in this case in the sense that: "Where a 'series of similar and related actions by a respondent State' is at issue, an investor cannot evade the limitations period by basing its claim on 'the most recent transgression in that series.'"[156]

121. Here, as in *Corona Materials*, the claims related to both actions by the State are based on the same theory of liability: that URSEC's revocation of the frequencies and the authorization to provide services prohibited Italba from continuing its business activities.

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[153] *Id.*, ¶¶ 204-211; *see also Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (October 25, 2016) (Bethlehem, Kantor, Vinuesa), ¶ 226 (RL-117) ("in determining jurisdiction, a tribunal cannot rest simply on how a claimant has formulated its case and the respondent formulated its reply. […] Their task is not to shine a light on truth. It is to shine a light on the issues, leaving the tribunal to discern the reality of the case.").

[154] *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award (May 31, 2016) (Dupuy, Mantilla-Serrano, Thomas), ¶ 210 (RL-114).

[155] *Id.*

[156] *Id.*, ¶ 215.

122. There is no question that when Italba was given notice of the revocation, *i.e.*, in January 2011, Italba considered that such action was unlawful and in violation of the Treaty. The dates of the events themselves, as well as the e-mail from Dr. Alberelli in March 2011, establish that Italba had knowledge of the alleged breach and the resulting losses almost two years before the critical date for the purposes of the limitations period, and they contradict Italba's assertion that it was not until March 2015 that it first became aware of this alleged violation of its rights under the Treaty.

123. Therefore, in accordance with Article 26(1) of the Treaty, all of Italba's claims had already become time-barred before Italba filed its Notice of Arbitration with ICSID on February 16, 2016.

D. TRIGOSUL'S AUTHORIZATION TO PROVIDE SERVICES AND ALLOCATION OF FREQUENCIES DO NOT QUALIFY AS "INVESTMENTS" UNDER THE TREATY

124. The Treaty defines the term "investment" in Article 1 as

> every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include: […] (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law.

125. The above definition of "investment" in Article 1 of the Treaty is subject to two important clarifications. One of them is included in footnote number 3, which stipulates that not all "licenses, authorizations, permits" have the characteristics of an investment. Footnote 3 states:

> Whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that *do not create any rights protected under domestic law*. (Emphasis added).

126. Italba alleges that its investments in Uruguay include its "license to operate in the Spectrum."[157] Italba formulates its claims and bases a major part of the request for damages on the loss of value of the "license" as if it were a property right of Trigosul.[158]

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[157] Memorial, ¶ 93.

[158] Expert Report of Santiago Dellepiane Avellaneda, Compass Lexecon (September 16, 2016) ("Compass Lexecon Report"), ¶ 62.

127. However, as explained in this section, neither the authorization nor the allocation of frequencies underlying the alleged license "create any rights protected under [Uruguayan] law"[159] in accordance with the definition in the Treaty of protected investments.

128. This is another important fact that Italba has attempted to evade or omit. Italba attached to its Memorial the original allocation of frequencies to Dr. Alberelli.[160] This allocation is Exhibit C-004. But this document is incomplete. When Uruguay noticed this, it notified Italba's counsel about the incompleteness of the document and requested a full copy.[161] Italba's counsel responded that Italba did not have a complete version. This surprised Uruguay, which fortunately managed to locate a complete copy of the document in its files. Upon comparing both versions, Uruguay found that the following text was missing from the version presented by Italba to the Tribunal:

> **"5.-** That this authorization is provisional and revocable at any time without a right to a claim or compensation of any kind whatsoever […]"[162]

129. Either by mistake or on purpose, Italba presented a document to the Tribunal that omitted crucial text: that the allocation of frequencies to Dr. Alberelli was provisional and revocable, and that the allocation, therefore, could be revoked without any compensation whatsoever.

130. The provisional and revocable nature of the allocation of frequencies and the clause that expressly indicates that the regulatory authority could revoke it "without a right to a

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[159] BIT between Uruguay and the United States, note 3 (C-001).

[160] National Communications Directorate, Resolution No. 227/97 (August 4, 1997) (R-12).

[161] Letter from P. Reichler to A. Yanos (December 6, 2016) (R-73).

[162] National Communications Directorate, Resolution No. 227/97 (August 4, 1997), p. 3 (R-12).

claim or compensation of any kind whatsoever,"[163] are important characteristics that fulfill essential functions for the proper functioning of national telecommunications systems.[164] In Uruguay, as in many countries, the radio spectrum is considered a public asset, and because of its limited nature, the State has an interest in ensuring that the use of the radio spectrum serves the public interest.[165]

131. The revocable and provisional nature of the allocation of frequencies allows the State to ensure that companies receiving allocations are serious operators who meet all the technical, legal and economic requirements to effectively provide the authorized services to the public in an uninterrupted fashion.[166] It is not in the public interest to allocate frequencies to companies that do not use them; or, in any case, to speculative companies that do not seek to provide services to the public[167] but rather sell or lease their access to the frequencies to other

[163] National Communications Directorate, Resolution No. 227/97 (August 4, 1997) (R-12); National Communications Directorate, Resolution No. 444/000 (December 12, 2000) (C-012); URSEC, Resolution No. 611/007 (December 27, 2007), p. 2 (C-041); URSEC, Resolution No. 157/010 (March 25, 2010), p. 3 (C-053); URSEC, Resolution No. 544/010 (October 29, 2010), p. 2 (C-054); URSEC, Resolution No. 053/011 (March 16, 2011), p. 3 (C-055).

[164] Witness Statement of Dr. Cendoya, ¶ 13 ("The use of particular spectrum frequencies can change as a result of agreements made internationally as a logical consequence of the fact that the characteristics of the radio spectrum derive from the rules of physics and not from the borders of States [...] This is why frequencies are allocated on a 'provisional and revocable basis, without the right to claim any kind of indemnity.' This text appears on all frequency allocations made without auction in Uruguay.").

[165] *Id.*, ¶¶ 7-8.

[166] Decree Law 15,671, according to which the frequency allocations have been awarded to Dr. Alberelli and Trigosul, states that all of them will be made provisionally. Ministry of National Defense, Law No. 15,671 (November 8, 1984), Article 3 (R-10).

[167] Witness Statement of Dr. Cendoya, ¶ 8 ("This general principle of granting authorizations on a provisional and therefore essentially revocable basis is due precisely to the national quality of the natural asset (radio spectrum) that must be administered with strict adherence to the rules and principles of Administrative Law and in order to satisfy the general interest. Accordingly, the regulations of this law (Decree 114/003 of 25 March 2003) establish several measures to ensure that an asset that belongs to everyone is not used as an element of pure economic speculation.").

companies, which, in any case, would be illegal without express approval from URSEC.[168] The revocable and provisional nature of the allocation allows the State to protect the public interest by facilitating the revocation of frequencies allocated to operators that do not use them, and allocate them to other operators that make a more efficient use of the radio spectrum.[169]

132. Consequently, having an authorization to provide services, such as Trigosul's authorization, does not entitle the authorization holder to automatic allocation by Uruguay of a frequency in the spectrum.[170] The allocation of frequencies is a different administrative act, carried out by different authorities,[171] and it is subject to conditions that are separate from those considered for an authorization to provide services. These conditions include the availability of frequencies for the authorized service and the need to provide such service.[172]

133. When specific frequencies were allocated to a company, this allocation was always done provisionally and revocably.[173] In other words, frequency allocations were not granted for any set period of time, much less in perpetuity.[174] Under these clear conditions,

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[168] *Id.*, ¶ 7 ("[A]ny transaction that involves the alienation of a publicly-owned asset would be completely null and void in terms of its object and, however much a provisional and revocable allocation may be extended, there will never be a change of ownership based on the passage of time inherent to adverse possession.").

[169] *Id.*, ¶ 21 ("It is therefore very important for URSEC to comply with its task to ensure efficient use of the spectrum, making certain that there is no unused or inefficiently used spectrum.").

[170] *Id.*, ¶ 20 ("It is also important to stress that possession of an authorization to provide services does not create an obligation on the State to allocate frequencies."); Ministry of National Defense, Decree No. 115/003 (March 25, 2003), Article 5, pp. 36-37 (C-017).

[171] Ministry of National Defense, Law No. 15,671 (November 8, 1984), Articles 3, 4 (R-10); Witness Statement of Dr. Cendoya, ¶¶ 18-19.

[172] Witness Statement of Dr. Cendoya, ¶ 26; Law No. 18,719 (December 27, 2010), Article 143 (R-41).

[173] Witness Statement of Dr. Cendoya, ¶¶ 7, 11.

[174] In the opinion of Dr. Pereira, "radio or Hertzian waves constitute a limited natural resource […[nobody has a pre-existing right to use these waves. Their use is only possible through a concession. Whether it is called thus or an authorization, the decision approving the use of waves is nothing other than a concession for the use of a public asset [...] as with every decision to grant a concession, it is granted in exercise of discretionary power." Opinion of Dr. Pereira, ¶ 97; Witness Statement of Dr. Cendoya, ¶ 14.

companies know that their allocation could be canceled at any time because of its revocable nature, and that they would not be entitled to claim any compensation.[175] In concrete terms, as analyzed by Dr. Santiago Pereira, an expert in Uruguayan administrative law, provisional allocation of a frequency involves the following:

> "the very nature and characteristic of this type of right is not so much the fact that the link happens to guarantee some instrumental use, but rather its provisional nature… this is indeed an imperfect right because, at any moment and without compensating to any private party, the Administration may revoke the respective decision for reasons of public interest …." Therefore, following DURÁN MARTÍNEZ, "the administrative decision that grants an imperfect subjective right may be revoked, complying with the aforementioned; when this is ignored, the act that provides for said revocation is illegitimate …."[176]

This means that URSEC can revoke the spectrum at any time with only the limits of the general legal regime of administrative acts.[177]

134. According to Dr. Pereira, due to the provisional and revocable nature of spectrum frequency allocations, such allocations do not confer to the recipients any right recognized or protected by the laws of Uruguay: "… the allocation of radio channels of which the plaintiff company was the holder was provisional and revocable, in view of which it is not possible to invoke a legitimate expectation that said allocation would not be revoked, or of the existence of supposed acquired rights to maintain it, because the claimant was aware of the

[175] Witness Statement of Dr. Cendoya, ¶ 11.

[176] Opinion of Dr. Pereira, ¶ 89.

[177] In the opinion of Dr. Pereira, "the authorization for the provision of services granted by the Administration to Trigosul under Executive Resolution No. 142/2000 was granted without any term, constituting a concession with no fixed term or a permit, which could be revoked by the Administration, at any moment, for reasons of general interest." *Id.*, ¶ 90; Witness Statement of Dr. Cendoya, ¶ 11.

provisional status of the situation."[178]

135. When the frequencies originally allocated to Dr. Alberelli were allocated to Trigosul, the allocation was also subject to the condition of being provisional and revocable.[179] Therefore, the evidence leaves no doubt: the allocation of frequencies to Trigosul did not give Trigosul a right protected by Uruguayan law. Therefore, it does not constitute an investment under the Treaty, and it cannot serve as a basis for the claims asserted in this arbitration.

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136. In view of the foregoing, the Tribunal does not have jurisdiction over the claims filed by Italba. *First*, Italba has failed to meet the basic and indispensable requirement of demonstrating that it is in fact the owner of Trigosul. The lack of evidence in this regard is striking. *Second*, Italba has no significant business activities in the United States and is controlled by a person from a country that is not party to the Treaty, and therefore Uruguay has the right to deny it the protections of the Treaty. *Third*, Italba's claims are time-barred because they were not filed within three years after the date on which it first became aware of the breaches it alleges and the damage it allegedly incurred as a result. *Fourth*, the authorization to provide services and the allocation of frequencies that Trigosul had do not constitute protected

[178] Opinion of Dr. Pereira, ¶ 99 (citing TCA, Judgment No. 539/2015 (July 28, 2015) (R-51)); *see also*, Witness Statement of Dr. Cendoya, ¶ 19 ("It is important to emphasize that there is no natural right to use certain frequencies. That is why, when URSEC allocates frequencies, the text of the allocation expressly states that they are 'provisional and revocable without the right to any claim or indemnity.' This text is found in all the frequency allocations received by Trigosul, including in its frequency allocations that were revoked in 2011.").

[179] National Communications Directorate, Resolution No. 444/000 (December 12, 2000) (C-012).

investments for the purposes of the Treaty. For each of these four reasons, Italba's claims should be dismissed in their entirety.[180]

[180] In light of the severe evidentiary deficiencies in Claimant's case, Uruguay reserves its right to request that the Tribunal dismiss Italba's claims with prejudice. *Cementownia v. Turkey*, Award, ¶¶ 162-163 (RL-78) (granting the respondent's request to declare that the claimant had filed a fraudulent claim with ICSID through "attempts to gain access to international jurisdiction without having made an investment within the meaning of Art. 1(6) of the ECT" in order "to prevent the Claimant from filing this baseless claim before other international jurisdictions or even before ICSID again.").

III. EVEN IF THE TRIBUNAL WERE TO EXAMINE THE MERITS OF THE DISPUTE, IT WOULD NOT FIND ANY BREACH OF URUGUAY´S OBLIGATIONS UNDER THE TREATY

137. As noted above, Italba alleges that Uruguay breached its obligations under the Treaty in four respects: (1) failure to issue a new license to Trigosul in accordance with the 2003 regulation; (2) the revocation in 2011 of the authorization to provide telecommunications services and allocation of frequencies that had been granted to Trigosul; (3) the subsequent allocation to Dedicado of the frequencies that were revoked; and (4) the alleged noncompliance with the Judgment of the TCA. Italba alleges that these acts or omissions have violated its rights not to be expropriated, to receive fair and equitable treatment, to receive national treatment and treatment no less favorable than that accorded to other countries, and full security of its investment, contained in Articles 3, 4, 5, and 6 of the Treaty. All of these allegations are completely unfounded. As shown below, Uruguay has always acted in accordance with the standards established by the Treaty and Italba's arguments contain critical errors that, without question, will result in finding no liability of Uruguay.

A. URUGUAY DID NOT VIOLATE ITS OBLIGATIONS WITH RESPECT TO THE NON-AUTHORIZATION OF A NEW LICENSE BETWEEN 2003 AND 2011

138. In 1997, the Uruguayan government granted Dr. Alberelli, in his personal capacity, authorization to provide data transmission services in the radio spectrum,[181] and, through a separate administrative act, it allocated to him the use of the specific frequencies to provide these services in the 1865 and 1900 MHz bands.[182] In 2000, Dr. Alberelli transferred the authorization to Trigosul.[183] The transfer was approved by the National Communications Directorate (DNC), based on the representations of Dr. Alberelli that Trigosul's stock belonged to him, in his personal capacity (95%) and to his mother (5%).[184]

139. On December 12 of the same year, in connection with the international agreements for the allocation of spectrum intended for mobile communications,[185] all the allocation recipients that, like Dr. Alberelli, had frequency allocations in the band between 1700 MHz and 2200 MHz, were migrated to other frequencies.[186] As a result of this migration, Trigosul was allocated the sub-blocks "K" and "M," corresponding to the sub-bands of frequencies 3425 – 3450 MHz and 3525 – 3550 MHz, to provide the services for which it was

[181] Ministry of National Defense, Resolution No. 75/997 (January 17, 1997), p. 2 (C-003). Uruguay submits a legible copy of this document in Exhibit R-11, since Italba submitted an illegible copy of this document in its memorial. By itself, this resolution did not guarantee Dr. Alberelli access to the radio spectrum, let alone to specific frequencies thereof, for the performance of the authorized activities. *See* Witness Statement of Dr. Cendoya, ¶¶ 20-21; Opinion of Dr. Pereira, ¶ 94.

[182] Ministry of National Defense, Resolution No. 227/997 (August 4, 1997) (C-004).

[183] Ministry of National Defense, Resolution No. 142/000 (February 8, 2000) (C-005).

[184] Letter from L. Herbón (Trigosul S.A.) to the National Telecommunications Directorate (November 4, 1999) (R-19).

[185] Witness Statement of Dr. Cendoya, ¶ 13.

[186] Ministry of National Defense, Decree 282/000 (October 3, 2000) (C-010).

authorized.[187] At the time of the allocation of the new frequencies, Trigosul had not yet begun to provide the authorized services.

140. In March 2003, Uruguay enacted a comprehensive reform of the telecommunications regulatory system.[188] Trigosul had not yet begun to provide any services. Italba alleges in its Memorial that, because of these new regulations, it was necessary for companies previously authorized to provide specific services in allocated frequencies, such as Trigosul, to obtain new licenses (specifically "Class B") to continue their operations.[189] Italba further alleges that the new regulatory framework required URSEC to "provide Trigosul with a license conforming to the new regulations."[190] Italba argues that not granting a license to Trigosul constitutes a breach of the Treaty, specifically of the rights to receive: (1) fair and equitable treatment under Article 5 (a); (2) treatment no less favorable than its competitors under Article 3; and (3) the full protection and security of its "investment" under Article 5(b).

141. Italba's argument is factually and legally unsound, because it is based on three completely false premises: (1) that Trigosul needed to update its authorization to provide services into a new license after the adoption of the regulations in 2003; (2) that URSEC was obligated to issue the new license to Trigosul; and (3) that Trigosul's competitors received updated licenses. All these allegations by Italba are manifestly erroneous. The conclusive evidence attached to this memorial demonstrate that: (1) it was neither required nor necessary for

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[187] National Communications Directorate, Resolution No. 444/000 (December 12, 2000), p. 2 (C-012).

[188] Witness Statement of Dr. Cendoya, ¶ 22; Ministry of National Defense, Decree No. 114/003 and Decree No. 115/003 (March 25, 2003) (C-017).

[189] Memorial, ¶ 4.

[190] *Id.*, ¶ 2.

Trigosul or its competitors to receive an updated license as of 2003 to continue operating in accordance with their prior authorizations; (2) URSEC was not obligated to issue such licenses; and (3) of course, none of Trigosul's alleged competitors received them.

142. Therefore, Italba's arguments are without merit, and there was no breach of the Treaty.

1. The 2003 Regulations Did Not Affect Trigosul's Authorization or Frequency Allocation

143. The Claimant's claim is based on the erroneous argument that the regulations adopted by Uruguay in 2003 affected its ability to operate, in the sense that, as a result of these new regulations, Trigosul could not provide the data transmission services through the allocated frequencies without obtaining a new license from URSEC. This argument has no connection to reality.

144. The authorization to provide services and the allocation of frequencies originally granted to Dr. Alberelli were transferred, on the same terms, to Trigosul.[191] The 2003 regulations did not impose any limitation on its authorization to provide services or on the use it could give to the frequencies allocated to it.[192] No obligation of obtaining a new license was imposed on it, let alone as a precondition to provide the services previously authorized in the frequencies previously allocated.[193] At all times, until the revocation of its frequency allocation in 2011,

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[191] Ministry of National Defense, Resolution No. 142/000 (February 8, 2000) (C-005); National Communications Directorate, Resolution No. 444/000 (December 12, 2000) (C-012).

[192] Witness Statement of Dr. Cendoya, ¶ 23 ("The new 2003 license system co-exists with the previous permits, which continued in operation as before without any obstacle or restriction.").

[193] *Id.*, ¶ 60 ("Contrary to Italba's statement, the 2003 Regulations do not establish any obligation on URSEC to update service provision authorizations already in existence under the previous rules. In fact, the two systems have co-existed to date."); Opinion of Dr. Pereira, ¶¶ 122, 127.

Trigosul was able to provide the same services in the same frequencies without needing to obtain additional licenses, authorizations or allocations from URSEC or from any other regulatory agency.[194]

145. The Claimant misunderstands the regulatory framework that entered into force as of 2003. Or perhaps it understands it very well and it deliberately misrepresents it to mislead the Tribunal and create the false impression that the new regulations imposed the requirement that Trigosul obtain a new license to provide the authorized services as of the year 2000, and that, solely because of the bad faith of URSEC was this supposedly essential license not granted.[195] Therefore, it is useful for Uruguay to clarify what the regulatory changes in 2003 were, and explain why they had no impact whatsoever on Trigosul's operation.

146. On March 25, 2003, two regulations were issued: the "Regulation on the Management and Supervision of the Radio Electric Spectrum" and the "Telecommunications Licenses Regulation"; Decrees 114/003 and 115/003, respectively.[196] As its name indicates, Decree 114/003 regulates the use of the radio spectrum; consequently, it applies with regard to frequency allocation.[197] Among the relevant provisions, we should note that, as part of the efficient use of the spectrum, URSEC may modify the quantity of radio spectrum allocated

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[194] Witness Statement of Dr. Cendoya, ¶ 25 ("The fact is that all services authorized before the regulations were issued continued to work without any problem.").

[195] *Id.*, ¶ 68 ("The truth is that there was no right (or need) to have its authorization updated and so Trigosul never lodged any appeals demanding this (until this arbitration occurred).").

[196] Ministry of National Defense, Decree No. 114/003 and Decree No. 115/003 (March 25, 2003) (C-017). Decree 114/003 "Regulations for Administration and Supervision of the Radio Spectrum" is contained on pp. 1 to 32 of the exhibit (reproduced twice), and Decree 115/003 "Regulations on Telecommunications Licenses," is contained on pp. 33 to 48 of this same exhibit.

[197] Opinion of Dr. Pereira, ¶ 112.

without this giving rise to claims of any kind;[198] moreover, URSEC was given authorization to cancel allocated frequency blocks that were not used in the terms of the respective authorization.[199] Similarly, any open-ended allocation granted will be a "provisional permit."[200] It is clear that these fundamental aspects of the regulatory system prior to 2003 were preserved by the new regulations.[201]

147. The other decree, 115/003, regulates the conditions under which providing telecommunication services will be authorized.[202] The issuance of these two separate regulations distinguished between the laws that regulate the use of a certain frequency in the spectrum and those that authorize providing telecommunication services.[203] Even after the adoption of these regulations, it was not sufficient to simply obtain authorization to provide telecommunication services. The authorized party needs to also obtain allocation of specific frequencies to be able to provide the authorized services. This is another fundamental aspect of the regulatory framework prior to 2003 that was preserved in the new regulation.[204]

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[198] Ministry of National Defense, Decree No. 114/003 (March 25, 2003), Article 12, pp. 6-7 (C-017).

[199] Ministry of National Defense, Decree No. 114/003 (March 25, 2003), Article 26, p. 11 (C-017); Opinion of Dr. Pereira, ¶¶ 114-116.

[200] Ministry of National Defense, Decree No. 114/003 (March 25, 2003), Article 18.a, p. 8 (C-017). As Dr. Pereira has noted, "[t]he provisional and revocable nature of the allocation of frequencies arises not only out of the very nature of the allocation of frequencies, but it is also stipulated in the text of subsection 3 of Article 3 of Decree-Law No. 15.671, which confers power upon the DNC to grant provisional authorizations. Said solution is reiterated in subsection 4 of Article 8 of Public Companies Law No. 16.211. Likewise, the current Article 18 of Decree No. 114/2003 provides that the use of the radio spectrum may be carried out with: a) an authorization with no fixed term or provisional permission, or b) an authorization with a fixed term." Opinion of Dr. Pereira, ¶ 95.

[201] Ministry of National Defense, Law No. 15,671 (November 8, 1984), Article 3 (R-10).

[202] Opinion of Dr. Pereira, ¶ 118.

[203] Article 5 of Decree 115/003 establishes that allocation of frequencies will be carried out according to a rule other than the decree itself: "[t]he assignment of frequencies […] shall be made in conformity with the regulations in force relevant to each case and the existing availability of means or facilities." Ministry of National Defense, Decree No. 115/003 (March 25, 2003), Article 5, p. 37 (C-017).

[204] Opinion of Dr. Pereira, ¶¶ 93-94.

148. The most significant change introduced in 2003 was the part of Decree 115/003 that established four new types of license to provide telecommunication services and stipulated the requirements needed to obtain a license of any of the new types.[205] Decree 115/003 defines a license as "authorizations for the provision of telecommunications services to third parties or to the public at large."[206] Only companies that did not have this authorization under the previous regulatory framework needed a license under this decree.[207] Therefore, obtaining a new license was not necessary for companies that already had their authorizations under the previous regulatory system.[208] The previous authorizations were still in effect with respect to those companies, without any change and without the need to obtain a new authorization.[209]

149. In fact, none of the other companies that, like Trigosul, had a prior authorization to provide telecommunication services and operated during this period, requested or obtained one of the new licenses—because it was not necessary—and all continued to provide the same services, on the same frequencies that were allocated to them, under the same authorizations and allocations prior to 2003.[210]

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[205] Statement of Dr. Cendoya, ¶ 24; Ministry of National Defense, Decree No 115/003 (March 25, 2003), Article 11, pp. 39-41 (C-017).

[206] Ministry of National Defense, Decree No. 115/003 (March 25, 2003), Article 3, p. 35 (C-017).

[207] *Ibid*, Articles 5, 8, pp. 36-38.

[208] Opinion of Dr. Pereira, ¶¶ 122, 127 ("Trigosul did not need to change, modify and/or update its authorization prior to the regime of Decrees 114/003 and 115/003 […] Trigosul could have continued carrying out its activity without the need to receive an 'update' of its authorization, as it indeed occurred according to the allegations made by Claimant itself and as it occurred with many other companies.") Statement of Dr. Cendoya, ¶ 23 ("The new 2003 license system co-exists with the previous permits, which continued in operation as before without any obstacle or restriction.").

[209] Statement of Dr. Cendoya, ¶¶ 23, 59, 68.

[210] *Ibid*, ¶ 58.

150. For example, Dedicado S.A. is a company that had an authorization for providing services similar to that of Trigosul and maintained its normal operations after 2003.[211] Dedicado did not receive a new license, or what Italba calls in its Memorial, an update or "adjustment" of its authorization.[212] Nevertheless, Dedicado provided the services for which it had authorization granted prior to 2003, specifically point to point transmission of data nationally.[213] Between 2003 and 2011, Dedicado, operating under its old authorization, reported annual revenue of over one hundred million Uruguayan pesos (equivalent to US$ 8,256,895.19),[214] as well as having 16,425 clients in 2011, without having obtained a new authorization or license after 2003.[215]

151. Not only Dedicado was in that situation, other companies also had profitable operations with authorization similar to those of Trigosul, without obtaining a new license or "adjustment" of its prior authorization. Telefónica Móviles del Uruguay, between 2005 and 2010 reported that it had between 183 and 236 clients.[216] Telstar reported that it also had between 94 and 262 clients during the same period.[217] These other companies, in the same

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[211] Ibid., ¶ 60.

[212] Memorial, ¶ 31 ("We are writing to *request that you adjust* Trigosul SA's data transmission license."); Letter from L. Herbón (Trigosul S.A.) to J. Piaggio (URSEC) (July 6, 2005) (C-020) (emphasis added).

[213] The authorization originally granted to Advance Telecom S.A. has been transferred to Dedicado S.A. *See* URSEC, Resolution No. 220/013 (September 5, 2013), Findings I-IX (C-084). Dedicado S.A. currently provides services under that authorization for data transmission that authorizes it for: "the installation and operation, for business purposes, of a wireless broadband network for the non-exclusive provision of data-transmission services, excluding the provision of broadcasting (radio and television) or telephone services, subject to the availability of radio spectrum." Ministry of National Defense, Resolution No. 768/999 (September 7, 1999), p. 2 (R-17).

[214] In 2011 Dedicado declared revenues of 156,468,164 Uruguayan pesos, *see* Dedicado S.A. Statistical Table (2016) (R-52).

[215] *Ibid.*

[216] Telefónica Móviles del Uruguay Statistical Table (2016) (R-55).

[217] Telstar S.A. Statistical Table (2016) (R-56).

circumstances as Trigosul, continued to operate under their authorizations and allocations prior to 2003, providing the same services and using the same frequencies, because the new regulation did not take away, limit or impose conditions on those authorizations or allocations in any way.[218] None of these competitors of Trigosul requested a new license or updated license in order to provide services that were already authorized,[219] and logically they did not receive it,[220] given that after the regulations of 2003 were adopted, authorizations to provide services that were issued previously were not affected or modified.[221]

2. URSEC Was Not Required to Grant Trigosul a New License or an "Updated" License

152. The obligation to grant a new license or updated license according to the 2003 regulation exists only in Italba's imagination. The conduct of Uruguay was not in any way "arbitrary" or in bad faith, as the Claimant alleges.[222]

153. *First*, as will be explained herein,[223] the complaints of arbitrariness and lack of good faith are inappropriate in the context of the Treaty between the United States and Uruguay,

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[218] Statement of Dr. Cendoya, ¶ 25 ("The fact is that all services authorized before the regulations were issued continued to work without any problem.").

[219] Italba falsely affirms that competitors of Trigosul received "licenses conforming to the 2003 License Regulations." *See* Memorial, ¶ 155; URSEC, Resolution No. 611/007 (December 27, 2007) (C-041); URSEC, Resolution No. 157/010 (March 25, 2010) (C-053); URSEC, Resolution No. 544/010 (October 29, 2010) (C-054); URSEC, Resolution No. 053/011 (March 16, 2011) (C-055). Those resolutions grant various petitions of competing companies of Trigosul, none of which was a request to obtain an adjusted license. *See* Request of Dedicado to URSEC (October 19, 2010) (R-40); Request of Rinytel to URSEC (March 3, 2011); Request of Telstar to URSEC (August 16, 2010) (R-39); Request of Telefónica Móviles to URSEC (September 15, 2006) (R-37).

[220] Statement of Dr. Cendoya, ¶ 62.

[221] *Ibid.*, ¶ 23; Opinion of Dr. Pereira, ¶ 127.

[222] Memorial, ¶¶ 126, 136-138, 143-144.

[223] *See below* Section III.A.4.

because with regard to this Treaty specifically, the Claimant has not proven that they are within the standard of fair and equitable treatment agreed between the two Parties. *Second*, the action or lack of action by Uruguay was completely reasonable, and was not in any way arbitrary or in bad faith.

154. The International Court of Justice defined the concept of arbitrariness in the case of *Elettronica Sicula S.p.A. (ELSI)*: "[a]rbitrariness is […] a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."[224] To consider that certain measures are arbitrary "requires that some important measure of impropriety be manifest";[225] that reflects "the absence of legitimate purpose, capriciousness, bad faith, or a serious lack of due process."[226]

155. The same definition has been recognized by arbitration tribunals. For example, in *Cargill v. Mexico*, the tribunal ruled that "arbitrariness may lead to a violation of a State's duties […] only when the State's actions move beyond a merely inconsistent or questionable application of administrative or legal policy or procedure to the point where the action constitutes an unexpected and shocking repudiation of a policy's very purpose and goals, or

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[224] *Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)*, Judgment (July 20, 1989), Rep. C.I.J. 1989, p. 15, ¶ 128 (CL-048).

[225] *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award (September 28, 2007) (Orrego Vicuña, Lalonde, Morelli Rico), ¶ 319 (RL-63); *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (October 31, 2011) (Caflisch, Bernardini, Stern), ¶ 281 (RL-89). *See also Ulysseas, Inc. v. Republic of Ecuador*, UNCITRAL, Final Award (June 12, 2012) (Bernardini, Pryles, Stern), ¶¶ 319, 320, 323 (RL-92) (the court dismissed the claim of violation of the BIT due to arbitrary treatment, citing the Enron case "a finding of arbitrariness requires that some important measure of impropriety is manifest" and sustaining that in the sanction of Constitutional Mandate No. 15, July 23, 2008, and in its implementation by means of subsequent regulations of the CONELEC "[t]here was nothing 'improper.'").

[226] A. Newcombe & L. Paradell, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT (2009), p. 302 (RL-74).

otherwise grossly subverts a domestic law or policy for an ulterior motive."[227] And, in *Enron v. Argentina*, the tribunal declared that a "finding of arbitrariness requires that some important measure of impropriety is manifest, and this is not found in a process which although far from desirable is nonetheless not entirely surprising in the context it took place."[228]

156. The Claimant cannot meet this standard. There is not even a minimum indication of arbitrariness on the part of Uruguay in not granting a new license to Trigosul.

157. The Claimant reiterates on several occasions that URSEC was obligated to "adjust existing licenses";[229] but has not provided to the Tribunal any legal provision that is pertinent to support its arguments. Specifically, it is remarkable that Italba maintains the obligation of the URSEC with respect to issuing a license without pointing to any provisions within Decree 115/003, which would be the unavoidable standard for obtaining a license.[230] If the Claimant had read all of Decree 115/003, it would not find any reference indicating, much

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[227] *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award September 18, 2009) (Pryles, Caron, McRae), ¶ 293 (CL-054).

[228] *Enron Corporation and Ponderosa Assets, L.P. v. Republic of Argentina,* ICSID Case No. ARB/01/3, Award (May 22, 2007) (Orrego Vicuña, van den Berg, Tschanz), ¶ 281 (CD-077).

Also, in customary international law, the discussion about good or bad faith is present "[i]n a few instances" and "it is rare that the concept of good faith adds anything to the principle of reasonableness of the other principles embraced within the fair and equitable treatment standard." K. Vandevelde, *A Unified Theory of Fair and Equitable Treatment*, 43 N.Y.U.J. INT'L L. POL. 43 (2010), pp. 96-97 (RL-82).

The U.S. accepts this interpretation. In its presentation of third parties in the *TECO v. Guatemala*, interpreting the same text as the Treaty in this case, the U.S. clarified: "Nor is the principle of 'good faith' a separate element of the minimum standard of treatment embodied in the Agreement. It is well established in international law that good faith is 'one of the basic principles governing the creation and performance of legal obligations,' but 'it is not in itself a source of obligation where none would otherwise exist." *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Writing of the United States of America (November 23, 2012), ¶ 5 (RL-94). (citing *Border and Transborder Armed Actions (Nicaragua v. Honduras),* Award (December 20, 1998), ICJ Rep. 1988, ¶ 94 (RL-35) (internal quotation marks omitted); *see also ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award (January 9, 2003), (Feliciano, de Mestral, Lamm), ¶ 191 (CL-035).

[229] Memorial, ¶¶ 26, 36.

[230] Ministry of National Defense, Decree No. 115/003 (March 25, 2003), Articles 3, 9, 11, pp. 34-36, 38-41 (C-017); Opinion of Dr. Pereira, ¶¶ 118-120.

less obligating, the URSEC to take any action with respect to previous authorizations, like the one Trigosul had.

158. Italba cannot base the alleged obligation of URSEC on the provisions of Decree 114/003.[231] Its efforts to do so have serious errors. As analyzed previously,[232] Decree 114/003 does not regulate the issuance of licenses or any other aspect of the authorization to provide telecommunication services. The reference that is made to "the regularization of authorizations and permits granted before" is restricted to such authorizations for the use of the spectrum,[233] in other words: allocation of frequencies. As demonstrated previously, the allocation of frequencies cannot be confused with the authorization to provide services.[234] They are two different concepts.[235] Trigosul never asked URSEC for any change, adjustment or adaptation with respect to the allocation of its frequencies after the regulatory changes of 2003.

159. Even if we ignored the confusion that Italba tries to cause in the Tribunal, the very language of Article 38 of Decree 114/003 on which it bases its argument clearly shows the poor legal basis of its argument. Unlike the categorical way Italba affirms that URSEC has an obligation to grant an updated license,[236] Article 38 says verbatim that URSEC "will dictate

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[231] Memorial, note 41; *see also* Ministry of National Defense, Decree No. 114/003 (March 25, 2003), Article 38, p. 18 (C-017) ("ARTICLE 38. Adaptation of Previous Authorizations. The Regulatory Unit for Communications Services will dictate regulations for the regularization of authorizations and permits granted before the new system approved through this Regulation became effective").

[232] *See above*, Section III.A.I

[233] *See* Decrees No. 114/003 and No. 115/003, Articles 18, 19 (114/003), pp. 8-9 (C-017).

[234] Opinion of Dr. Pereira, ¶¶ 73,74.

[235] Statement of Dr. Cendoya, ¶ 120.

[236] Memorial, ¶ 26.

regulations for the regularization of authorizations and permits granted before."[237] It is incoherent of the Claimant to attempt to base its rights, and the corresponding obligations of URSEC, on this provision that refers to a different set of rules.[238] However, Italba has not specified any other legal provision that might contain the alleged obligation of URSEC. Moreover, Article 38 makes perfectly clear that "regularization" regarding "authorizations and permits granted before," would be subject to other provisions that would be issued by URSEC in the future.[239] In fact, those other provisions were never issued, and all prior authorizations and permits granted were fully honored by URSEC after 2003.[240] These authorizations and permits, of course, included those of Trigosul.

160. In spite of this transparent regulatory framework, Dr. Alberelli as well as Mr. Herbón affirm having called or personally visited URSEC's offices assiduously to request on behalf of Trigosul an updated license with respect to the authorization to provide services that it already held.[241] During these various conversations, these two witnesses of Italba, without

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[237] In this respect Dr. Pereira maintains that "[i]t is clear that the Administration has discretion on the matter and it is necessary to have general rules not issued by URSEC; consequently, Article 38 does not in itself entitle Trigosul to claim the updating of frequency allocations (much less, as we shall see, the updating of the 'authorization' or 'license')." Opinion of Dr. Pereira, ¶ 117; Ministry of National Defense, Decree No. 114/003 (March 25, 2003), Article 28, p. 18 (C-017).

[238] From the analysis of the current legal framework, Dr. Pereira has concluded that "[l]ikewise, it is worth mentioning that national legislation does not provide for a process for the "modification" of licenses, as Italba claims that Trigosul requested […] What is regulated by the national legal framework, is the process to request a license, without prejudice to URSEC's power to issue regulations for the modification of authorizations and permits related to the allocation of frequencies (but not authorizations or licenses) granted before the entry into force of Decree 114/003, in accordance with art. 38 thereof." Opinion of Dr. Pereira, ¶¶ 135-136.

[239] Ministry of National Defense, Decree No. 114/003 (March 25, 2003), Article 38, p. 18 (C-017) ("ARTICLE 38.- Adaptation of Previous Authorizations. The Regulatory Unit for Communications Services *will dictate regulations* for the regularization of authorizations and permits granted before the new system approved through this Regulation became effective.") (emphasis added)

[240] Statement of Dr. Cendoya, ¶ 23.

[241] Statement of Dr. Alberelli, ¶¶ 31, 33, 34, 38; Statement of Mr. Herbón, ¶¶ 15, 17-18, 20-21.

providing any documentary proof, declare that they were given verbal "guarantees" by URSEC officials that such a license would be granted to them.[242]

161. This testimony is completely untrue. In fact, representatives of URSEC never would have promised Dr. Alberelli or Mr. Herbón a new license or an adjustment of the previously granted authorization. Regarding these alleged assurances that Trigosul received from URSEC officials, it is obvious that the Claimant has not furnished any documentary evidence. All its argument in this respect depends on the statements of Dr. Alberelli and Mr. Herbón, who are not objective or disinterested parties.[243] There is no document to support the Claimant's account.

162. Moreover, all the officials that have been implicated by Italba in its Memorial have denied the veracity of the Claimant's affirmations. All officials with whom Trigosul's representatives met declare that they urged the company to submit requests that complied with legal requirements so that they would be evaluated by URSEC.[244] The result of any request or procedure was never promised,[245] for example, as explained by Dr. Elena Grauert, it would have been "impossible for them to obtain their license without going through the appropriate administrative procedure"[246] that included compliance with the procedures and obtaining

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[242] Memorial, ¶ 27; Statement of Dr. Alberelli, ¶¶ 28, 31, 33; Statement of Mr. Herbón, ¶¶ 15, 17, 21.

[243] Statement of Dr. Alberelli, ¶ 1; Statement of Mr. Herbón, ¶ 1.

[244] Testimony of Mr. Juan Piaggio (December 23, 2016) ("Statement of Mr. Piaggio"), ¶ 4; Testimony of Mrs. Elena Grauert (December 30, 2016) ("Statement of Mrs. Grauert"), ¶ 6, Testimony of Mr. Fernando Pérez Tabó (December 30, 2016) ("Statement of Mr. Pérez"), ¶ 4; Testimony of Mr. León Lev (December 28, 2016) ("Statement of Mr. Lev"), ¶ 4.

[245] Testimony of Mr. Gabriel Lombide (December 21, 2016) ("Statement of Mr. Lombide"), ¶ 4; Statement of Mrs. Grauert, ¶ 7; Statement of Mr. Lev, ¶ 6.

[246] Statement of Mrs. Grauert, ¶ 6. *See also* Statement of Mr. Pérez, ¶4; Statement of Mr. Lev, ¶4.

favorable reports of technical and legal services from URSEC.[247] Also, Mr. Juan Piaggio states that he told Luis Herbón in 2005 that the request that he suggested should "be formally presented in a note, in compliance with all the legal requirements, so that it could be studied by the legal and technical departments."[248]

163. Elaborating on the subject, legal expert Dr. Pereira explains that:

> Article 11 of Decree 115/003 establishes a series of requirements to obtain a license […] [a]mong other documents that must be submitted are the documentation about the legal person, such as its bylaws, tax identification number, shareholders' register, balance sheets, sworn statements on the knowledge of the telecommunications regulations, sworn statement on the adoption of security systems, and technical requirements (description of services, technical plan, indication of the area of coverage, investment plan, and radio frequencies).[249]

Trigosul never fulfilled these requirements.[250] The Claimant does not even venture to argue that they were fulfilled.

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[247] Statement of Mr. Pérez, ¶ 4 ("What we always stated in similar cases in light of the numerous requirements under Decree 115/003 was that if all technical and legal requirements were met and if our departments reported favorably, we would have no problem granting the license.") Statement of Mrs. Grauert, ¶ 6 ("What the President and I always said in cases like Trigosul's was that if the procedures were followed and the technical and legal departments reported favorably, the license would be granted.").

[248] Statement of Mr. Piaggio, ¶ 4.

[249] Opinion of Dr. Pereira, ¶ 143; Statement of Dr. Cendoya, ¶ 26.

[250] On this point, Dr. Cendoya states that "Trigosul never attached to its applications any of the aspects stated in the License Regulations and so a license could not have been issued under the 2003 rules." Statement of Dr. Cendoya, ¶ 28. After analyzing the communications from Trigosul on the matter, Dr. Pereira concluded that "none of the five notes submitted met the requirements established by Article 11 of the Regulations on Licenses in order to be deemed a license application [,]" adding that "[…] [r]eading the five notes submitted by Trigosul, *the only requirement met therein is the requirement for the interested party's signature."* Opinion of Dr. Pereira, ¶¶ 145, 147 (emphasis added).

164. Moreover, Uruguay's witnesses concur that at no time were promises made about any outcome of the procedure.[251] As can be seen in the statement of Mr. Piaggio[252] and Mr. Gabriel Lombide,[253] the information given to Trigosul at all times was contingent on the fact that any request could be reviewed by the pertinent entities of the URSEC.

165. In any case, it is implausible that officials of URSEC would have promised Trigosul something that they had no right to and in subterfuge of the regulatory requirements. In fact, the very conduct of Trigosul shows that there was no obligation to update the authorization that had already been granted to it. In the first place, the language of the letters submitted by Trigosul[254] does not reference any obligation on URSEC's part to update the authorization of Trigosul, nor do they provide a legal basis for its aspirations.[255] Second, if there really had been an obligation of URSEC to grant to Trigosul the update of its authorization as affirmed by Italba, they would have formally petitioned URSEC through administrative appeals or before the TCA

[251] Statement of Mrs. Grauert, ¶ 7.

[252] Statement of Mr. Piaggio, ¶ 4.

[253] Statement of Mr. Lombide, ¶ 4 ("I only promised to study the arguments raised by Dr. Durán Martínez during the meeting. I could not have assumed any commitment regarding the treatment of the matter").

[254] It is surprising that Trigosul waited over two years to submit a written request asking for an adjustment of its authorization. It was not until July 2005 that Trigosul submitted a letter, which, according to the Claimant, was for the purpose of "formally reminding URSEC of Trigosul's right to a license conforming to the 2003 License Regulations." Letter from L. Herbón (Trigosul S.A.) to J. Piaggio (URSEC) (July 6, 2005) (C-020); Memorial, ¶ 31. This affirmation is rash. No part of the letter states an alleged obligation of URSEC that Italba maintains in this arbitration. *See* Memorial, ¶¶ 26, 144, 155.

[255] Memorial, ¶¶ 26, 155; The original request dated July 6, 2005, merely says "[w]e are writing to request that you adjust Trigosul SA's data transmission license in accordance with the provisions set forth in Law No. 17296 dated February 21, 2001 and in Decrees 114/03 and 115/03 dated March 25, 2003." Letter from L. Herbón (Trigosul S.A.) to J. Piaggio (URSEC) (July 6, 2005) (C-020). Letter dated January 26, 2006, which repeats the argument of six months before, in the same generic terms: "[i]n parallel with this application, we requested the adjustment of TRIGOSUL S.A.'s license, dated December 2000, to the provisions of Law 17,296 of February 21, 2001, and Decrees 114/03 and 15/03, both dated March 25, 2003." Letter of L. Herbón (Trigosul S.A.) to URSEC (January 26, 2006) (C-022).

at the proper time.[256] The fact that it did not mention the alleged obligation of URSEC to grant an updated license to Trigosul and that it did not protest through administrative or judicial means is a strong indication that contemporaneously Trigosul did not believe that such an obligation existed. Therefore, for Italba to make such claims in this arbitration, in the categorical terms that it does, is disingenuous.[257]

166. Among all of Italba's lies, perhaps the most outrageous is the accusation by Dr. Alberelli, stating that he was personally offered a new license for Trigosul in exchange for a bribe.[258] This is an insult for Uruguay as well as for the former director of URSEC, Mrs. Alicia Fernández, whom Dr. Alberelli accused. As is the case with all of Dr. Alberelli's false statements, there is no documentary evidence to support his irresponsible claims.[259] On the other hand, there is documentary evidence that disproves them. Dr. Alberelli states that his meeting with Mrs. Fernández was held in July 2006.[260] However, the records of the immigration service

[256] In this respect Dr. Pereira has maintained that "if Trigosul's intention was to compel the Administration to make a pronouncement on these 'applications,' it should have complied with the procedures laid down in Uruguayan law, which it did not do. Trigosul did not carry out the necessary legal acts to obtain a response from the Administration on the intended application for the "updating" of a license: it did not contest, by means of the pertinent administrative appeals, the presumptive denial of its application by the Administration; nor did it request its annulment before the TCA." Opinion of Dr. Pereira, ¶ 26j; *see also,* Opinion of Dr. Pereira, ¶¶ 153-161; Statement of Dr. Cendoya, ¶ 60.

[257] Memorial, ¶¶ 2, 26.

[258] Statement of Dr. Alberelli, ¶ 39.

[259] Italba's witness, Luis Herbón, in spite of the fact that he does not demonstrate any direct knowledge of the events because he was "unable to attend" the meeting, repeats the statement made by Dr. Alberelli. Statement of Mr. Herbón, ¶ 22. In the same imprudent manner, the Claimant repeats these slanderous accusations without providing any support for his allegations. Memorial, ¶¶ 35-36.

[260] Statement of Dr. Alberelli, ¶ 39; Memorial, ¶ 35.

of Uruguay show that he was not in Uruguay during the month of July 2006, except for his arrival and only entry into the country during the month in question, on July 31st, 2006.[261]

167. Furthermore, the content of Dr. Alberelli's statement lacks any credibility at all. According to him, Mrs. Fernández was so clumsy as to demand that the alleged bribe be paid with a deposit of US$25,000 *into her own bank account in Montevideo.*[262] The audacity of such an accusation is simply unbelievable. Dr. Alberelli would have us believe not only that Mrs. Fernández is a thief, but also an idiot. Mrs. Fernández is actually neither: she is a highly competent and honorable public official, whom Dr. Alberelli has decided to make a victim of accusations that are ridiculous as well as ignominious. The sworn statement of Mrs. Fernández is attached to this pleading; in it she denies all the false accusations of Dr. Alberelli,[263] including having had the meeting to which he refers.[264]

168. The evidence categorically demonstrates that URSEC was not required to grant to Trigosul a new license or update of authorization—that, at any rate, Trigosul did not need to provide the authorized services—and that URSEC did not act arbitrarily or in bad faith in its dealings with Trigosul.

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[261] National Immigration Department, Official Communication 2387/16 MC/lb (October 18, 2016), p. 2 (R-69). Moreover, Dr. Alicia Fernández has stated that she never had a meeting with Dr. Alberelli, much less in July 2006, when she was out of the country from July 7 – 20. Testimony of Mrs. Alicia Fernández (December 28, 2016) ("Statement of Mrs. Fernández"), ¶ 4.

[262] Statement of Dr. Alberelli, ¶ 39.

[263] Statement of Mrs. Fernández, ¶ 4.

[264] *Ibid.*

3. Uruguay Did Not Treat Trigosul in a Discriminatory Manner nor in a Manner Less Favorable Than Its Competitors

169. Italba falsely asserts that Trigosul was treated in a discriminatory manner because "URSEC issued licenses conforming to the 2003 License Regulations to numerous Trigosul competitors."[265] Italba also mentions that its expectations increased each time URSEC issued an adjusted license to any of its alleged competitors.[266] Yet again, the Claimant's assertions are mistaken and misleading.

170. To determine whether there was discriminatory treatment, it is necessary to "make a comparison with another investor in a similar position (like circumstances)."[267] Furthermore, even if a claimant or other allegedly similar third party "are in a similar economic and business sector [,] […] the situation of the two investors will not be in like circumstances *if a justification of the different treatment is established."*[268] This requires an analysis based on very specific facts.[269]

171. Uruguay can categorically affirm that it did not treat Trigosul differently. None of the alleged adjusted or adapted licenses was issued to any of the companies mentioned by the

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[265] Memorial, ¶ 155.

[266] *Ibid.*, ¶¶ 47, 52.

[267] *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (September 11, 2007) (Lévy, Lew, Lalonde), ¶ 288 (RL-62); *see also CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award (May 12, 2005) (Orrego Vicuña, Lalonde, Rezek), ¶ 293 (CL -051) ("The Respondent's argument about discrimination existing only in similarly situated groups or categories of people is correct.").

[268] *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (September 11, 2007) (Lévy, Lew, Lalonde), ¶¶ 373, 375 (RL-62) (emphasis added); *see also Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award (October 31, 2012) (Hanotiau, Ali Khan, Williams), ¶ 420 (RL-93) (the tribunal defined "not discriminatory" as behavior "not based on *unjustifiable* distinctions or arbitrary") (emphasis added).

[269] *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (September 11, 2007) (Lévy, Lew, Lalonde), ¶ 290 (RL-62).

Claimant.[270] To support its reckless assertions, Italba attached four resolutions of URSEC[271]—none of which is a license to adapt or broaden an authorization to provide services issued before 2003, as erroneously claimed by Trigosul.[272]

172. Specifically, Resolution 611, dated December 27, 2011, was issued in response to Telefónica Móviles del Uruguay S.A.'s request to authorize modifications of operation in their radio links and operating parameters.[273] As a result, URSEC authorized, among other things, cancellation of some authorizations to use certain frequencies, authorized the use of other frequencies that met new operating parameters, and confirmed some of the authorizations for use of certain frequencies by Telefónica.[274] All these authorizations have to do with allocations of frequencies that Telefónica had. No part of this resolution modifies the nature of the telecommunication services that Telefónica had a right to provide. Also, no mention is made of any granting of licenses, nor of the category that it would have had, nor any of those characteristics that Italba alleges prevented it from operating with the authorizations that Trigosul had.[275]

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[270] Statement of Dr. Cendoya, ¶ 61.

[271] URSEC, Resolution No. 611/007 (December 27, 2007) (C-041); URSEC, Resolution No. 157/010 (March 25, 2010 (C-053); URSEC, Resolution No. 544/010 (October 29, 2010) (C-054); URSEC, Resolution No. 053/011 (March 16, 2011) (C-055).

[272] Memorial, ¶ 155.

[273] URSEC, Resolution No. 611/007 (December 27, 2007), p. 1 (C-041("HAVING REGARD TO: the actions taken by Telefónica Móviles del Uruguay S.A. in order for them to be authorized to make modifications to the operation of the point to point directional and bidirectional radio links, which include additions, modifications to operating parameters, and removals.") *see also* Request of Telefónica Móviles to URSEC (September 15, 2006) (R-37).

[274] URSEC, Resolution No. 611/007 (December 27, 2007) (C-041). In this respect, Dr. Cendoya explains that "it is untrue that the authorizations for the corporations mentioned by Italba were updated to licenses that accorded with the 2003 Regulations […] [t]he examples that it uses in its attempt to confuse refer to Resolutions that have nothing to do with the adjustment of licenses as it claimed." Statement of Dr. Cendoya, ¶ 62.

[275] URSEC, Resolution No. 611/007 (December 27, 2007) (C-041).

173. The decisions related to Dedicado, Telstar, and Rinytel mentioned by Italba in its Memorial are of a similar scope to those already mentioned.[276] These decisions simply adjust the radio channels authorized for each one of the companies.[277] They respond to the technical operating requirements for the systems of each company, and allocate, confirm, and cancel frequencies accordingly.[278] They do not grant any new licenses or adjustments to prior authorizations to conform to the regulatory framework of 2003.[279] Nor did they modify the services that the administered entities could provide, or the provisional nature of the frequencies assigned to them in the decisions.[280] Moreover, the requests granted in the

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[276] Communication Services Regulatory Agency, Decision No. 157/010 (March 25, 2010) (C-053); Communication Services Regulatory Agency, Decision No. 544/010 (October 29, 2010) (C-054); Communication Services Regulatory Agency, Decision No. 053/011 (March 16, 2011) (C-055).

[277] As explained by Dr. Cendoya, "[r]adio links are point to point wireless connections within the network of each operator. They do not involve the provision of any service to the public. They are part of the "backbone" or nuclear infrastructure of a network having no interaction with any third party system (other operators or clients)." Witness statement by Dr. Cendoya, note 49.

[278] *Id.*, ¶ 58.

[279] For example, Italba alleges that by means of Communication Services Regulatory Agency Decision 544/010 (C-054), Telstar S.A. received a license adjustment. *See* Memorial, ¶ 52. However, this Decision was in response to the petition made by Telstar S.A. "to install and operate wireless data transmission systems for business purposes in the 5725 – 5850 Ghz band." It is not a request for a license adjustment. *See* Request by Telstar to Communication Services Regulatory Agency (August 16, 2010) (R-39). For its part, Dedicado S.A. also did not receive a license adjustment as alleged by the Claimant. *See* Memorial, ¶ 52. What the Communication Services Regulatory Agency Decision 157/010 (C-053) does grant is the request made by Dedicado S.A. so that "pursuant to article 25 of the Regulations for the Management and Control of the Radio Spectrum [*Reglamento de Administración y Control del Espectro Radioeléctrico*] (Decree 114/003), that the allocations of the radio frequency sub-blocks and the radio-links detailed in the annexes below be transferred from Dedicado S.A. to Enalur S.A."; no license adjustment was requested. *See* Request by Dedicado to the Communication Services Regulatory Agency (October 19, 2010) (R-40). In like manner, Communication Services Regulatory Agency Decision 053/011 (C-055) granted the request by Rinytel, S.A. that "the authorized spectrum blocks be modified as soon as possible, so that [they] are granted two blocks of similar bandwidth sizes, but separated by 45 Mhz between them, and then decommission the aforementioned [] blocks." *See* Request by Rinytel to the Communication Services Regulatory Agency (March 3, 2011) (R-43). This is not a request for a license adjustment, so the Claimant's assertion in which it holds that Rinytel S.A. received the adjusted license in March 2011 is also false. *See* Memorial, note 106. In the same vein, Italba alleges that the Communication Services Regulatory Agency Decision 611/007 (C-041) issued a "license adjustment" to Telefónica Móviles del Uruguay S.A. *See* Memorial, ¶ 47. However, the Claimant's assertion is false because said Decision approves the request made by Telefónica Móviles del Uruguay, S.A. for "the allocation of frequencies for microwave linking." *See* Request by Telefónica Móviles to Communication Services Regulatory Agency (September 15, 2006) (R-37); the company did not request a license adjustment.

[280] Communication Services Regulatory Agency, Decision No. 611/007 (December 27, 2007), operative part 5.a., p. 2 (C-041) ("[T]he authorizations are granted on a provisional basis and can be revoked at any time, without the right

resolutions are in response to petitions that are completely different from those submitted by Trigosul.[281] Once again, Italba is seeking to deceive the Tribunal.

174. The alleged failure to grant a new license or adjustment to the license is but a smokescreen to hide Trigosul's lack of intent to provide the services authorized to it and its fictitious business prospects.[282] This is made abundantly clear upon the observation that Trigosul was a company with barely any commercial activity; it never formally reported having more than eight clients to URSEC[283] and the ones it allegedly did have never generated it any revenue whatsoever, based on what was reported by Trigosul at the time,[284] and Italba's own admissions in this arbitration.[285]

175. In its reports to URSEC, Trigosul declared the following clients and revenue[286]:

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to claims or compensation of any kind."). *See also* Communication Services Regulatory Agency, Decision No. 157/010 (March 25, 2010), p. 3 (C-053); Communication Services Regulatory Agency, Decision No. 544/010 (October 29, 2010), p. 2 (C-054); Communication Services Regulatory Agency, Decision No. 053/011 (March 16, 2011), p. 3 (C-055).

[281] The only request submitted in this sense by Trigosul states, "[w]e are writing to request that you adjust Trigosul SA's data transmission license in accordance with the provisions set forth in Law No. 17296 dated February 21, 2001 and in Decrees 114/03 and 115/03 dated March 25, 2003." Letter by L. Herbón (Trigosul S.A.) to J. Piaggio (Communication Services Regulatory Agency) (July 6, 2005) (C-020). Even if it is assumed that Trigosul wished to obtain decisions similar to those referred to by Italba in its Memorial as "licenses conforming to the 2003 License Regulations," the request it submitted is completely different than the one submitted by other companies. *See* Request by Telefónica Móviles to the Communication Services Regulatory Agency (September 15, 2006) (R-37); Request by Dedicado to the Communication Services Regulatory Agency (October 19, 2010) (R-40); Request by Rinytel to the Communication Services Regulatory Agency (March 3, 2011) (R-43); Request by Telstar to the Communication Services Regulatory Agency (August 16, 2010) (R-39).

[282] *See infra*, Section IV.A.2.

[283] Trigosul S.A. Statistical Table (2016) (R-54).

[284] Trigosul S.A. Statistical Table (2016) (R-54).

[285] In its Memorial, Italba acknowledges that the alleged clients it had in 2010 did not pay for the services that Trigosul allegedly provided to them. Memorial, ¶¶ 56, 58.

[286] Trigosul S.A. Statistical Table (2016) (R-54).

Year	Clients	Revenue
2005	8	No revenue statement
2006	6	No revenue statement
2007	6	No revenue statement
2008	6	No revenue statement
2009	0	No revenue statement
2010	0	No revenue statement

Based on these statistics, it is impossible to infer any serious intent on Trigosul's part to provide any services whatsoever. This is also proven by the minimal deployment of infrastructure it rolled out in Uruguay; for over a decade, it never had more than one traffic aggregator station and two antennas operating.[287] Unlike what Italba states in its Memorial,[288] since 2005, Trigosul did not report having made any investment at all in infrastructure to URSEC.[289] And, as will be analyzed in more detail in subsequent sections, Trigosul's alleged business opportunities were mere fantasies.[290]

176. As the evidence demonstrates, Trigosul was in no way disadvantaged under the 2003 regulations, not by its non-grant of a new license, nor by not modifying its authorization to provide the telecommunications services that it already had. The business failures suffered by Trigosul, demonstrated by its lack of clients, its inability to generate any income and profits,[291] and its incapacity to negotiate strategic alliances with other companies that were legally

[287] Witness Statement by Dr. Cendoya, ¶ 50.

[288] Memorial, ¶ 17.

[289] Trigosul S.A. Statistical Table (2016) (R-54).

[290] *See infra*, Section IV.A.2.

[291] Trigosul S.A. Statistical Table (2016) (R-54).

possible[292] and commercially sustainable,[293] are ultimately the product of Trigosul's own failings.

177. Therefore, there is no merit in Italba's allegation that, in its dealings with Trigosul, Uruguay has violated the obligations of the Treaty pertaining to treatment that is not discriminatory, or no less favorable than that accorded to national investors in similar circumstances (Article 3) or no less favorable than that accorded to other foreign investors (Article 4).

178. The evidence analyzed clearly demonstrates that Uruguay did not commit any violations of the Treaty. The obligations to provide treatment no less favorable than that provided to national companies or other foreign investors in similar circumstances are part of many BITs, and have been analyzed with a great deal of attention by other tribunals. The legal elements are clear. To substantiate a violation of any of these obligations, three elements must be proven: (1) there must be an appropriate investor in "similar circumstances" to compare; (2) it must be determined whether the treatment provided to the claimant, or its investment, was less favorable than that received by domestic or foreign investors; and, (3) it must be determined if there were legitimate reasons justifying different treatment.[294] Moreover, any difference in treatment purported to predicate a violation must in fact be harmful to the claimant, that is, "the

[292] Witness Statement by Dr. Cendoya, ¶¶ 111, 119, 159, 163; Opinion by Dr. Pereira, ¶ 121.

[293] Witness Statement by Dr. Cendoya, ¶ 107.

[294] A. Bjorklund, *National Treatment* in STANDARDS OF INVESTMENT PROTECTION (2008), p. 37 (RL-69).

treatment complained of must have some not-insignificant practical negative impact in order to lead to a breach"[295] of the Treaty.

179. Italba has not satisfied any of these elements with regard to the lack of a license for Trigosul in accordance with the new regulations of 2003. As has been demonstrated, Trigosul was not treated less favorably in comparison with other companies, either domestic or foreign, in similar circumstances. None of the companies mentioned in the Memorial with authorizations prior to the regulatory changes of 2003 received a new license or "adjustment" of its prior authorization. And, as was the case with each of them, Trigosul was able to use its prior authorization after 2003 to provide authorized services, using the same frequencies it already had been allocated. Trigosul was not treated any differently than those companies, and did not suffer any disadvantage due to not receiving a new license.

180. The URSEC decisions cited by Italba, issued with respect to other companies, do not prove different treatment. Italba is incorrect when it claims that licenses were issued to these other companies. As analyzed previously,[296] the decisions the Claimant submitted with its Memorial are administrative acts related to the allocation of frequencies already held by these companies,[297] and not to services they are authorized to provide, and therefore are not licenses

[295] *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award (August 25, 2014) (Veeder, Rowley, Crook), ¶ 8.21 (RL-109).

[296] *See supra*, ¶¶ 36-37.

[297] Witness statement by Dr. Cendoya, ¶ 62 ("So it is untrue that the authorizations for the corporations mentioned by Italba were updated to licenses that accorded with the 2003 Regulations. The examples that it uses in its attempt to confuse refer to Resolutions that have nothing to do with the adjustment of licenses as it claimed. In fact, none of the four Resolutions refers to any of the types of license mentioned in Decree 115/003").

according to the 2003 regulations.[298]

181. Furthermore, these decisions are in response to various requests made by these companies.[299] Trigosul never submitted such a request.[300] It was not seeking to change its authorization or its frequencies. Trigosul only informally expressed to URSEC its interest in receiving a new license—which it did not need—and for which it never submitted a request in accordance with established procedures.[301] As stated by Dr. Cendoya: "[I]f Trigosul wished to convert its authorization, they were prepared to do so if the application met the technical and legal requirements under the new system […]. Trigosul never submitted these materials."[302] Therefore, Italba cannot argue that Trigosul suffered any treatment that was less favorable than that accorded to other companies in similar circumstances.[303]

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[298] Decree 115/003 defines license as "authorizations for the provision of telecommunications services to third parties or to the public at large." Ministry of National Defense, Decree No. 115/003 (March 25, 2003), Art. 3, p. 35 (C-017).

[299] *See supra*, note 279.

[300] *See supra*, note 281.

[301] Opinion by Dr. Pereira, ¶¶ 144-145 ("None of the five notes submitted by Trigosul to the state authorities comply with any of the requirements of the regulations […] The required documentation was not attached and the authorities were not requested to waive its submission, nor was it stated that it would be submitted at a later date, etc. […] [W]hat is more relevant is that none of the five notes submitted met the requirements established by Article 11 of the Regulations on Licenses in order to be deemed a license application.").

[302] Witness statement by Dr. Cendoya, ¶ 66.

[303] It should be pointed out that, in Article 14 of the Treaty ("Non-Conforming Measures"), the Parties to the Treaty provided for an exception for certain sectors for which Articles 3, 4, 8, and 9 would not apply. Specifically, paragraph 2 of Article 14 establishes that Articles 3, 4, 8, and 9 would not apply to "any measure that a Party adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex II." In Annex II, the "Explanatory Note" clarifies that, with regard to the list of specific sectors, subsectors or activities included in the Annex, each Party "may maintain existing, or adopt new or more restrictive, measures that do not conform with obligations imposed by: (a) Article 3 (National Treatment); (b) Article 4 (Most-Favored-Nation Treatment) […]." BIT between Uruguay and the United States, Annex II, p. 69 (C-001) (emphasis added). The list in Annex II includes, *inter alia*, that Uruguay "reserves the right to adopt or maintain any measure that accords differential treatment to countries under any bilateral or multilateral international agreement in force or signed after the date of entry into force of this Treaty involving: […] (d) telecommunications." The "obligation concerned" for this reservation is the Most-Favored-Nation Treatment clause (Article 4).

4. Uruguay Did Not Accord Unfair or Inequitable Treatment to Trigosul

182. After having demonstrated in the previous sections that Uruguay did not treat Trigosul in an arbitrary or discriminatory manner, or in bad faith, there would be no violation of the obligation to provide fair and equitable treatment, even according to the groundless interpretation of Article 5 of the Treaty proposed by Italba.

183. This Article obligates Uruguay to grant United States investors "treatment in accordance with customary international law."[304] As has been explained by the United States, this "standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law in specific contexts."[305] One of these rules is the obligation to provide fair and equitable treatment (FET). This obligation is addressed in Article 5 of the Treaty, which, for greater certainty, explicitly states that the FET "do[es] not require

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As explained by Dr. Cendoya, Uruguay is Party to the Constitution and Convention of the International Telecommunication Union (ITU). Witness Statement by Dr. Cendoya, ¶¶ 9, 13, 30. As a State Party, Uruguay has the obligation to "to promote the development of technical facilities *and their most efficient operation with a view to improving the efficiency of telecommunication services,* increasing their usefulness *and making them, so far as possible, generally available to the public*" Constitution of the International Telecommunication Union (2014), art. 1.1(c) (RL-104) (emphasis added). Moreover, for the use of its frequency bands, Uruguay must take into account that "radio frequencies and any associated orbits, including the geostationary-satellite orbit, *are limited natural resources and that they must be used rationally, efficiently and economically*, in conformity with the provisions of the Radio Regulations, so that countries or groups of countries may have equitable access to those orbits and frequencies, taking into account the special needs of the developing countries and the geographical situation of particular countries."*Id.* art. 44(2) (emphasis added).

The measures taken by Uruguay with regard to Trigosul were undoubtedly to "manage, defend, and control the national radio spectrum," in accordance with its obligations under the ITU Convention. Witness Statement by Dr. Cendoya, ¶ 5. Consequently, these measures are excluded from the scope of Article 4 of the Treaty by virtue of Article 14 and Annex II.

[304] BIT between Uruguay and the United States, art. 5(1) (C-001) (emphasis added).

[305] *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Submission of the United States (November 23, 2012), ¶ 3 (RL-94) (emphasis added); *see also Methanex Corporation v. United States of America*, UNCITRAL, Memorial on Jurisdiction and Admissibility (November 13, 2000), pp. 38-46 (RL-41); *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Counter-Memorial of the United States (September 19, 2006), pp. 218-222 (RL-56); *Grand River Enterprises Six Nations Ltd., Jerry Montour, Kenneth Hill, and Arthur Montour, Jr. v. United States*, NAFTA/UNCITRAL, Counter-Memorial (December 22, 2008), pp. 88-93 (RL-73).

treatment in addition to or beyond that which is required by that standard, and do[es] not create additional substantive rights."[306]

184. Article 5 also reflects the agreement between the State Parties with respect to the specific content of the obligation to provide FET. It consists expressly of "not [denying] 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."[307] This is the only FET requirement specified in the Treaty, and reflects the intention of both State Parties to limit the scope of the obligation in Article 5 on FET to the minimum standard of treatment, which includes the obligation not to deny justice, but does not extend to the other obligations alleged by the Claimant.[308] This limitation is consistent with the practice of the United States in other bilateral treaties from the same period as the Treaty with Uruguay.[309] Uruguay shares the

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[306] BIT between Uruguay and the United States, art. 5 (C-001).

[307] *Id.*

[308] *See, for example*, *Methanex Corporation v. United States of America*, UNCITRAL, Memorial on Jurisdiction and Admissibility (November 13, 2000), p. 44 (RL-41) ("The relevant principles [of the 'international minimum standard'] includes standards for denial of justice, expropriation and other acts subject to an absolute, rather than a relative, standard of international law."); *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Counter-Memorial of the United States (September 19, 2006), pp. 221-222 (RL-56) ("Article 1105(1) embodies, for example, the requirement to provide a minimum level of internal security and law and order, referred to as the customary international law obligation of ***full protection and security***. Similarly, Article 1105 recognizes that a State may incur international responsibility for a '*denial of justice*' where its judiciary administers justice to aliens in a 'notoriously unjust' or 'egregious' manner 'which offends a sense of judicial propriety.' In addition, the most widely-recognized substantive standard applicable to legislative and rule-making acts in the investment context is the rule barring *expropriation* without compensation, but that obligation is particularized in the NAFTA under Article 1110. In the absence of a customary international law rule governing State conduct in a particular area, however, a State remains free to conduct its affairs as it deems appropriate.") (emphasis added) (citations omitted); *Grand River Enterprises Six Nations Ltd., Jerry Montour, Kenneth Hill, and Arthur Montour, Jr. v. United States*, NAFTA/UNCITRAL, Counter-Memorial (December 22, 2008), pp. 90-91 (RL-73).

[309] *Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Submission of the United States of America (April 17, 2015), ¶ 13 (RL-111) (citing the Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA) (August 5, 2004), art. 10.5.2(a) (RL-48)); *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Submission of the United States (November 23, 2012), ¶ 6 (RL-94) (interpreting DR-CAFTA Art. 10.5). In these cases, the United States commented on provisions 10.5(1)-(3) of the Central America Free Trade Agreement ("DR-CAFTA"). The text of this Treaty for these provisions is exactly the same as the text of the Treaty being considered here.

understanding of its counterparty regarding the agreed upon obligation, as well as the text clarifying the meaning of said obligation.

185. Italba proposes a broader interpretation of the FET obligation. However, the burden is on the Defendant to prove the extension of FET beyond the denial of justice in customary international law.[310] According to the clear text of the Treaty, to establish the existence and applicability of each additional obligation created in customary international law, the Claimant must demonstrate that the obligation "results from a general and consistent practice of States that they follow from a sense of legal obligation."[311] According to the tribunal in

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The legislative history of the Treaty between Uruguay and the United States also acknowledges the intent to use the model BIT completed by the United States in 2004, which has been recognized as "similar" to the provisions on investment in the NAFTA and the DR-CAFTA. *See* Senate Foreign Relations Committee, Report on the Treaty Between the United States and the Oriental Republic of Uruguay Concerning the Encouragement and *Reciprocal* Protection of Investments *(*August 30, 2006), p. 13 (RL-55) ("The most recent revision of the model BIT was completed in 2004, and, as noted earlier, is the model on which the U.S.-Uruguay Treaty is based. The 2004 model text embodies the same basic investment principles as its predecessors. It is similar to the investment provisions of the North American Free Trade Agreement (NAFTA) and, in keeping with our policy of maintaining consistency across our agreements, is very similar to the investment chapters of our recently-concluded free trade agreements, including those with Chile, Singapore, five Central American countries and the Dominican Republic (DR-CAFTA), Morocco, Australia, Oman, Peru, and Colombia.").

[310] *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Submission of the United States (November 23, 2012), ¶ 7 (RL-94) ("The burden is on the claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*.") (citing *Rights of Nationals of the United States of America in Morocco (France v. United States)* Judgment (August 27, 1952) 1952 ICJ Report, p. 200 (RL-28) ("The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party.")); *see also Apotex Holdings Inc. and Apotex Inc. v. United States*, ICSID Case No. ARB(AF)/12/1, Counter-Memorial on Merits and Jurisdiction (December 14, 2012), ¶¶ 352, 354 (RL-95) ("A rule crystallizes into customary international law over time through a general and consistent practice of States that is adhered to from a sense of legal obligation. […] The burden is on the claimant to establish the existence of a rule of customary international law.").

[311] BIT between Uruguay and the United States, Annex A (C-001); *see also TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Submission of the United States (November 23, 2012), ¶ 7 (RL-94) ("The party which relies on a custom,' therefore, 'must prove that this custom is established in such a manner that it has become binding on the other Party.'") (emphasis added) (citing *Asylum (Colombia v. Peru)*, Judgment (November 20, 1950), 1950 ICJ Report, p. 276 (RL-27)); *see also North Sea Continental Shelf (Federal Republic of Germany v. Denmark, Netherlands)*, Judgment (February 20, 1969), 1969 ICJ Report, ¶ 74 (RL-31) ("[A]n indispensable requirement [of showing a new rule of customary international law] would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; – and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.").

Glamis Gold v. United States, the evidence of said "practice" is shown in the following authorized sources: "treaty ratification language, statements of governments, treaty practice (e.g., Model BITs), and sometimes pleadings."[312] In fact, "[l]ooking to a claimant to ascertain custom requires it to ascertain such intent, a complicated and particularly difficult task. In the context of arbitration, however, it is necessarily Claimant's place to establish a change in custom."[313]

186. The Claimant has not met its burden of proof in demonstrating that the FET obligation extends beyond what the Treaty specifies: the obligation "not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world."[314] Regarding this subject, it does not cite any recognized sources—the text of treaties, statements by Parties to the Treaty, BIT models, or submissions by State Parties—to demonstrate additional obligations. The only authorities used by the Claimant are arbitral awards, however, as the tribunal explained in *Glamis Gold*: "[a]rbitral awards, Respondent rightly notes, do not constitute State practice and thus cannot create or prove customary international law."[315]

187. Specifically, in its Memorial, the Claimant cites inapplicable and inadequate cases as evidence of a cocktail of additional elements—including transparency and good faith,[316]

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[312] *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award (June 8, 2009) (Young, Caron, Hubbard), ¶ 603 (RL-75).

[313] *Id.*

[314] BIT between Uruguay and the United States, art. 5 (C-001).

[315] *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award (June 8, 2009) (Young, Caron, Hubbard), ¶ 605 (RL-75). The tribunal determined that arbitral awards can, however, "serve as illustrations of customary international law *if they involve an examination of customary international law*, as opposed to a treaty-based, or autonomous, interpretation."). Here, the Claimant has not met its burden of analyzing the evidence in this respect.

[316] Memorial, ¶¶ 136-137, 140.

non-arbitrariness,[317] due process,[318] and nondiscrimination[319]—within the FET standard. Uruguay has already demonstrated that, even under the assumption that the Treaty included these obligations within the FET principle, it did not commit any violation in not granting a new license, or not "adjusting" its previous authorization to provide services, starting in the year 2003. The evidence demonstrates without any doubt that URSEC did not act in bad faith, or in an arbitrary or discriminatory manner against Trigosul. In this section, Uruguay demonstrates that these obligations are not even found in the Treaty.

188. The Claimant cites two cases from the NAFTA and the DR-CAFTA, respectively, in which *dicta* suggests that "the customary international law minimum standard is different from the formulation adopted in the *Neer v. Mexico* case 89 years ago."[320] As a preliminary point, these cases do not establish that the minimum standard is "different" than the enunciation in *Neer*. They simply observe that the standard is "constantly in a process of development."[321] And it does not come close to what is necessary to prove that customary law has "evolved" to incorporate obligations that are new, different, or in additional to the obligation

[317] *Id.*, ¶¶ 144-146.

[318] *Id.*, ¶¶ 132-133.

[319] *Id.*, ¶ 149.

[320] Memorial, ¶ 124.

[321] *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award (January 9, 2003) (Feliciano, de Mestral, Lamm), ¶ 179 (CL-035) ("For both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development"); *see also Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award (June 29, 2012) (Rigo Sureda, Eizenstat, Crawford), ¶ 218 (CL-036). Furthermore, in *ADF Group*, the Tribunal also expressed doubts on the applicability of the *Neer* case given that the case "did not purport to pronounce a general standard applicable not only with respect to protection against acts of private parties directed against the physical safety of foreigners while in the territory of a host State, but also in any and all conceivable contexts." *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award (January 9, 2003) (Feliciano, de Mestral, Lamm), ¶ 181 (CL-035) Therefore, it determined that "[t]here appears no logical necessity and no concordant state practice to support the view that the *Neer* formulation is automatically.".

specified in the Treaty. It is clear that none of these cases constitute evidence of the practice of States.

189. Even more deceptively, the Claimant persists in its argument by stating that "*[t]hose* 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 reference to the customary international law minimum standard."[322] But the tribunals cited to support this idea are different than "those [two] tribunals," *ADF Grp. Inc.* and *RDC*. These tribunals do not say anything about the equivalency between the minimum standard in customary international law and the "fair and equitable treatment applicable in treaties that do not include a reference to the customary international law minimum standard."[323]

190. The cases cited by the Claimant to support the idea that the minimum standard in customary international law "has come to coincide" with another, different FET standard are cases in which the text of the Treaty and, consequently, the intent of the parties, are contrary to the Treaty applicable to this case. For example, the Claimant cites *Crystallex v. Venezuela*, a case in which the tribunal interpreted the FET standard in a treaty without any reference to the minimum standard of treatment.[324] The tribunal specifically noted this difference in its analysis: "*Unlike treaties such as NAFTA,* which expressly incorporate the minimum standard of

[322] Memorial, ¶ 124.

[323] *Id.*, ¶ 124.

[324] The BIT between Canada and Venezuela establishes: "Each Contracting Party shall, in accordance with the principles of international law, accord investments or returns of investors of the other Contracting Party fair and equitable treatment and full protection and security." Agreement on Encouragement and Reciprocal Protection of Investments between Canada and the Bolivarian Republic of Venezuela (July 1, 1996), art. II (2) (RL-37).

treatment,[] the Canada-Venezuela BIT *nowhere refers* to such minimum standard."[325] The other cases cited by the Claimant are also irrelevant in this context for the same reason.[326]

191. On this unfounded basis, the Claimant reaches the conclusion that:

> 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 unfair, unjust, idiosyncratic, or discriminatory; and (*d*) with respect for due process.[327]

192. As will be explained in turn, the cases cited in support of this claim contain provisions that are anything but "almost identical" to the provisions in the Treaty between Uruguay and the United States (with one exception, in which the court found no breach of the FET standard). This characterization by the Claimant is misleading and, at best, suggests that the Claimant is not aware of the obligation contained in the Treaty between Uruguay and the United

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[325] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (April 4, 2016) (Lévy, Gotanda, Boisson de Chazournes), ¶ 530 (RL-113) (available in English in CL-020) (emphasis added).

[326] In *Rusoro v. Venezuela*, the tribunal conducted its analysis based on the same treaty between Canada and Venezuela, with no reference to the minimum standard of treatment. *See Rusoro Mining Limited v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award (August 22, 2016) (Fernández-Armesto, Orrego Vicuña, Simma), ¶ 2(CL-021). In *Rumeli v. Kazakhstan*, the treaty makes no reference whatsoever regarding customary international law, much less the minimum standard of treatment. *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award (July 29, 2008), ¶¶ 557-561 (Hanotiau, Boyd, Lalonde) (CL-027) (the only mention of "fair and equitable treatment" is in the preamble of the treaty between Turkey and Kazakhstan).

In *Mondev v. United States*, the only case in which the treaty makes a reference to the minimum standard of treatment, the Claimant cites language out of context and, in any case, in no way demonstrates the "convergence" of the minimum standard of treatment in customary international law with the FET standard applicable in treaties without a reference to this minimum standard of treatment. In this case the tribunal is clear: "an arbitral tribunal may not apply its own idiosyncratic standard in lieu of the standard laid down in Article 1105 (1)," "if there had been an intention to incorporate by reference extraneous treaty standards in Article 1105 and to make Chapter 11 arbitration applicable to them, some clear indication of this would have been expected," "the terms 'fair and equitable treatment' and 'full protection and security' are, in the view of the NAFTA Parties, references to existing elements of the customary international law standard and are not intended to add novel elements to that standard." *Mondev International Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award (October 11, 2002) (Stephen, Crawford, Schwebel), ¶¶ 120-122 (CL-013).

[327] Memorial, ¶ 125.

States, and that it does not understand the difference between the different provisions of FET nor the evolution of the concept in BITs. In addition to *Crystallex v. Venezuela* and *Rumeli v. Kazakhstan,* discussed above, the Claimant cites *Lemire v. Ukraine*, *Bayindir v. Pakistan*, and *Waste Management v. Mexico.*

193. In *Lemire,* the relevant provision states that: "Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law."[328] Apart from the use of the words "fair and equitable treatment," there is nothing "identical" about this provision and the provision in the Treaty between Uruguay and the United States. And, indeed, the tribunal in the *Lemire* case defined the FET standard as an autonomous standard[329] specifically because the States Parties to the treaty decided not to link the FET standard to the minimum standard of treatment.[330] As was explained by the tribunal in the *Glamis Gold*, interpreting the NAFTA's FET clause, "arbitral decisions that apply an autonomous standard provide no guidance inasmuch as the entire method of reasoning does not bear on an inquiry into custom."[331]

194. Similarly, in the *Bayindir* case, the FET clause in the BIT between Pakistan and Switzerland does not make reference to "general international law,"[332] and much less to the

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[328] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decisión sobre Jurisdicción y Responsabilidad (June 6, 2012) (Fernández-Armesto, Paulsson, Voss), ¶ 244 (CL-038).

[329] *Id.*, ¶ 284.

[330] *Id.*, ¶¶ 252-255.

[331] *Glamis Gold, Ltd. v. The United States*, UNCITRAL, Award (June 8, 2009) (Young, Caron, Hubbard), ¶ 608 (RL-75) (emphasis added).

[332] *Bayindir Insaat Sanayi Ve Ticaret AS Turzim v. The Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award (August 27, 2009) (Kaufmann-Kohler, Berman, Böckstiegel), ¶ 176 (CL-039).

minimum standard of treatment.[333] Furthermore, in *Waste Management v. Mexico,* the only case cited in which the text of the treaty (NAFTA) was linked to the minimum standard of treatment, the tribunal concluded that the actions of the State did not breach the FET obligations.[334]

195. In short, the Claimant obscures the meaning of the text of the Treaty, makes reference to cases and treaties that do not apply, and does not attempt, in any way, to prove the existence of the obligations—beyond the obligation regarding no denial of justice—under customary international law.[335] Therefore, under the Treaty between Uruguay and the United

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[333] The BIT between Pakistan and Switzerland establishes that: "[e]ach Contracting Party shall grant within its territory fair and equitable treatment to investments of investors from the other Contracting Party." *See Bayindir Insaat Sanayi Ve Ticaret AS Turzim v. The Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award (August 27, 2009) (Kaufmann-Kohler, Berman, Böckstiegel), ¶ 165 (CL-039)

[334] *ADF Group Inc. v. the United States*, ICSID Case No. ARB(AF)/00/3, Award (April 30, 2004) (Feliciano, deMestral, Lamm), ¶ 100 (CL-033).

[335] The Claimant also argues that the standard of fair and equitable treatment (FET) must be modified by the language used in the treaty between Uruguay and Switzerland, which entered into force in 1991. *See* Memorial, ¶ 124 note 251. The use of the FET clause of another treaty does not affect the content of the standard. As explained in the arguments set out in the case *ADF v. United States of America*, "ADF errs in suggesting that the standards of the provisions it invokes in the United States' BITs with Albania and Estonia are different from the customary international law standards incorporated into Article 1105(1). […] [T]he State Department has repeatedly advised the Senate over the past decade that the BIT paragraph containing the provisions concerning 'fair and equitable treatment' and 'full protection and security' is intended only to require a minimum standard of treatment based on customary international law." *ADF Group Inc. v. United States,* ICSID Case No. ARB(AF)/00/1, Rejoinder of the United States (March 29, 2002), pp. 40-41 (RL-43). The tribunal agreed with the Respondent, rejecting the validity of the interpretation of the Claimant and concluding that "[t]he intent of one of the two State Parties to the two treaties is clearly relevant, and it does not appear necessary to engage in rigorous interpretative analysis." *ADF Group Inc. v. the United States*, ICSID Case No. ARB(AF)/00/1, Award (January 9, 2003) (Feliciano, deMestral, Lamm), ¶¶ 194-95 (CL-035); *see also* United Nations Conference on Trade and Development, *Most-Favored-Nation Treatment: A Sequel* (2010), p. 58 (RL-81). Moreover, as is the case in the BIT between Venezuela and Uruguay, the BIT between Uruguay and Switzerland entered into force in 1991, 15 years before the conclusion of the Treaty at issue here. Therefore, the parties clearly were aware of the option to not include a reference to international law or the minimum standard of treatment, but *they decided to include it. See* BIT between Uruguay and the United States, Annex II (C-001); *see infra*, ¶¶ 199-200.

In any case, in the interpretation of the treaty between Uruguay and Switzerland, the tribunal in *PMI v. Uruguay* explained that the "the absence of any reference in Article 3(2) of the BIT to "treatment in accordance with international law" or "to customary international law or a minimum standard of treatment," as provided by some other investment treaties with regard to the FET standard, *does not mean that the BIT creates an "autonomous" FET standard, as contended by the Claimants*[.]" *Philip Morris Brands Sarl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic Of Uruguay*, ICSID Case No. ARB/10/7, Award (July 8, 2016) (Bernardini, Born, Crawford), ¶ 316 (RL-115) (emphasis added).

States, the obligation to provide fair and equitable treatment only consists of the obligation specified in the Treaty: not to deny justice.

196. Italba does not allege that not granting a new license to Trigosul or the "adjustment" of its prior authorization means that justice has been denied.[336] Therefore, it does not even raise a claim of fair and equitable treatment under the Treaty.

5. Uruguay Did Not Breach the Obligation to Provide Full Protection and Security to Trigosul

197. Finally, Italba argues that the failure to grant a new license breached the obligation of Article 5 of the Treaty to provide "full protection and security" to covered investments. This argument is totally groundless because it was the express intention of the two State Parties to limit the scope of this obligation to the standard of customary international law, that is, to police protection of the investment against any action of a criminal nature.[337] Italba itself accepts that there was no lack of police protection.

198. Italba argues that the obligation to provide full protection and security is broader than what was agreed between the Parties in the Treaty. Italba bases its argument on Article 5 which, in its own words, "not only ensure[s] that a host State's actions and policies do not favor some investors over others, but also imports substantive guarantees made in bilateral treaties

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[336] *See infra*, Section III.D.3.

[337] Article 5 of the Treaty establishes that each Party "shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security." Paragraph 2 of the Article sets out that the standard "requires each Party to provide the level of *police protection* required under customary international law." BIT between Uruguay and the United States, Article 5 (C-001).

between the host State and other States."[338]

199. Based on this interpretation of Article 5, Italba invokes the BIT between Uruguay and Venezuela and, specifically,[339] the obligation in that treaty to provide "full protection and security" which, according to Italba, requires the exercise of "due diligence and vigilance to ensure both the physical and legal protection and security of investments by foreign investors."[340]

200. This argument suffers from several fatal defects. First, even in the case—*quod non*—that the definition of "full protection and security" in the BIT with Venezuela takes precedence over the definition agreed upon by Uruguay and the United States, Italba cannot demonstrate that not granting a new license had an adverse effect on its "legal certainty" because it was not entitled to this license and did not need it to provide the telecommunication services that had been authorized previously.

201. Second, Article 5 does not allow Italba to substitute the BIT standard with Venezuela with the standard agreed upon by Uruguay and the United States because, in the interpretation of a standard, the intention of the Parties of the treaty, indicated in the text, is paramount.[341] The United States has been consistent in its interpretation of the full protection and

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[338] Memorial, ¶ 169. The Claimant also alleges that 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." *Id.*

[339] Venezuela-Uruguay *Agreement for the Reciprocal Promotion and Protection of Investments* (May 20, 1997), Article 4 (CL-065).

[340] Memorial, ¶ 174.

[341] Vienna Convention on the Law of Treaties (May 23, 1969), 1155 U.N.T.S. 331, Articles. 31-32 (RL-32). *See also* J. Pauwelyn & M. Elsig, *The Politics of Treaty Interpretation: Variations and Explanations across International Tribunals* (October 3, 2011), p. 451 (RL-88) ("Most interpreters agree that the task bestowed on them is to give effect to the intentions of the parties. In this sense, tribunals are the agents of the state-parties (principals) who created the tribunal."); E.S. Yambrusic, TREATY INTERPRETATION (1987), p. 14 (RL-33); M. H. Lauterpacht, *Treaty*

security standard under international law. In *Loewen Group, Inc. v. United States,* for example, the United States explained:

> [T]he "full protection and security" standard is defined by customary international law and does not expand or otherwise modify the minimum standard of treatment under customary international law. Moreover, cases in which the customary international law obligation of full protection and security was found to have been breached are limited to those in which a State failed to provide reasonable police protection against acts of a criminal nature that physically invaded the person or property of an alien.".[342]

202. The United States continued, explaining that:

> Indeed, if the full protection and security requirement were to extend to an obligation "to prevent economic injury inflicted by private parties, […] NAFTA Article 1105(1) would constitute a very substantial enlargement of that obligation as it has been recognized under customary international law. […] [I]f the governments intended to depart from the general principles of international law, then the 'agreement would naturally have found direct expression in the protocol itself and would not have been left to doubtful interpretation.'"[343]

203. These understandings relating to the "full protection and security" were expressly incorporated into Article 5 of the Treaty between Uruguay and the United States:

> 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,

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Interpretation [*De l'interprétation des traités*], 43 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 366, (1950), pp. 390-402, 457-460 (RL-26).

[342] *The Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB (AF)/98/3, Counter-Memorial of the United States (March 30, 2001), pp. 176-177 (RL-42) (citations omitted) (emphasis added). In this case, the United States established the correct interpretation of the standard of full protection and security under NAFTA. Article 1105(1) of NAFTA stipulates that: "[e]ach Party shall accord to investments of investors of another Party treatment in

accordance with international law, including fair and equitable treatment and full protection and security." North American Free Trade Agreement (NAFTA) (signed on December 17, 1992), Article 1105(1) (RL-36).

[343] *The Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB (AF)/98/3, Memorial of Reply of the United States (30 March 2001), pp. 179-180 (RL-42) (citations omitted) (emphasis added).

> and do not create additional substantive rights. *The obligation in paragraph 1 to provide: […]"full protection and security" requires each Party to provide the level of police protection required under customary international law*.[344]

The clear intention of the States Parties regarding the definition of this obligation, which was a fundamental condition of their agreement to the BIT, cannot be annulled by importing a contrary definition in another treaty by mere operation of a most favored nation clause.[345] Less still if the other treaty came into force at an earlier date, and the States parties could have used the same definition, if they so intended.[346] If Uruguay and the United States wanted to include a standard without a limitation on the full protection and security, they could have used language that reflected this intention. They did not, and because of this, the standard of Article 5 is the one under customary international law. Therefore, because Italba does not even allege that there was a lack of police protection, Uruguay could not have breached its obligation to ensure full protection and security for Trigosul.

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[344] The BIT between Uruguay and the United States, Article 5 (C-001) (emphasis added); *See also* Free Trade Agreement between the Dominican Republic – Central America and the United States (DR-CAFTA) (August 5, 2004), Article 10.5 (RL-48).

[345] *See, e.g., Emilio Agustin Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Court on Objections to Jurisdiction (January 25, 2000) (Orrego Vicuña, Buergenthal, Wolf), ¶ 64 (RL-39); *Técnicas Medioambientales TECMED S.A v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003) (Grigera Naón, Fernández Rozas, Bernal Verea), ¶ 69 (CL-009) (where it was stated that "the core of matters that must be deemed to be specifically negotiated by the Contracting Parties" cannot be changed by the most favored nation clause"); *Vladimir Berschader and Moïse Berschader v. Russian Federation*, SCC Case No. 080/2004, Award (April 21, 2006) (Sjovall, Lebedev, Weiler), ¶ 204 (RL-52) (the consistent practice of the contracting party is considered as "strong," evidence of the scope of a most favored nation clause.)

[346] *See* T. Cole, *The Boundaries of Most Favored Nation Treatment in International Investment Law*, 33 MICH. J. INT'L L. 537 (2004), p. 575 (RL-46) ("[P]arties usually *cannot plausibly be understood to have intended an MFN clause* in an investment treaty *to grant the beneficiary of the clause access to more favorable provisions* present in other investment treaties *already in effect when the Basic Treaty came into force.* Consequently, even where the text of the MFN clause would itself seem to allow such an application, the clear intent of the parties should be taken to override the language of the clause.") (emphasis added).

In fact, the provision that the Claimant would like to invoke comes from a treaty concluded in 1997, almost ten years before the conclusion of the Treaty in this case. Clearly, the parties were aware of the option to use the same terms present in the treaty between Uruguay and Venezuela, but chose to draft it differently.

B. URUGUAY DID NOT BREACH ITS TREATY OBLIGATIONS WHEN IT REVOKED TRIGOSUL'S AUTHORIZATION AND FREQUENCY ALLOCATION

204. URSEC acted transparently and on reasonable grounds, in exercising its legal powers and its duty to safeguard the public interest, when, in early 2011, it released the frequencies allocated to Trigosul. At the time that it revoked the allocation of these frequencies, it had been over ten years since they had been allocated to Trigosul, without it having made efficient use of them. This was the reason for revoking the frequency allocation that Trigosul had, and it was justified under the current regulatory system in Uruguay.

205. Without a doubt, URSEC had the authority and responsibility to revoke the frequency allocation granted to Trigosul due to the company's protracted breach of its obligation to use these frequencies to provide the public services for which it had been authorized. According to Article 26 of the decree 114/ 003, "Where a portion of the assigned radio electric spectrum is not used in conformity with the terms and conditions set forth in the authorization or permit granted, such nonconformity may cause the cancellation of said authorization or permit for the use of such portion of the band."[347]

[347] Ministry of National Defense, Decree No. 114/003 (March 25, 2003), Article 26, p. 11 (C-017); *see* Statement of Dr. Cendoya, ¶ 42 ("Effective provision of the service is so important that Article 26 of Decree 115/003 includes in the grounds for revocation of the license, which the Administration may and must pay attention to, the three grounds associated with the characteristics of the authorization, already stated above: '*a. Licensee's failure to provide the public with the services stated in its license application by the expiration of the deadline for installation; b. Interruption of all authorized services for 60 (sixty) consecutive days; c. Failure to meet the deadlines for installing and putting into operation the network.*'"). *See also,* Opinion of Dr. Pereira, ¶ 92. "[T]he authorization could be revoked at any moment through a reasoned resolution of the Executive Branch, pursuant to the reasons of general interest that justify such decision. For example, not providing the public with the services for which the authorization was granted, interruption of the authorized services, any serious cause resulting from the provision of the services, or due to other reasons that would justify such decision (technological changes, amendments to international agreements, etc.)."

206. Italba alleges, against all of the evidence, that the revocation was arbitrary and in bad faith, and therefore constitutes a breach of its right to fair and equitable treatment and a violation of its right to enjoy full protection and security under Article 5 of the Treaty. Interestingly, Italba did not characterize the revocation as an "expropriation" in breach of Article 6. Thus, Italba concedes that the revocation was not an act of expropriation of its rights. As set out below, nor was the revocation a breach of its rights to receive fair and equitable treatment and full protection and security.

1. The Authorization to Provide Services and the Allocation of Frequencies Were Provisional and Revocable

207. Between 2000 and 2011, Trigosul was subject to a clear regulatory framework for the provision of telecommunications services that has been explained in previous sections.[348] In this regard, Uruguay reiterates that the allocation of frequencies, under the conditions in which Trigosul received it,[349] did not confer the right to use them for any determined period of time.[350] However, in reading Claimant's Memorial, it would seem that the provisional and revocable nature of the allocation granted to Trigosul had no effect on the extent of use of the spectrum to

[348] *See supra,* Section III.A.1.

[349] National Communications Directorate, Resolution No. 444/000 (December 12, 2000), pp. 1-2 (C-012) ("IN VIEW OF: the provisions of the standards listed above. NATIONAL COMMUNICATIONS DIRECTOR ORDERS: 1. To allocate to TRIGOSUL S.A., on a provisional and revocable basis, without the right to claim or compensation of any type, the sub-blocks 'K' and 'M' corresponding to the 3425 - 3450 MHz. and 3525 - 3550 MHz. sub-frequency bands."). *See also,* Opinion of Dr. Pereira, ¶ 97 ("The case law of the TCA has been clear on this issue. In the specific field of telecommunications, the TCA has repeatedly highlighted the provisional and revocable nature of permits for the use of the radio spectrum for of reasons of general interest.").

[350] Opinion of Dr. Pereira, ¶ 99 ("T]he allocation of radio channels of which the plaintiff company was the holder was provisional and revocable, in view of which it is not possible to invoke a legitimate expectation that said allocation would not be revoked, or of the existence of supposed acquired rights to maintain it, because the claimant was aware of the provisional status of the situation."); *see also,* Statement of Dr. Cendoya, ¶ 14 ("Only authorizations obtained by public bidding process, auction or competitive procedure, and which have a definite term are different. But that is not the case with Trigosul.").

which they could aspire;[351] but that was definitely not the case. As explained by the Director of URSEC, Dr. Nicolas Cendoya, and the expert in Uruguayan law, Dr. Santiago Pereira, the authorization to provide services "was granted [to Trigosul]without any term, constituting a concession with no fixed term or a permit, which could be revoked by the Administration, at any moment, for reasons of general interest,"[352] and, in the same respect, "the Administration can withdraw the spectrum at any time only subject to the limits established in the general legal rules on administrative acts."[353]

208. The conditions under which these authorizations were authorized to the other companies that were supposedly competing with Trigosul were the same.[354] In all cases mentioned by Italba in the Memorial,[355] the frequency allocations were provisional and revocable, without there being any right to a claim or compensation of any kind.[356] These conditions are not capricious or unusual, quite the opposite, in fact, they are necessary and

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[351] It is striking that Italba makes no mention of these characteristics at any point in its memorial. In relation to the characteristics of the allocation of frequencies granted to Trigosul, Dr. Pereira points out that "Trigosul had always been aware that the allocation of the frequency block was granted by the Administration (DNC and URSEC) with a provisional and revocable nature […] It is not possible for Trigosul to ignore or attempt to ignore this circumstance, reiterated on various occasions expressly in the text of resolutions on such matter. The company had always been aware of its situation in relation to the allocation of the frequency block by URSEC." Opinion of Dr. Pereira, ¶¶ 102, 107.

[352] *Id.*, ¶ 90.

[353] Statement of Dr. Cendoya, ¶ 11.

[354] *Id.*, ¶ 61 ("It was not only Trigosul whose authorizations were not updated. None of the corporations who provide services similar to those offered by Trigosul have had their authorizations updated yet. They still have the authorizations granted to them under acts implemented before Decree 115/003 came into force.").

[355] Memorial, ¶ 155.

[356] Communication Services Regulatory Agency, Resolution No. 611/007 (December 27, 2007), p. 2 (C-041); Communication Services Regulatory Agency, Resolution No. 157/010 (March 25, 2010), p. 3 (C-053); Communication Services Regulatory Agency, Resolution No. 544/010 (October 29, 2010), p. 2 (C-054); Communication Services Regulatory Agency, Resolution No. 053/011 (March 16, 2011), p. 3, (C-055). Dr. Pereira also noted that the allocation of frequency blocks by the Administration on a provisional and revocable basis without right to claim or compensation "[…] has been a constant in Uruguay's regulatory framework for telecommunications." Opinion of Dr. Pereira, ¶ 26, f.

reasonable for the efficient operation of the telecommunications system in Uruguay.[357] Trigosul must have been aware of these limitations on its possibilities of using the spectrum, and therefore contemplated that the allocation of its frequencies could be revoked according to the regulatory framework in force.[358]

209. Greater emphasis should be placed on this point considering that conduct, such as repeated administrative breaches, failure to provide services for which it has been authorized and, more generally, departing from the objectives of public policy aimed at protecting the public interest, are sufficient grounds to revoke any kind of permit granted to an individual by the State.[359] In the specific case of the "provisional" radio spectrum frequency allocations, if any of these irregularities occur in the way they did with Trigosul—especially its prolonged lack of use of the allocated frequencies—it would certainly trigger and justify a revocation of the

[357] Statement of Dr. Cendoya ¶ 13 ("The use of particular spectrum frequencies can change as a result of agreements made internationally as a logical consequence of the fact that the characteristics of the radio spectrum derive from the rules of physics and not from the borders of States. […] This is why frequencies are allocated on a 'provisional and revocable basis, without the right to claim any kind of indemnity.' This text appears on all frequency allocations made without auction in Uruguay." Dr. Pereira also points out that the jurisprudence of the TCA has determined that "the existence of a limitation on radio channels is logical and reasonable […] due to the [] reasons of public interest related to the nature of the radio spectrum resource."). *See* Opinion of Dr. Pereira, ¶ 100.

[358] Statement of Dr. Cendoya, ¶ 14 ("In this respect, one thing is certain: neither the authorizations nor the allocations of frequencies such as those given to Trigosul are in perpetuity. They are provisional and revocable, without the right to any claim or indemnity. Only authorizations obtained by public bidding process, auction or competitive procedure, and which have a definite term are different. But that is not the case with Trigosul."); Opinion of Dr. Pereira, ¶ 101 ("It is relevant to mention that the only exception to the revocable and provisional nature of the allocation of frequencies is the case in which such allocation is made pursuant to a bidding process or other competitive procedure, which did not occur in the case in question. In fact, Trigosul never participated in any competitive procedure for the allocation of frequencies.").

[359] According to Dr. Pereira, "From the perspective of subjective legal situations, the position of Trigosul upon receiving the authorization, was that of a conditional or imperfect right '… the existence of which is subject to its compatibility with the public interest. As long as the condition that would require the sacrificing of these rights is not verified, they imply subjective rights in the strict sense; however, given that there is a possibility of sacrifice, they are called conditional or imperfect rights.' […] Indeed, DURÁN MARTÍNEZ mentions that in the Uruguayan Constitution permits are concessions for undefined terms, thus they may be revoked at any moment" Opinion of Dr. Pereira, ¶¶ 84-86.

allocation.[360]

210. Therefore, Italba's allegations that the revocation of the frequency allocation granted to Trigosul was arbitrary or done in bad faith are manifestly wrong. These allegations ignore the provisional and revocable conditions under which Trigosul was allocated the frequencies; and they also aim to ignore the history of Trigosul in Uruguay, which demonstrates a reluctance to provide the authorized services,[361] and incurring constant irregularities,[362] which constitute reasonable grounds for the revocation that it now qualifies as a breach of the Treaty.

2. The Revocation Was Made on the Basis of the Efficient Use of the Spectrum and the Public Interest

211. Contrary to Italba´s allegations,[363] URSEC revoked Trigosul's allocation of frequencies based on the public interest, applying objective statutory criteria, and making reasonable use of its powers. Trigosul's historical performance, as a whole, is an example of conflict with the principle of efficient use of the spectrum; after having been allocated frequencies for more than ten years, there is no evidence that it provided effective and continuous service.[364]

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[360] Opinion of Dr. Pereira, ¶¶ 112, 116.

[361] Statement of Dr. Cendoya, ¶ 52.

[362] As recounted by Dr. Cendoya, "Trigosul failed to comply with nearly all the obligations to which a service operator is subject. On several occasions, delays and irregularities in payment for use of the frequencies had been recorded against it. When it changed its TCS to Punta del Este, it says that it started to provide services, whether on a test or experimental basis, without an authorization to modify the system or the relevant authorization from URSEC, with the risk to the integrity of the rest of the radio communications system that this entails. Trigosul's limited, if not non-existent, operation was sufficient reason to revoke its authorization." *Id.*, ¶ 80.

[363] Memorial, ¶¶ 127, 136.

[364] Statement of Dr. Cendoya, ¶ 54. "the reports made to URSEC's Regulatory Databases never showed a consistent number of clients […] the highest stated number of clients was recorded in the file when they sought an "adjustment" of the authorization, where they reported the existence of eight clients in 2005."

212. It is worth reiterating that Trigosul did not even attempt to be able to provide the authorized services before 2003.[365] Furthermore, from that year on, despite the fact that it had all the necessary permits, and supposedly the capability to provide the services authorized, it only officially reported that it had eight customers in 2005, six customers between 2006 and 2008, and zero customers in 2009 and 2010.[366] Worse still, there is no evidence that any of the few customers reported between 2005 and 2008 had paid Trigosul for its services; Trigosul did not report any income for services rendered in those years.[367] Trigosul also did not report that it would make any investment in the infrastructure needed to provide the authorized services for all of those years.[368]

213. At the end of 2010, URSEC decided to commence administrative proceedings to revoke the allocation of the frequencies that it had been allocated,[369] based on the reports submitted by Trigosul itself showing that Trigosul did not make—nor was it capable of making—efficient use of the spectrum, in addition to the constant delays in payments to URSEC of the fees for the spectrum use.[370] As part of the process, on December 21, 2010, URSEC conducted an inspection of Trigosul's offices, which confirmed that, according to URSEC's

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[365] Since September 1999, Dr. Alberelli was informed that the installation and operation of the authorized data transmission system could not be postponed indefinitely. *See* National Communications Directorate, Resolution No. 270/99 (September 7, 1999) (R-15). Trigosul system was not in working order until June 20, 2003. *See,* Communication Services Regulatory Agency, Resolution No. 303/034 (September 11, 2003) p. 2 (R-28).

[366] Trigosul S.A. Statistical Table (2016) (R-54).

[367] *Id.*

[368] *Id.*

[369] Communication Services Regulatory Agency, Technical Advisory Memorandum No. 2010/5/00064 (December 28, 2010) (C-066).

[370] Communication Services Regulatory Agency, Draft Resolution and Resolution No. 364/041 (October 30, 2003) (R-29); Communication Services Regulatory Agency, Report of the Accounting Division, Accounts Receivable (December 30, 2003) (R-30); Communication Services Regulatory Agency, Resolution No. 054/006 (February 19, 2004) (R-32).

criteria, Trigosul was not providing services, and it did not have the capacity or intention to provide them, in its actual conditions.[371] After thus confirming what was obvious from Trigosul's periodic reports, and from the experience with the delays in payments, URSEC proceeded to revoke the allocated frequencies, by Resolution 001/011 of January 20, 2011,[372] and Trigosul was promptly notified.

214. Decree 114/003 of 2003 itself expressly recognizes that the radio spectrum is a limited resource in the public domain of the State;[373] and, since its inception, URSEC is responsible for controlling its use.[374] For its part, the regulations of radio spectrum use in Uruguay have established that the proper exercise of URSEC's regulatory power entails that the radio spectrum should be used efficiently [375] and, in the event that the frequencies allocated to a assignee are not being used efficiently, the corresponding allocations can be cancelled.[376]

215. According to the current regulation, radio spectrum frequencies are used efficiently when "such use takes place in an effective and continuous manner in the geographical areas for which such frequencies have been reserved, with adequate traffic volume."[377] The same decree sets out that the efficient use of the spectrum shall be promoted "endeavoring to keep the

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[371] *Id.*, p. 2.

[372] Communication Services Regulatory Agency, Resolution No. 001/011 (September 20, 2011) (C-068).

[373] Ministry of National Defense, Decree No. 114/003 (March 25, 2003), Article 3, pp. 2-3 (C-017).

[374] Law No. 17.296 (February 21, 2001), Article 86 (C-013) ("In terms of telecommunications services, URSEC shall have the following responsibilities and legal powers: […] c. To manage, defend, and control the national radio spectrum."). In the same sense, Dr. Cendoya states that "one of URSEC's main functions is to ensure the efficient use of the radio spectrum as a public asset with limited frequencies." Statement of Dr. Cendoya, ¶ 76.

[375] Ministry of National Defense, Decree No. 114/003 (March 25, 2003), Recital I, Articles 2, 12, pp. 1-2, 6-7 (C-017).

[376] *Id.*, Article 26, p. 11.

[377] Ministry of National Defense, Decree No. 114/003 (March 25, 2003), Article 12, pp. 6-7 (C-017).

number of frequencies and spectrum usage to the minimum extent necessary to ensure the adequate functioning of services and systems."[378]

216. In other words, the objective of URSEC in terms of the efficient use of the spectrum includes having frequency assignees that actually provide services, and its mandate does not include granting or maintaining frequency allocations in the hands of assignees that are not essential to the operation of the telecommunications system in Uruguay.[379]

217. The narrative presented by Italba alleging that URSEC's actions were arbitrary or in bad faith,[380] are only distractions to try to obscure the fact that Trigosul did not operate continuously for long periods of time, while it had all the necessary authorizations to do so.[381] The reasonable conclusion to Trigosul's careless pattern of behavior was for its frequency allocation to be revoked. URSEC would, at some point, have to revoke Trigosul's allocation of frequencies and eventually allocate them to a party that would make better use of them, in accordance with the parameters established in the regulation which has been in force for more than seven years.[382]

218. The Claimant's lack of interest in providing the authorized services was evident from the start. In 1999, two years after Dr. Alberelli was initially granted permission, the then National Communications Directorate was already concerned about the authorized system's lack

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[378] *Id.*, Article 2, p. 2.

[379] In this respect, Dr. Cendoya believes that Decree 114/003 "establish[es] several measures to ensure that an asset that belongs to everyone is not used as an element of pure economic speculation." Statement of Dr. Cendoya, ¶ 8.

[380] Memorial, ¶¶ 9, 101, 126, 143, 145, 150.

[381] *See supra,* Section III.A.1.

[382] Ministry of National Defense, Decree No. 114/003 (March 25, 2003), Articles 2, 12, pp. 2, 6-7 (C-017).

of operation and it recommended the release of the respective frequencies.[383] At that time, the corresponding resolution noted that "more than two years after the authorization to operate a radio system was granted, said system has not been put into operation" and that the period for doing it could not be indefinite.[384] A period of 180 days was granted to put the authorized system into operation.[385] However, Dr. Alberelli did not put the system into operation within that period.

219. Instead, Dr. Alberelli requested that the authorization for data transmission granted to him personally be transferred to Trigosul.[386] The National Communications Directorate granted Dr. Alberelli's request and extended the previous term until August 2000.[387] Trigosul also failed to put a system into operation to provide services before that date.

220. Later, when Trigosul was allocated the blocks in the 3500 MHz frequency—the 2011 revocation of which Italba considers to be a breach of the Treaty in this arbitration[388]—it was stipulated that the deadline to start commercial operation of Trigosul's system was December 1, 2001.[389] Again, Trigosul failed to start operation of its system before that date.

221. When the end of the deadline was drawing near, this was again extended in November 2001 for an additional 180 days.[390] Trigosul did not put its system into operation by the end of this new deadline and requested another extension. This latest extension was granted

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[383] Proposal to Revoke the Licenses by Mr. Héctor Budé (May 26, 1999) (R-13).

[384] National Communications Directorate, Resolution No. 270/99 (September 7, 1999) (R-15).

[385] The period had March 11, 2000 as the deadline. *Id.*

[386] Letter from G. Alberelli (Italba) to the National Telecommunications Directorate (August 9, 1999) (R-14).

[387] National Communications Directorate, Legal Advisory Report (February 28, 2000) (R-21).

[388] Memorial, ¶¶ 126, 137.

[389] National Communications Directorate, Resolution No. 444/000 (December 12, 2000), p. 2 (C-012).

[390] Communication Services Regulatory Agency, Resolution No. 231/27 (November 8, 2001) (R-23).

to Trigosul in May 2002, for another 180 days.[391] This extension was simply another deadline that Trigosul did not meet.[392]

222. It is important to highlight that, during all of these requests for extensions, URSEC and its predecessors took into account a series of reasons given by Trigosul regarding the economic difficulties and other types of difficulties that prevented it from starting operation,[393] without having the regulatory obligation to do so; this in itself demonstrates the good faith accorded by Uruguay in its treatment of Trigosul, with the expectation that operations would start within the agreed deadlines. [394]

223. It was not until June 20, 2003 that Trigosul's system was put into operation.[395] The system was evidently put into operation after the deadline for doing so and a warning was imposed on Trigosul as a penalty for failing to comply with the deadlines.[396]

224. The negligent conduct of Trigosul extended to the performance of its other obligations. Trigosul was repeatedly notified of the debts that it owed for payment of the

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[391] Communication Services Regulatory Agency, Resolution No. 175/16 (May 2, 2001) (R-25).

[392] Communication Services Regulatory Agency, Radio Frequencies Department Report (November 13, 2002) (R-27).

[393] National Communications Directorate, Legal Advisory Report (February 28, 2000) (R-21); Communication Services Regulatory Agency, Legal Advisory Report (November 7, 2001) (R-22); Regulatory Unit of Communications Services, Resolution No. 231/27 (November 8, 2001) (R-23); Communication Services Regulatory Agency, Legal Advisory Report (April 18, 2002) (R-24); Regulatory Unit of Communications Services, Resolution No. 175/16 (May 2, 2002) (R-25).

[394] Statement of Dr. Cendoya, ¶ 77 ("In spite of the opportunities that it was given, specifically, three extensions of the term that it had to implement its services, which demonstrates the extreme tolerance of the Administration towards Trigosul's delays in making its investment.").

[395] Communication Services Regulatory Agency, Resolution No. 303/034 (September 11, 2003) (R-28).

[396] *Id.*, p. 2 ("The Communications Services Regulatory Agency Hereby Decides […] 2. To give TRIGOSUL S.A. a warning for having failed to meet the deadlines for installation of the aforementioned system […]").

frequencies' fees.[397]

225. Trigosul's repeated delay in making its payments caused URSEC to constantly call on the company to pay its debts.[398] In addition, Trigosul was unorganized when making payments and often only partially settled invoices for the use of frequency.[399] In several of these communications it was put on notice that its authorization would be cancelled if it did not promptly comply with its mandatory payments.[400]

226. This situation continued for several years, as evidenced by the accounting division of URSEC's repeated efforts to collect the payments, prompted by the reiterated noncompliance of Trigosul.[401] Trigosul's debts were constantly increasing. While Trigosul was issued a demand for payment in 2004, where it was made aware of the possibility that its authorization would be revoked and required to pay 144,016 Uruguayan pesos[402] (equivalent to US $ 10,820), by 2005 the company's debt had tripled.[403]

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[397] Communication Services Regulatory Agency, Draft Resolution and Resolution No. 364/041 (October 30, 2003) (R-29); Communication Services Regulatory Agency, Resolution No. 054/006 (February 19, 2004) (R-32).

[398] Communication Services Regulatory Agency, Report of the Accounting Division, Accounts Receivable (December 30, 2003) (R-30).

[399] Communication Services Regulatory Agency, Report of the Accounting Division, Accounts Receivable (February 11, 2004) (R-31) ("It should be noted that in Decision No. 364 Minutes 041 of 10/30/2003 (p. 7), the company was ordered to pay the amount owed in the period January–August 2003. This debt was partially paid.").

[400] Communication Services Regulatory Agency, Resolution No. 054/006 (February 19, 2004) (R-32).

[401] Communication Services Regulatory Agency, Report of the Accounting Division, Accounts Receivable (February 11, 2004) (R-31); Communication Services Regulatory Agency, Report of the Accounting Division, Accounts Receivable (December 30, 2003) (R-30); Communication Services Regulatory Agency, Report of the Accounting Division, Accounts Receivable (October 17, 2005) (R-36).

[402] Communication Services Regulatory Agency, Resolution No. 054/006 (February 19, 2004) (R-32).

[403] By September 2005, Trigosul's debt had reached 479,349 Uruguayan pesos (equivalent to approximately US $ 33,444.89). Communication Services Regulatory Agency, Report of the Accounting Division, Accounts Receivable (September 19, 2005) (R-35).

227. To pay off this debt, Trigosul requested that it be granted a payment plan by which it was allowed to make payments in monthly installments and that 20% of the debt be written off.[404] URSEC processed Trigosul's request and granted it on June 29, 2007, by implementing Payment Facilitation Agreement No. 25/2007.[405] However, in the time between the date of the request and the implementation of the Payment Facilitation Agreement, Trigosul's debt increased significantly due to non-payment.[406]

228. Trigosul's disorderly conduct in relation to the payment of these fees continued until its frequency allocation was revoked.[407] As explained by URSEC's accounting division in the revocation proceedings, Trigosul made payments irregularly, for amounts different to the amounts invoiced monthly without providing proper notice, which made it impossible to clearly maintain its customer account's bookkeeping.[408]

229. The first indication that Trigosul started to have customers was in September 2005, more than five years after receiving Dr. Alberelli's authorization and frequencies. In his letter of September 6, 2005, Trigosul said that it only had four customers in its system;[409] one of

[404] Letter from L. Herbón (Trigosul S.A.) to the Communication Services Regulatory Agency (September 13, 2005) (R-34).

[405] Communication Services Regulatory Agency, Accounting Division, Accounts Receivable Management, Facilities Convention (June 29, 2007) (R-38).

[406] By June 2007, Trigosul's debt had reached 605,607.38 Uruguayan pesos (equivalent to approximately US $ 30,280.36).

[407] Communication Services Regulatory Agency, Administration and Finance Management Report, Invoicing (September 8, 2011) (R-44).

[408] *Id.*

[409] Letter from L. Herbón (Trigosul) to the Communication Services Regulatory Agency (September 6, 2005) (R-33) ("The Subscriber stations currently served by the system are: Puerto de Montevideo, depósito de RILCOMAR S.A., Rivera 2221 piso 8, Depto.804, Salto 1056 y Nueva Palmira 2166.").

them was the home of Dr. Alberelli in Montevideo.[410] The other three were not identified. As mentioned above, in its 2005 report to URSEC, Trigosul reported that it had a total of eight customers, without identifying them. This number dropped to six the following year, and again dropped to zero—zero customers—in 2009 and 2010, according to the reports of Trigosul itself.[411]

230. In contrast, Trigosul's main competition—Dedicado, S.A., which also provides data transmission services with the same authorization[412] and frequencies allocated before the 2003 regulatory change—reported the following:[413]

Year	**Number of customers**
2005	12,327
2006	13,226
2007	12,465
2008	16,385
2009	15,712
2010	16,479

[410] Statement of Dr. Cendoya, ¶ 109.

[411] Trigosul S.A. Statistical Table (2016) (R-54).

[412] The authorization granted to Advance Telecomunicaciones S.A., through the National Communications Directorate, Resolution No. 768/999 (September 15, 1999) (R-18), for "the installation and operation, for business purposes, of a wireless broadband network for the nonexclusive provision of data-transmission services, excluding the provision of broadcasting (radio and television) or telephone services," has been transferred to Dedicado S.A. by means of several transfers and corporate changes (see URSEC, resolution No. 220/013 (September 5, 2013), Whereas clause I to IX, p. 1-2 (C-084)). Dedicado S.A. provides data transmission services on the basis of that authorization.

[413] Dedicado S.A. Statistical Table (2016) (R-52).

231. At least three other companies, which have operations that are not as large as Dedicado, offered data transmission services during the same period, all based on authorizations and frequencies allocated before 2003 and without updating their authorizations or new licenses. The amount of customers reported was:[414]

Year	**Enalur**	**Telstar**	**Telefonica Moviles**
2005	183	94	183
2006	216	114	196
2007	168	119	204
2008	129	139	208
2009	54	190	219
2010	23	262	236

232. For the years 2009 and 2010, out of these five companies that provided the same services, Trigosul was the only one to report zero customers. Moreover, in addition to not having customers in 2009 and 2010 (the years immediately preceding the revocation of its allocation of frequencies), Trigosul did not declare any income, and did not report that it had any employees or investments in infrastructure and other fixed assets.[415] On the basis of this information, Trigosul looked like a ghost company.

233. In contradiction to the documentary evidence regarding the number of customers that Trigosul reported, which was established as zero for the years 2009 and 2010, Italba argues

[414] Enalur S.A. Statistical Table (2016) (R-53); Telstar S.A. Statistical Table (2016) (R-56); Telefónica Móviles del Uruguay Statistical Table (2016) (R-55).

[415] Trigosul S.A. Statistical Table (2016) (R-54).

that Trigosul did have some customers, specifically: Canal 7 de Maldonado[416] and the radiology clinic of Dr. Fernando García.[417] In addition to these alleged customers, Italba claims that Trigosul had a business prospect with the "Grupo Afinidad Mary."[418] Italba's problem with these allegations is that the first two deny ever having been customers of Trigosul, and the third does not exist.

234. With regard to Canal 7, its representatives have confirmed that they never received any service from Trigosul.[419] They claim that only test nodes were installed, but that Trigosul never provided any data transmission service to Canal 7.[420]

235. Italba's lies about an alleged relationship with the radiology clinic of Dr. García are even more serious. Not only does Dr. García say that he never received any services from Trigosul, but that he never had any communication with Trigosul or its representatives.[421] He swore under oath before the Clerk of the State Notary and before the Criminal Court of First Instance that the documents submitted by Italba in this arbitration—a supposed letter from Dr. García[422] to Dr. Alberelli and a supposed contract signed by Dr. García and Mr. Herbón[423]—are

[416] Memorial, ¶ 57.

[417] *Id.*, ¶ 55.

[418] *Id.*, ¶¶ 61-62.

[419] Letter from D. Bobre (Canal 7), to M. Toma (Office of the President of the Republic) (November 9, 2016) (R-72).

[420] *Id.*

[421] Witness Statement of Mr. Fernando García Piriz (December 29, 2016) ("Statement of Mr. García"), ¶¶ 1, 2; Criminal record Counsel assigned to the Court of First Instance (October 19, 2016), pp. 31–32 (C-138).

[422] Letter from F. García to G. Alberelli (Italba) (October 4, 2010) (C-056).

[423] Loan Contract of Data Transmission and Test Computer Equipment (December 1, 2010) (C-057).

false, that he does not recognize them, that he had never seen them before, and that his supposed signatures on both were forged.[424]

236. On the other hand, the business project between Trigosul and the "Grupo Afinidad Mary" is another fabrication of Dr. Alberelli and Mr. Herbón. The "Grupo de Afinidad Mary" does not exist in Uruguay. It has never existed. The only "evidence" offered by Italba is a letter from a Mr. Richard Weber from May 2012, which does not mention this alleged organization.[425] According to public comments by Mr. Weber, an American retiree, he did not live in Uruguay in 2012 and at that time he did not even have any definite plans to move to Uruguay.[426] It was not until 2015 that Mr. Webber began the process of obtaining permanent residence in Uruguay.[427] In any case, his letter from May 2012 could only serve as proof of his interest in the "telemedicine" services that Trigosul apparently offered him. However, the letter does not mention any price or other conditions, and therefore is not proof of any actual business relationship, even with the sole individual with whom Trigosul had a communication.[428] Finally,

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[424] Criminal complaint filed with the Office of the Prosecutor General (October 19, 2016) (C-139).

[425] Letter from R. Weber to G. Alberelli (Italba) (May 1, 2012) (C-065); Memorial, ¶ 62.

[426] In his post on July 16, 2012, Mr. Weber recounts how his first trips were intended "to be first hand experiences of the research [he had] done" and that the "the first three countries to explore are Uruguay, Paraguay and Chile"; in the same post, he also said he was not seeking to "compare them to each other as much as seeing if [he] can actually live there physically due to my allergy to aspergillus." Blog post by Richard G. Weber on "Total Uruguay" (July 16, 2012), *available at* https://totaluruguay.com/18db5/Obtaining_Uruguayan_Pesos_in_the_US_for_upcoming_trip (R-45) (last visited on January 26, 2017).

[427] In his post on May 11, 2015, Mr. Weber said that he still did not live in Uruguay; that he was "in the process of obtaining a residency" and that he would return to Uruguay "for a longer time in September and will look for a place to buy" Blog post by Richard G. Weber on "Total Uruguay" (May 11, 2015), *available at* https://totaluruguay.com/52e69/Uruguay_Banking (R-49) (last visited on January 26, 2017). Permanent legal residence is a process that *foreigners who intend to reside permanently in the country* can carry out to regularize their legal status in Uruguay. Ministry of Foreign Affairs, Permanent Residence, *available at* http://www.mrree.gub.uy/frontend/page?1,inicio,ampliacion-tramites,O,es,0,PAG;CONC;121;5;D;gestion-de-residencia-o-ciudadania-uruguaya;1;PAG (R-9) (last visited on January 26, 2017).

[428] Econ One Report, ¶¶ 96-99, 113.

Trigosul apparently forgot to inform Mr. Weber that it did not have the necessary authorization to provide telemedicine services in Uruguay.[429]

237. In these circumstances it was reasonable and justifiable for URSEC to conclude that Trigosul was not making efficient use of the spectrum that it had allocated—on a revocable and provisional basis—and that the public interest in the efficient use of the spectrum required that the frequencies allocated to Trigosul were released so as to be able to reallocate them to another company.[430] The revocation of the allocation of frequencies was followed, on July 8, 2011, by the revocation of the authorization to provide services by the Ministry of Industry, Energy and Mining (MIEM), on the same basis.[431] In these revocations there was nothing arbitrary or in bad faith. Therefore, there was no unfair or inequitable treatment, even under the incorrect definition of FET to which Italba subscribes. As was explained above,[432] according to the agreement between Uruguay and the United States reflected in Article 5 of the Treaty, FET consists only of the denial of justice, something which Italba does not claim in relation to the 2011 revocations.

238. Uruguay also did not interfere with the right to full protection and security of Trigosul's supposed investments. As described above,[433] this right only guarantees Trigosul police protection, which Italba does not claim was denied to Trigosul. Even under the incorrect

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[429] Statement of Dr. Cendoya, ¶ 162.

[430] *Id.*, ¶ 86.

[431] Ministry of Industry, Energy and Mining, Resolution No. 335/011 (July 8, 2011) (C-072).

[432] *See supra,* Section III.A.5.

[433] *See infra,* Section III.D.

standard proposed by Italba, there was no breach of this obligation because there was no denial of Trigosul's legal certainty.

3. After the TCA's Judgment, URSEC Offered to Return the Revoked Frequencies to Trigosul

239. On October 28, 2011 and March 22, 2012 respectively, Trigosul filed lawsuits against URSEC and MIEM before the *Tribunal de lo Contencioso Administrativo* (TCA), requesting that the two revocations be overturned,[434] to recover the frequencies allocated and the authorization to provide the appropriate services. Trigosul's main argument was that the circumstances on which the revocation was based were false;[435] because, *inter alia,* the offices inspected in December 2010 were not Trigosul's actual offices, but rather Trigosul's former offices, from which Trigosul had moved a few months before the inspection (a fact of which URSEC had supposedly been made aware).[436]

240. In this regard, the TCA found that, in December 2010, the date on which the inspection of the company was carried out, URSEC "had been notified of TRIGOSUL S.A.'s

[434] Trigosul, S.A., Appeal for annulment (October 28, 2011) (C-074); Trigosul, SA, Appeal for annulment (March 22, 2012) (C-075).

[435] Trigosul, SA, Appeal for annulment (October 28, 2011), p. 2 (C-074).

[436] Trigosul, SA, Appeal for annulment (October 28, 2011), p. 5 (C-074). Also, the company supposedly had not breached its obligation to provide services. To support its claims, Trigosul attached as alleged evidence the "Agreement for the Loan of data Transmission and Computer Equipment on approval signed on December 1, 2010 with Mr. Fernando GARCÍA" also alleging "Trigosul S.A. also contracted services with Channel 7 of the Department of Maldonado." Both statements have been denied by Dr. García and the representatives of Canal 7 of Maldonado. Trigosul, SA, Appeal for annulment (October 28, 2011), p. 3 (C-074); Statement of Mr. García, Letter of D. Bobre (Canal 7), M. Toma (Office of the President of the Republic) (November 9, 2016) (R-72); *see also,* Statement of Dr. Cendoya, note 65.

change of address"[437] Consequently, the TCA determined, in its judgment dated October 23, 2014, that "the performance of the inspection at calle Constituyente is null and void since it was tainted by error. This necessarily entails that the conclusions arrived at from the inspection must also be considered null and void."[438] On this basis, the TCA concluded that "inasmuch as the supposed fact that was decisive in the issuance of the contested Resolution [the mistake in the address] was not as the Agency stated when the Resolution was issued, this alone is sufficient to make the contested Resolution null and void."[439]

241. That is to say that, on account of a technical error on the part of URSEC—inspecting the wrong offices—the TCA ordered that the administrative decisions that revoked the allocation of frequencies and the revocation of Trigosul's authorization be overturned.[440] However, it is worth emphasizing that the TCA did not rule on any arbitrariness, discrimination or bad faith by URSEC.[441] It did also not question the authority of URSEC to revoke the frequencies of an assignee based on the inefficient use or non-use of the allocated frequencies. It also did not determine that Trigosul was making efficient use of its allocated frequencies. Consequently, if URSEC had based the revocation on Trigosul's reports (which had not reported customers for two consecutive years), or on an inspection of the correct offices of the company, the lawsuit filed by Trigosul would have been dismissed. As Dr. Pereira states:

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[437] TCA, Judgment No. 579 (October 23, 2014), p. 15 (C-076).

[438] *Id.*, p. 15.

[439] *Id.*, p. 17.

[440] *Id.*, p. 17.

[441] *See* Opinion of Dr. Pereira, ¶ 207 ("First, it should be pointed out that the TCA always pronounces only on the legitimacy of administrative decisions, analyzing questions of fact and law, but without entering into questions of merit (opportunity or appropriateness of the Administration in the adoption of its decisions.)").

> In light of the above, although the decision to revoke the frequencies allocated to Trigosul was annulled by the TCA, this did not exclude the possibility that the Administration could have ultimately revoked them subsequently due to reasons of general interest or for violation of the regulatory provisions, without having to pay any type of compensation.[442]

242. However, instead of issuing a new administrative decision to revoke the frequencies allocated to Trigosul, based on the overwhelming evidence of the lack of efficient use of these frequencies, URSEC decided to offer Trigosul alternative frequencies, with the same capacity, in order to put an end to the dispute. After this offer was rejected by Trigosul, URSEC offered to return the same frequencies.[443]

243. These circumstances constitute further grounds to reject Italba's claim regarding the revocation of the frequency allocation and of the authorization to provide services, in addition to the fact that they were reasonable and justified. First, the two revocations were overturned by decision of the TCA. Second, to comply with the TCA's Judgment, URSEC offered to give Trigosul back the same frequencies that it had previously held. What grounds are left to sustain a claim about the revocation? Obviously, none. It would be impossible to sustain a Treaty breach concerning the revocation, since the TCA, the highest court in Uruguay in administrative matters, has corrected any deviation in formalities which URSEC could have entered into.[444]

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[442] *Id.*, ¶ 288.

[443] Italba alleges that the Communication Services Regulatory Agency refused to comply with the decision of the TCA. *See*, Memorial, ¶¶ 126-130. However, this allegation is completely incorrect, the Communication Services Regulatory Agency fully complied with the provisions handed down by the TCA, as shown in Section III.D

[444] *Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award (November 6, 2008) (Kaufmann-Kohler, Mayer, Stern) ¶¶ 258-259 (CL-040).

244. In any case, the fact that the TCA annulled the administrative decision that decreed the revocation is not proof of a breach of the Treaty. It is a widely accepted principle that a simple omission in respect of a domestic legal provision is not enough to establish a breach of an investment treaty.[445] To this end, Italba should have proved that the behavior displayed by Uruguay had been clearly arbitrary or grossly unjust, and that the behavior in question was within an area effectively regulated by customary international law.[446]

245. In short, Italba has not shown in any way that the revocation of its allocation of frequencies or the authorization to provide services has breached the obligation to provide fair and equitable treatment and full protection and security contained in Article 5 of the Treaty. Italba has not demonstrated that the standards of treatment that it seeks to have declared as breached form part of the minimum standard of treatment recognized by customary international law;[447] it has also failed to demonstrate, even using the standards that it proposes, that Trigosul has been subject to any arbitrary treatment, or that Uruguay had acted in bad faith.[448]

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[445] *Elettronica Sicula SpA (United States v. Italy)*, Ruling (July 29, 1989), Rep. I.C.J. 1989, p. 15, in ¶ 124 (CL-048).

[446] *ADF Group Inc. v. the United States*, ICSID Case No. ARB(AF)/00/1, Award (January 9, 2003) (Feliciano, deMestral, Lamm), ¶ 190 (CL-035). "But something more than simple illegality or lack of authority under the domestic law of a State is necessary to render an act or measure inconsistent with the customary international law requirements of Article 1105(1), even under the Investor's view of that Article. That 'something more' has not been shown by the Investor." *See also, Alex Genin, Eastern Credit Limited, Inc. y A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2 (June 25, 2001) (Fortier, Heth, Van Den Berg), ¶ 363 (CL-012) ("In sum, the Tribunal finds that the Bank of Estonia acted within its statutory discretion when it took the steps that it did, for the reasons that it did, to revoke EIB's license. Its ultimate decision cannot be said to have been arbitrary or discriminatory against the foreign investors in the sense in which those words are used in the BIT. The decision, as it turns out, was further justified by subsequent revelations and appears even more understandable with hindsight.").

[447] *See supra,* Section III.A.4.

[448] *See supra,* Section III.A.4.

C. URUGUAY DID NOT BREACH THE TREATY IN ALLOCATING TO DEDICADO THE FREQUENCIES PREVIOUSLY ALLOCATED TO TRIGOSUL

246. At first glance, it seems strange that Italba would protest the allocation of its original frequencies to Dedicado in September 2013—which did not involve any "taking" from Trigosul—as an "expropriation" of Trigosul, while it *does not* claim an "expropriation" with respect to the revocation of the same frequencies from Trigosul in January 2011. The incongruity is explained by the dates. Any claim that arises in 2011 is time-barred, as more than three years passed before the arbitration started. Therefore, if Italba wants to claim an "expropriation," it has to find—or invent—a later act of expropriation, after February 2013. The problem for Italba is that there was no act of expropriation before or after February 2013.

247. Contrary to what Italba argues,[449] the allocation of the frequencies to Dedicado was not an expropriation but rather an allocation to a third party—an allocation that no longer belonged to Trigosul, and therefore did not represent any "taking" from Trigosul. Furthermore, it was not a decision that was discriminatory or made in bad faith, nor was it a breach of due process, as Italba alleges.

1. Uruguay Cannot Expropriate Rights That Do Not Exist

248. Under the Treaty,[450] and international law, not even the revocation of the frequencies from Trigosul, much less the subsequent allocation to Dedicado, can be an "expropriation" when allocations are provisional and revocable in nature, and do not confer rights recognized or protected by law in Uruguay. For example, in *EnCana v. Ecuador*, the

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[449] Memorial, ¶¶ 79, 108, 109, 111, 112, 115; *see also* Statement of Mr. Luis Herbón (September 16, 2016) ("Statement of Mr. Herbón"), ¶ 49; Statement of Dr. Gustavo Alberelli (September 16, 2016) ("Statement of Dr. Alberelli"), ¶ 88.

[450] BIT between Uruguay and the United States, Annex B (2) (C-001).

tribunal determined that "for there to have been an expropriation of an investment or return (in a situation involving legal rights or claims as distinct from the seizure of physical assets), *the rights affected must exist under the law which creates them*, in this case, the law of Ecuador."[451] It would not make sense to suggest that something that is not a right could be expropriated.

249. In the same vein, in *Generation Ukraine v. Ukraine*, the tribunal analyzed the Claimant's argument regarding the right to use a property as a base of operations for a construction project. Given that the tribunal determined that the right at issue did not exist between the parties, "any countenance to the Claimant's alleged right would involve a flagrant breach of Ukrainian land law."[452] The tribunal concluded that "[t]here cannot be an expropriation of something to which the Claimant never had a legitimate claim."[453] And, in *Emmis International Holding, B.V. v. Hungary*, the tribunal determined the legal situation under international law:

> The loss of a right conferred by contract may be capable of giving rise to a claim of expropriation but *only if it gives rise to an asset owned by the claimant to which a monetary value may be ascribed*. The claimant must own the asset at the date of the alleged breach. It is the asset itself – the property interest or chose in action – and not its contractual source that is the subject of the expropriation claim. *Contractual or other rights accorded to the investor under host state law that do not meet this test will not give rise to a claim of expropriation*.[454]

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[451] *EnCana Corporation v. Republic of Ecuador*, TAIL Case No. 3481, Award (February 3, 2006) (Crawford, Grigera, Thomas), ¶ 184 (CL-032) (emphasis added).

[452] *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award (September 16, 2003) (Paulsson, Salpius, Voss), ¶ 22.1 (RL-44).

[453] *Id.*

[454] *Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2, Award (April 16, 2014) (McLachlan, Thomas, Lalonde), ¶ 169 (RL-108) (emphasis added); *see also Amoco Int'l Finance Corp. v. Islamic Republic of Iran*, Award No. 310-56-3 (July 14, 1987), *reprinted in* 15 IRAN-US CLAIMS TRIBUNAL Rep. No. 189, ¶ 108 (RL-34) ("Expropriation, which can be defined as a compulsory transfer of property rights, may extend to any right which can be the object of a commercial transaction, i.e., freely sold and bought, and thus has a monetary value. [...]

250. Here, as is described in Section II, Trigosul did not have a "right" under Uruguayan law due to the "revocable and provisional" nature of the allocation of frequencies. With respect to this allocation, Dr. Cendoya explains that: "there is no natural right to use certain frequencies."[455] As Dr. Pereira described, citing a TCA Judgment: "the allocation of radio channels of which the plaintiff company was the holder was provisional and revocable, in view of which it is not possible to invoke a legitimate expectation that said allocation would not be revoked, *or of the existence of supposed acquired rights to maintain it*, because the claimant was aware of the provisional status of the situation."[456] Nor does this allocation have any economic value, as it may be revoked expressly without the need to pay compensation of any kind.[457] Therefore, the cases cited by Italba regarding interference with licenses that are *neither* provisional *nor* revocable do not apply to this case.[458]

251. Based on these principles, there was not even an expropriation from Trigosul in 2011, when its authorization to provide services and its allocation of frequencies were revoked. Less still was Trigosul ever the victim of expropriation in 2013. As a result of these revocations, Trigosul was left without any type of authorization and without any allocated frequencies since 2011. Therefore, the decision that was taken two years later to allocate the same frequencies to

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It is because Amoco's interests under the Khemco Agreement have such an economic value that the nullification of those interests by the Single Article Act can be considered as a nationalization.") (emphasis added); *Marvin Roy Feldman Karpa v. United States Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, (December 16, 2002) (Kerameus, Covarrubiaz Bravo & Gantz), ¶ 118 (CL-056) (rejecting a claim for expropriation on the grounds that "the Claimant never really possessed a 'right' [in light of Mexican law] to obtain tax rebates upon exportation of cigarettes […]").

[455] Statement of Dr. Cendoya, ¶ 19.

[456] Opinion of the Dr. Pereira, ¶ 99 (citing TCA Judgments Nos. 454/2004 and 441/2007) (emphasis added).

[457] *See infra*, Section IV.

[458] Memorial, notes 217 and 224.

Dedicado could not have been an expropriation of any rights or property of Trigosul, because, as of January and July 2011, respectively, Trigosul did not have them. It is impossible to expropriate property or rights from a party, in this case Trigosul, which does not have them, because it does not have a "legitimate claim."[459]

252. Italba argues that Trigosul still had an interest in the revoked frequencies because it was attempting to recover them in its administrative proceedings against URSEC before the TCA, and the proceedings were underway at the time the frequencies were allocated to Dedicado. However, the fact that Trigosul was trying to recover the revoked frequencies does not change anything concerning an alleged "expropriation." The administrative proceedings demonstrate that Trigosul recognized that its "rights" regarding the frequencies were canceled, and therefore it had to litigate. The mere fact of going before the TCA to seek the annulment of an administrative act has no suspensive effect.[460] Until the TCA issues its judgment, the administrative act maintains its legal force, with all its effects, including, in this case, the termination of Trigosul's interest in the revoked frequencies.[461] The only exception is when the affected party requests that the TCA order a suspension of the contested act. However, in this case, despite the fact that Trigosul could have requested a suspension of the act which revoked its allocation of frequencies, it did not.[462] And because of this, it had no property or rights subject to expropriation at the time of the allocation to Dedicado in September 2013.

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[459] *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award (September 16, 2003) (Paulsson, Salpius, Voss), ¶ 22.1 (RL-44).

[460] Opinion of Dr. Pereira, Section VII.

[461] Opinion of Dr. Pereira, Section VII.

[462] Opinion of Dr. Pereira, Section VII.

2. Granting Dedicado's Request for the Frequencies Was Reasonable Because It Was Not in Like Circumstances Compared to Trigosul

253. In addition to not constituting an "expropriation," the allocation of the frequencies to Dedicado was entirely reasonable and in good faith, and did not violate the obligation of fair and equitable treatment. First, the allocation of the frequencies to Dedicado was not preconceived or contemplated by URSEC when Trigosul's frequencies were revoked, as the Claimant suggests.[463] It came in response to Dedicado's request, in August 2012, that is, more than a year and a half *after* the revocation of Trigosul's allocation. For its own reasons, Dedicado requested the replacement of the allocations of its frequencies in the 3600-3700 MHz sub-band for frequencies in the 3400 and 3500 MHz sub-bands.[464] In August 2012, the sub-blocks corresponding to the 3425-3450 and 3525-3550 MHz frequency sub-bands were "currently unallocated."[465] In fact, at the time of Dedicado's request, Trigosul had no right to the allocation of any frequencies in Uruguay's spectrum.[466]

254. The reasons for Dedicado's request were completely reasonable. The company explained that, in 2011, it began to deploy a new technology called "4Motion"[467] in the 3500

[463] Memorial, ¶ 136 (Uruguay "perpetrated a scheme of active concealment that manifested itself in several ways, and only became apparent years after it began.").

[464] Communication Services Regulatory Agency, Request from Dedicado S.A., No. 00789 (August 29, 2012), p. 3 (R-46).

[465] Communication Services Regulatory Agency, Resolution No. 220/013 (September 5, 2013) Recital II (C-084).

[466] Therefore, the arguments on the alleged right to communication of "impending acts affecting a legal or property right" are rendered hollow. *See* Memorial, ¶ 132. There is no right to notification about rights that do not exist. *See* Opinion of Dr. Pereira, Section VIII.

[467] *Id.*, ¶ 5.

band.[468] This technology had the capacity to deliver Internet services at speeds nearly three times as fast as the current speeds at the time.[469] To be able to provide these services, the company needed the resources to allow its "wireless data network to have *adjacent* channels, thus *optimizing* the radio communication spectrum resource, and *achieving maximum speeds* while *minimizing guard bands*."[470]

255. Given the "decisions adopted by URSEC regarding modifying spectrum assignments in order to boost the effective and efficient use of radio communication frequencies,"[471] Dedicado requested the replacement of the 3600-3625 and 3675-3700 spectrum bands for the 3425-3450 and 3525-3550 MHz spectrum bands.[472] The company declared that this measure would allow it to achieve "an adequate separation between the outgoing and incoming frequencies, avoid spectrum partition that prevents an adequate deployment of new technologies and obtaining the largest broadbands possible, and increase efficiency in band use."[473] As can be clearly seen in the graphic, the decision to grant Dedicado's request was completely reasonable, given the obligation to make efficient use of the spectrum.

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[468] At that time, Dedicado and its subsidiaries (including Enalur S.A.) had the allocations in the 3400-3425 MHz, 3450-3525 MHz, 3550-3625 MHz, and 3675-3700 MHz sub-blocks. Communication Services Regulatory Agency, Request from Dedicado S.A., No. 00789 (August 29, 2012), ¶ 4 (R-46).

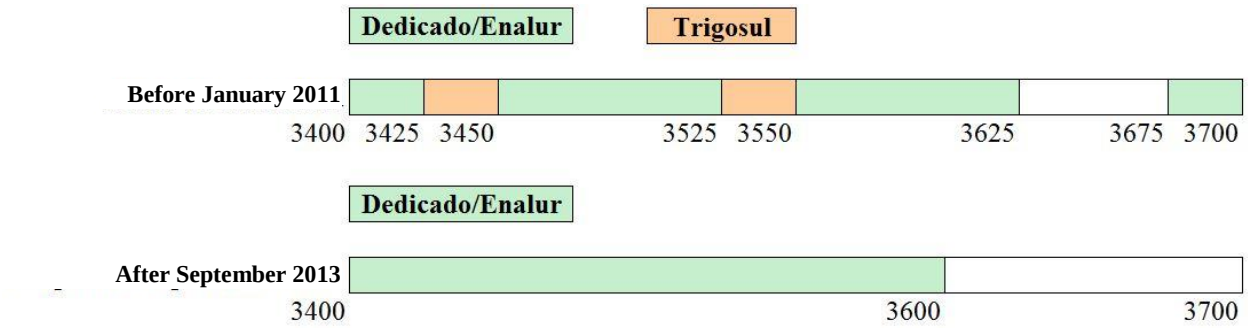
[469] *Id.*, ¶ 5.

[470] *Id.*, ¶ 6 (emphasis added).

[471] *Id.*, ¶ 7.

[472] *Id.*, ¶ 7.

[473] Communication Services Regulatory Agency, Request from Dedicado S.A., No. 00789 (August 29, 2012), ¶ 8 (R-46).



256. In contrast to Trigosul, which "was not using the spectrum sub-blocks that had been allocated to it,"[474] Dedicado "was operating, providing a relevant service to numerous clients. The frequency sub-blocks on bands 3400 and 3500 were very useful to Dedicado: they provided Dedicado with an increased band width because these sub-blocks adjoined other sub-blocks already allocated to Dedicado."[475] In fact, Dedicado, at the time of the frequency allocation, had 15,840 customers who "warranted a better service than the one that they were getting and there was no other service provider on this band that required the spectrum in question."[476] As Dr. Cendoya explained, "from the legal point of view and also from the technical point of view, it made complete sense to reallocate those frequency sub-blocks to Dedicado at that time."[477]

257. URSEC processed the request and drafted a memorandum, dated September 4, 2013, setting out the facts of the case. The memorandum acknowledged that, through resolution No. 001/011 of January 2011, the sub-blocks corresponding to the 3425-3450 and 3525-3550

[474] Statement of Dr. Cendoya, ¶ 85.

[475] *Id.*

[476] *Id.*

[477] *Id.*, ¶ 86.

frequency sub-bands, which had previously been allocated to Trigosul, had been released.[478] URSEC found that, as Dedicado and its subsidiary Enalur S.A. operated together on the spectrum level, the petition was "compatible with its argument" stated in the request.[479] Therefore, the agency approved the transfer and issued a resolution to that end on September 5, 2013.[480] In the resolution, URSEC reiterated that the authorizations granted were "temporary and may be revoked at any time, without the right to a claim or compensation of any kind, and their continuance is conditional on compliance with all applicable regulations and payment of the applicable fees and prices […]."[481] By virtue of the fact that the allocation was provisional and revocable, Dedicado was not obligated to pay for it.

258. It should be noted that the allocation to Dedicado should not have been a surprise to Trigosul. In fact, as set out in Section II, in an email dated March 29, 2011, Dr. Alberelli anticipated that URSEC would put "the frequencies up for public auction"[482]Also, at that time, Dr. Alberelli suggested the use of the "investment treaty" to resolve the situation.[483] In other words, in March 2011, the Claimant was already aware that the frequencies could have been allocated or auctioned to another company.[484]

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[478] Communication Services Regulatory Agency, Memorandum (September 4, 2013), p. 2 (R-47).

[479] *Id.*

[480] Communication Services Regulatory Agency, Resolution No. 220/013 (September 5, 2013) (C-084).

[481] *Id.*, p. 3.

[482] Letter from R. Gorter to G. Alberelli et al (April 14, 2011) (C-071).

[483] *Id.*

[484] This fact makes clear that the complaints of the Claimant about the lack of direct notification are disingenuous. *See* Memorial, ¶ 7. The Claimant was aware of the possibility of an allocation of its previously-held frequencies; it was its responsibility, or the responsibility of its legal representation, to monitor the *public* acts issued by URSEC. There was no legal obligation to notify Trigosul about the allocation of frequencies to Dedicado. Opinion of Dr. Pereira, Section VIII, ¶ 200. ("200. In light of the above, it was not necessary to notify Trigosul of these actions given that it *was not the holder of any right* with respect to the use of the frequency sub-blocks in question.

259. However, despite its knowledge, Trigosul did not take legal action to prevent the re-allocation of the frequencies. At any time after starting the TCA proceeding in October 2011, Trigosul could have asked the TCA, as a provisional measure, to suspend the contested act; and if the court had accepted the request, it would have kept the frequencies allocated to Trigosul and prevented them from being re-allocated until the conclusion of the proceeding.[485] But Trigosul did not make that request.

260. The final judgment of the TCA, in October 2014, had the effect—as explained above—of overturning the revocation.[486] In order to comply with the judgment, URSEC ultimately decided to recover the frequencies allocated to Dedicado in 2013 to offer them to Trigosul. In other words, URSEC offered to give Trigosul back the same frequencies that were revoked in 2011, despite the fact that they had been re-allocated to Dedicado. Obviously Trigosul did not suffer any impact from the re-allocation, except for its own decision not to accept the return of the frequencies. For this reason as well, the allocation of the frequencies to Dedicado in 2013 cannot be characterized as a breach of any of the provisions of the Treaty.

However, it was also not necessary to notify Trigosul of these actions given, *from its actions, it failed to show that it maintained any interest in the use of these frequencies*.") (emphasis added).

In fact, according to the Statement of Mr. Herbón, in March 2015, he "discovered" the allocation when he was "doing some research on URSEC's webpage," and immediately informed Dr. Alberelli about it. Statement of Sr. Herbón, ¶ 49. However, according to Dr. Cendoya, he told Dr. Durán Martínez, Claimant's legal representative in Uruguay, that the frequencies had been allocated to Dedicado in early *February* 2015. Statement of Dr. Cendoya, ¶ 90. The fact that Dr. Durán Martínez apparently never forwarded this crucial information to his clients once again reveals the strategy of Claimant to construct a series of facts in its favor in an unmasked attempt to extort a sovereign country.

[485] As Dr. Pereira explained "Trigosul only requested administratively –albeit in an unfounded and inefficient manner– the suspension of the revocation of the allocation of frequencies. However, it did not request before the administrative authority the suspension of the authorization, and it did not request the suspension of either of the two revocations before the TCA, nor did it carry out any other valid action for such purpose." Opinion of Dr. Pereira, ¶ 174; *see generally* Opinion of Dr. Pereira, Section VII.

[486] TCA, Judgment No. 579 (October 23, 2014), (C-076).

261. As Uruguay has already demonstrated, Article 4 of the Treaty does not apply to measures relating to the telecommunications sector. However, neither Article 4 nor Article 3 helps the Claimant in its arguments. There was no breach of these obligations regarding the allocation to Dedicado.[487] Trigosul was not treated less favorably than any company in similar circumstances.

262. It is impossible to say that Trigosul, which did not have any customers or revenue in 2009 and 2011, and barely used the frequencies allocated to it at all since 2000, was in similar circumstances to Dedicado, which had more than 15,000 customers and generated millions of dollars in revenue each year, having provided a constant and important service to the Uruguayan market for many years. In addition, in 2013, Dedicado presented URSEC with a comprehensive request justifying the allocation, while Trigosul did not even ask the TCA for a provisional order to suspend the revocation or to prevent the reallocation of the frequencies. The circumstances of Trigosul and Dedicado could not have been more different.

3. The Allocation to Dedicado Did Not Breach the Obligations of Article 5 to Provide Fair and Equitable Treatment or Full Protection and Security

263. As has been explained, according to Article 5 and the understanding of the two States Parties, the only obligation under the rubric of fair and equitable treatment is to not be denied justice. Italba does not even argue that the allocation to Dedicado was a denial of justice, and surely it was not. The only judicial process begun by Trigosul, before the TCA, resulted in a favorable judgment to Trigosul.

264. However, as discussed above, Italba offers a broader interpretation of fair and

[487] *See supra*, Section III.A.3.

equitable treatment, and argues that it includes the obligation not to act in an arbitrary or discriminatory manner, or in bad faith. Even accepting this definition—*quod non*—there was no unfair or inequitable treatment of Trigosul. As demonstrated in the previous subsections of this Counter-Memorial,[488] the allocation of frequencies to Dedicado was reasonable and justified under Uruguayan law, and there is no evidence to support Italba's allegations that URSEC acted in such a way that was arbitrary, discriminatory, or in bad faith.[489] The argument that Uruguay breached its obligations concerning FET should be rejected.[490]

265. It also did not breach its obligation regarding full protection and security. It is already clear that the obligation is limited to police protection. Italba does not allege any such breach. Even if we extend the obligation to legal certainty, as Italba incorrectly attempted, there is no breach. Trigosul cannot complain about a lack of legal security when the TCA ruled in its favor, and as a result, its authorization to provide services was restored and URSEC offered to return the previously revoked frequencies.

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[488] *See supra*, Section III.C.3.

[489] *See supra*, Section III.A.4. In addition to the standards of arbitrariness, discrimination and, good faith, non-applicable in the context of this Treaty, Italba also alleges breaches of the standard of due process. As well as the other standards mentioned, the Claimant does not explain how a "denial of due process" is part of the standard of the FET. *See* Memorial, ¶ 123. The treaty is clear in the fact that the *obligation* incorporated into the standard is "not to deny justice in criminal, civil, or administrative adjudicatory proceedings […]." This obligation is interpreted "in accordance with the principle of due process embodied in the principal legal systems of the world." *See* BIT between Uruguay and the United States, Article 5 (C-001). The Treaty in no way establishes that a "denial of due process" is a breach of the Treaty and the Claimant fails to even attempt to demonstrate that the obligation is incorporated in the FET standard under customary international law. Section III.A.4.

[490] *See* Memorial, ¶ 79 (alleging that the transfer of the spectrum "during the TCA proceedings" was evidence of "bad faith," and demonstrated "a pattern of discrimination against Trigosul […]").

D. URUGUAY DID NOT BREACH THE TREATY BY ITS ALLEGED "FAILURE TO COMPLY" WITH THE JUDGMENT OF THE *TRIBUNAL DE LO CONTENCIOSO ADMINISTRATIVO* (TCA)

266. Italba alleges that "URSEC refused to act in conformity with the TCA Judgment and allow Trigosul's enjoyment of its license," and "did not take immediate action to undo its transfer of the Spectrum to Dedicado and restore the Spectrum to Trigosul."[491] On the basis of these alleged facts, Uruguay "is responsible for the expropriation of Italba's investments."[492] Italba further alleges that the supposed failure to comply with the TCA's judgment was arbitrary and discriminatory, and in bad faith, and therefore constitutes unfair or inequitable treatment and a breach of full protection and security.

267. There is a short and decisive response to these false allegations: Uruguay fully complied with the TCA Judgment. First, after notification of the Judgment, URSEC took action to give Trigosul back both the authorization to provide the same services as before and the frequency allocation.[493] Second, Uruguay offered Trigosul equivalent frequencies, with the same character and value, to replace the previous frequencies, which had been allocated to Dedicado as of 2013.[494] Third, when Trigosul rejected the alternative frequencies, Uruguay took the extraordinary step of proceeding to reacquire the original frequencies and offer them to Trigosul—exactly the same frequencies the revocation of which Trigosul sought in the TCA

[491] Memorial, ¶¶ 107-108.

[492] *Id.*, ¶ 108.

[493] Statement of Dr. Cendoya, Section VI.

[494] *Id.*, ¶¶ 94-100; Communication Services Regulatory Agency, Citation of the Record 2015-2-9-1000070 (April 11, 2016) (R-63).

proceeding.[495] Trigosul rejected that offer from Uruguay as well.[496] After this rejection, Uruguay obtained formal recognition from the TCA of its compliance with the TCA's Judgment.[497] Therefore, there was no failure to comply with the TCA Judgment, and no breach of the Treaty.[498]

268. Furthermore, it should be noted that, despite the lack of customers, profits, or use of the spectrum by Trigosul, the "Administration was obligated by the TCA judgment to act in accordance with it."[499] The Judgment is based on Trigosul's alleged change of address, *inter alia*, but the decision does not affect "the provisional and essentially revocable nature"[500] of the frequency allocation in any way. In fact, "although the decision to revoke the frequencies allocated to Trigosul was annulled by the TCA, this did not exclude the possibility that the Administration could have ultimately revoked them subsequently due to reasons of general interest or for violation of the regulatory provisions, without having to pay any type of compensation."[501]

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[495] Statement of Dr. Cendoya, ¶¶ 101-106; URSEC, Draft Resolution (May 9, 2016) (C-098).

[496] Statement of Dr. Cendoya, ¶¶ 101-106; Letter from A. Yanos to P. Reichler (May 31, 2016) (C-099).

[497] Communication Services Regulatory Agency, TCA Request (August 3, 2016) (R-66); TCA, Decree 6172/2016 (August 9, 2016) (R-67).

[498] Statement of Dr. Cendoya, ¶ 106; Communication Services Regulatory Agency, TCA Request (August 3, 2016) (R-66); TCA, Decree 6172/2016 (August 9, 2016) (R-67).

[499] Opinion of Dr. Pereira, ¶ 213.

[500] *Id.*, Section V.F.

[501] *Id.*, ¶ 288.

1. Uruguay's Actions Following the Judgment Were Reasonable and with the Purpose of Complying with the Judgment

269. In the Judgment, the TCA annulled the two 2011 resolutions, which revoked the allocation of frequencies to Trigosul, and its authorization to provide services:

- URSEC Resolution 001 of January 20, 2011, which released blocks 3425-3450 MHz and 3525-3550 MHz allocated to Trigosul S.A.; and
- Executive Resolution of July 8, 2011, which revoked the authorization granted to the company to provide point-to-point and multipoint data transmission services without connection to the public network.

270. URSEC was notified on November 27, 2014 of the Judgment.[502] In early 2015, URSEC officials and representatives of Trigosul discussed it. After a series of telephone conversations with Dr. Cendoya of URSEC, on February 5, 2015, Dr. Augusto Durán Martínez, representing Trigosul, and Mr. Herbón administratively requested before URSEC the execution of the judgment.[503] For URSEC, it was not administratively simple, because the frequencies had been allocated to, and used by, Dedicado since September 2013, and it was necessary to find the right way to comply with the Judgment without causing another proceeding with Dedicado.[504] However, after communications between Trigosul's legal representative, Dr. Durán Martínez, and Dr. Cendoya of URSEC in January and February 2015, the Administration began the process of complying with the Judgment.[505] In May 2015, the Manager of Legal and Economic Affairs wrote a memorandum explaining the annulling effect of the Judgment, stating that:

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[502] Notification of TCA to the Communication Services Regulatory Agency (November 27, 2014) (R-48).

[503] Letter from L. Herbón (Trigosul S.A.) to G. Lombide (Communication Services Regulatory Agency) (February 5, 2015) (C-082); Statement of Dr. Cendoya, ¶ 90.

[504] Statement of Dr. Cendoya, ¶ 92.

[505] *See id.*, ¶¶ 89-93.

> Through the written record above, said company appears requesting compliance with the aforementioned judgment, the registration of the company in the data transmission Service Providers Registry is ordered and *the necessary measures are taken to put it in the conditions where it was at the time that Resolution No. 001/011 was issued.*[506]

Subsequently, according to Dr. Cendoya, "on July 7, the file was passed to the technical services for them to study the issue of equivalence of the frequencies."[507]

271. While URSEC was determining how to resolve the issue, Trigosul's attitude changed. According to Dr. Cendoya, following the communication of February 5, "I heard nothing from Dr. Durán Martínez until these arbitration proceedings commenced."[508] In fact, as of February 2015, Trigosul stopped insisting that URSEC return the frequencies. Nor did it appeal to the TCA to demand compliance with the Judgment.[509] To the contrary, Trigosul kept silent for some six months, until—according to the Memorial—Italba sent a letter to the Office of International Economic Affairs within the Ministry of Foreign Affairs, with a copy to the Office of the President of the Republic, in which it announced its intention to initiate arbitration proceedings before the ICSID.[510]

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[506] URSEC, Notification File No. 2015/1/00070 (12 May 2015) (R-50) (emphasis added).

[507] Statement of Dr. Cendoya, ¶ 91.

[508] *Id.*

[509] *See generally* Opinion of Dr. Pereira, Section X. If Trigosul considered that the Judgment had not been complied with in a reasonable timeframe, the company could have also appeared before the TCA to request compliance with it. According to Dr. Pereira, "Trigosul could (and if it urgently required compliance: should) have petitioned the TCA to order the Administration to comply with the annulment Judgment, and to determine the terms within which the ruling should be complied." Opinion of Dr. Pereira, ¶ 315. But Trigosul also did not go to the TCA for this purpose. Furthermore, the company had at least six other legal instruments that it could have used to seek relief in a situation in which the Administration was not voluntarily complying with the Judgment. Opinion of Dr. Pereira, Section X. Of course, this was not the case here, because the Administration did voluntarily comply, but the fact that the Claimant did not use these means of appeal when it supposedly thought that Uruguay was in breach of its obligation again demonstrates Italba's true intention.

[510] Letter from Italba to the Office of International Economic Affairs (August 5, 2015) (C-090).

272. It is not true, as Italba now argues, that URSEC had already failed to comply with the TCA judgment when it sent Uruguay's Foreign Ministry the notice of its intention to initiate arbitration proceedings in August 2015. The evidence shows that URSEC had every intention of complying with it, and never made any statement to the contrary. According to the Administrative Law of Uruguay, there is no fixed period to comply with a TCA Judgment.[511] And, the time that it took to comply with the Judgment in this case was reasonable, given the need to finalize the details related to it, including negotiating with Dedicado to revoke its allocation of frequencies and reallocate them to Trigosul. As Dr. Cendoya explained:

> It is important to note here that there could be no immediate compliance because several aspects had to be addressed, for example, the preparation of a draft resolution with a complete account of the facts and a study of the effects of the ruling, to be sent to the Executive Branch. This draft had to provide for the restitution of the authorization that had been revoked and commit URSEC to return the allocated frequencies and consideration had to be given as to whether this should be done by means of equivalent frequencies or the same ones, taking into account that Dedicado had been allocated the original frequencies and had not been summonsed in the proceedings so that it could defend its right.[512]

Dr. Pereira added: "[t]he time period for the subsequent acts taken by the State in compliance with the TCA Judgment was reasonable. The reestablishment of the situation in relation to the authorization was expressly consented to by Trigosul; by virtue of which –regarding the same– the execution of the Judgment is accepted in reasonable time and with reasonable measures. With respect to the allocation of frequencies […] they were not accepted by Trigosul."[513]

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[511] Opinion of Dr. Pereira, Section IX.G.

[512] Statement of Dr. Cendoya, ¶ 92.

[513] Opinion of Dr. Pereira, ¶¶ 299-301.

Therefore, between the date on which the TCA handed down the Judgment,[514] and the date on which URSEC took action to return the frequency allocation, Uruguay never "failed to comply" with the TCA's Judgment.

273. In January 2016, URSEC reported in an internal memorandum that there were four free sub-blocks available for allocation in the 3400-3700 MHz band.[515] These sub-blocks were 3600-3625 MHz, 3625-3650 MHz, 3650-3675 MHz, and 3675-3700 MHz.[516]

274. On February 1, 2016, about 15 days before the commencement of this arbitration, URSEC's Board approved the Executive's draft act, which committed URSEC to return the frequencies.[517] The Minister of Industry, Energy, and Mining, Ms. Carolina Cosse, was notified of the draft resolution on February 11.[518] MIEM approved the resolution and it was passed to the Secretary of the Presidency for signature.[519]

275. On April 5, 2016, the President signed Executive Resolution No. 156/016, authorizing the conditions set out in the original resolution of January 17, 1997 to provide dedicated wireless digital lines. The order required allocating "the corresponding frequencies for the provision of the service," but did not specifically establish which frequencies to allocate.[520]

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[514] URSEC was notified on November 27, 2014 about the Judgment. Notification of TCA to the Communication Services Regulatory Agency (November 27, 2014) (R-48).

[515] Communication Services Regulatory Agency, Notification of the Record 2015-2-9-1000070 (January 29, 2016) (R-58).

[516] *Id.*

[517] Communication Services Regulatory Agency, Notification of the Record 2015-2-9-1000070 (February 1, 2016) (R-59).

[518] Communication Services Regulatory Agency, Notification of the Record 2015-2-9-1000070 (February 11, 2016) (R-60).

[519] Approval of the Ministry of Industry, Energy, and Mining of Decree EI 156 (April 1, 2016) (R-62).

[520] Ministry of Industry, Energy, and Mining, Decree IE 156 (April 5, 2016), p. 3 (C-094).

The order stipulated that URSEC should allocate frequencies corresponding to the services to be provided.[521]

276. Shortly after and within a period of ten days, on April 11, 2016, URSEC proposed the allocation of frequencies in the 3600-3625 and 3675-3700 bands.[522] On April 27, 2016, the company, through Mr. Herbón, presented a letter stating that it did not accept the allocation of the frequencies because they "are not as useful or valuable as the frequencies that TRIGOSUL S.A. had previously, which were taken from it by the annulled decision."[523] The letter continued: "Therefore, I do not accept the frequencies that you propose to allocate to me," without explaining why the frequencies were not acceptable.[524] In its Memorial, the Claimant reiterates this claim that the frequencies "in the 3600-3700 MHz range are significantly less valuable than the Spectrum that Trigosul previously held,"[525] but it does not cite anything to substantiate this claim.

277. The reality, as Dr. Cendoya explains, is that the alternative frequencies were not sub-standard, or of lesser value than the frequencies that had been allocated previously:

> The whole band from 3.4 to 3.8 (which includes the alternative and original frequencies) is appropriate for point to point and point to multi-point data transmission. […] [I]t is true that, in the 1990s, there was no transmission equipment available on the high-band frequencies but they do exist now and many international manufacturers produce equipment that operates equally on the two frequency blocks in question. This technology has been in

[521] *Id.*; Statement of Dr. Cendoya, ¶ 95.

[522] Communication Services Regulatory Agency, Citation of the Record 2015-2-9-1000070 (April 11, 2016) (R-63).

[523] Communication Services Regulatory Agency, Letter from L. Herbón (Trigosul S.A.) of the Record No. 2015-2-9-1000070, ¶ VII (April 27, 2016) (R-64); *see also* Letter from A. Yanos to P. Reichler et al. (May 6, 2016) (C-096).

[524] Communication Services Regulatory Agency, Letter from L. Herbón (Trigosul S.A.) of the Record No. 2015-2-9-1000070 (April 27, 2016) (R-64); *see also* Letter from A. Yanos to P. Reichler et al. (May 6, 2016) (C-096).

[525] Memorial, ¶ 82.

> existence for several years because allocation of the 3.4 to 3.8 band to data transmission also took place internationally many years ago.[526]

In short, "the sets of frequency blocks were analogous,"[527] from a legal,[528] economic,[529] and technical standpoint.[530]

278. In May 2016, in good faith and in order to comply without question with the TCA Judgment, Uruguay proposed a new offer: a draft resolution to revoke Dedicado's allocation of frequencies in the Spectrum and to return them to Trigosul.[531] In fact, Uruguay agreed to return the original allocation of frequencies to Trigosul.[532]

279. On May 31, 2016, Italba sent a letter to Uruguay stating that:

> Italba elected to receive monetary damages as the remedy for Uruguay's breaches of the Treaty […]. Italba elected to reject restitution as a potential remedy for the expropriation, due, in particular, to the fact that, after Italba learned that URSEC would not comply with the judgment of the Uruguayan courts and had re-allocated Trigosul's frequencies to its competitor Dedicado […].[533]

280. In other words, the Claimant rejected the offer, demonstrating that its real motive was not the return of the frequencies it had previously been allocated to provide the authorized telecommunications services, but to extort an absolutely undeserved monetary compensation.

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[526] Statement of Dr. Cendoya, ¶¶ 97-98.

[527] *Id.*, ¶ 100.

[528] Statement of Dr. Cendoya, ¶ 100.

[529] *Id.*, ¶ 99.

[530] *Id.*, ¶ 98.

[531] Communication Services Regulatory Agency, Draft Resolution (May 9, 2016) (C-098).

[532] *Id.*

[533] Letter from A. Yanos to P. Reichler (May 31, 2016) (C-099). It should be noted that Trigosul *had known* about the allocation of the frequencies since January 2015 and, as explained, a month later, in February 2015, ordered the execution of the judgment.

281. After taking the actions described above to comply with the Judgment, URSEC appeared before the TCA to report that it had attempted compliance with the Judgment, explaining that its attempt to do so had been completely frustrated by the very own actions of the winning party of the proceeding.[534] The TCA confirmed acknowledgement[535] and Trigosul did not appeal within the statutory period of six days. Therefore, the ruling stands firm and the execution of the Judgment is closed.[536] This whole proceeding is proof that Italba's accusation that URSEC failed to comply with the TCA Judgment is false. In fact, URSEC complied with the Judgment under Uruguayan law and before the TCA,[537] and the TCA acknowledged that its Judgment had been complied with.

2. There Was No Expropriation with Respect to the State's Compliance with the TCA Judgment

282. The alleged breach of the Judgment, that never occurred, cannot constitute an "expropriation" or any other kind of violation of the Treaty. Italba dedicated much of its Memorial to the argument that "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."[538]

283. The problem is that Italba has put "the cart before the horse ('*poner la carreta*

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[534] URSEC, Request to TCA (3 August 2016) (R-66); *see also* Statement of Dr. Cendoya, ¶ 106.

[535] TCA, Decree 6172/2016 (August 9, 2016) (R-67).

[536] Opinion of Dr. Pereira, ¶ 363.

[537] Statement of Dr. Cendoya, ¶ 106.

[538] Memorial, ¶ 109.

delante de los caballos')".[539] Article 6 of the Treaty sets out the circumstances required to avoid liability when a State adopts measures of expropriation. However, if a measure is not an expropriation, Article 6 does not apply. As the court stated in *Fireman's Fund Insurance Co. v. Mexico*, it could not "start an inquiry into whether expropriation has occurred by examining whether the [four conditions] for avoiding liability in the event of an expropriation have been fulfilled," precisely because those conditions "do not bear on the question as whether an expropriation has occurred."[540]

284. To constitute an expropriation, the alleged measures would need to be final and permanent. A measure that leads to a decrease in value or temporary loss of control cannot be considered an expropriation. As the Tribunal determined in *Tecmed v. Mexico*: "it is understood that the measures adopted by a State, whether regulatory or not, are an indirect *de facto* expropriation if they are *irreversible and permanent* [...]."[541]

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[539] *Fireman's Fund Insurance Co. v. The United Mexican States*, ICSID Case No. ARB (AF)/02/01, Award (July 17, 2006) (van den Berg, Lowenfeld, Saavedra Olavarrieta), ¶ 174 (RL-54).

[540] *Fireman's Fund Insurance Co. v. The United Mexican States*, ICSID Case No. ARB (AF)/02/01, Award (July 17, 2006) (van den Berg, Lowenfeld, Saavedra Olavarrieta), ¶ 174 (RL-54); *see also Glamis Gold, Ltd. v. The United States*, UNCITRAL, Award (June 8, 2009) (Young, Caron, Hubbard), ¶ 356 (RL-75) ("There is for all expropriations, however, the foundational threshold inquiry of whether the property or property right was in fact taken."); *Saluka Investments B.V. (Holland) v. Czech Republic*, UNCITRAL, Award (March 17, 2006) (Watts, Fortier, Behrens), ¶ 264 (CL-018) ("It thus inevitably falls to the *adjudicator* to determine whether particular conduct by a state 'crosses the line' that separates valid regulatory activity from expropriation. Faced with the question of *when, how and at what point an otherwise valid regulation becomes, in fact and effect, an unlawful expropriation*, international tribunals must consider the circumstances in which the question arises. The context within which an impugned measure is adopted and applied is critical to the determination of its validity.") (Emphasis in the original).

[541] *Técnicas Medioambientales TECMED S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003) (Grigera Naón, Fernández Rozas, Bernal Verea), ¶ 116 (CL-009) (emphasis added); *see also Fireman's Fund Insurance Co. v. The United Mexican States*, ICSID Case No. ARB (AF)/02/01, Award (July 17, 2006)) (van den Berg, Lowenfeld, Saavedra Olavarrieta), ¶ 176 (d) (RL-54) (an expropriation contains a number of elements, including that "[t]he taking must be permanent, and not ephemeral or temporary.").

285. Similarly, the tribunal in *LG&E v. Argentina* determined that "one must consider the duration of the measure as it relates to the degree of interference with the investor's ownership rights. Generally, the expropriation must be permanent, that is to say, it cannot have a temporary nature […]. [T]he effect of the [] State's actions has not been permanent on the value of the Claimants' shares', and Claimants' investment has not ceased to exist. Without a permanent, severe deprivation […] [there is no] expropriation."[542] In *Glamis Gold v. the United States*, the tribunal rejected the claimant's argument that "delay and temporary denial occasioned by the federal government themselves effected an expropriation […]."[543] The tribunal also concluded that:

> The Tribunal finds that the federal Record of Decision denying approval of the Imperial Project, even if it presented difficulties to Claimant, was quickly reversed and therefore of short duration. This does not constitute an expropriation under NAFTA Article 1110. The Tribunal *therefore denies Claimant's claim that the delay and temporary denial occasioned by the federal government either individually or in combination with subsequent complained of measures of the State of California were violations of Article 1110*.[544]

In *Cargill v. Mexico,* the claimant alleged that interference with an investment that lasted more than five years could not be "temporary."[545] The tribunal determined that the claimant had not

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[542] *LG&E Energy Corp. et al. v. the Republic of Argentina*, ICSID Case No. ARB/02/1, Decision on Liability (October 3, 2006) (de Maekelt, Rezek, van den Berg), ¶¶ 193, 200 (CL-046); *see also Archer Daniels Midland Company et al. v. The United Mexican States*, ICSID Case No. ARB (AF)/99/1, Award (November 21, 2007) (Cremades, Rovine, Siqueiros), ¶ 243 (CL-055) (citing the determination of *LG&E v. Argentina* with approval); *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAgua Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability (July 30, 2010) (Salacuse, Kaufmann-Kohler, Nikken), ¶ 129 (RL-84) (concluding that the measures taken by Argentina to handle the financial crisis "did not constitute a permanent and substantial deprivation" of the investment).

[543] *Glamis Gold, Ltd. c. The United States*, UNCITRAL, Award (June 8, 2009) (Young, Caron, Hubbard), ¶ 360 (RL-75).

[544] *Id.* (emphasis added). In this case, the "short duration" was *eleven* months.

[545] *Cargill Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award (September 18, 2009) (Pryles, Caron, McRae), ¶¶ 339-341 (RL-79).

"established that it is possible under Article 1110 to bring a claim for a 'temporary' taking and denies the claim on that basis."[546] Even the cases cited by the Claimant support this point and conclude that expropriation can only arise in a situation where it is *permanently* taken.[547]

286. As is demonstrated by these cases, Italba is incorrect when it accuses URSEC of expropriating the "rights" of Trigosul because it "did not take immediate action to undo its transfer of the Spectrum to Dedicado and restore the Spectrum to Trigosul."[548] The "delay" in offering Trigosul the equivalent frequencies cannot constitute an expropriation under international law or under Article 6 of the Treaty. Therefore, even if—*quod non*—Uruguay had temporarily failed to comply with the Judgment, it would not have committed a breach of Article 6. Clearly Trigosul cannot complain about expropriation when it rejected the return of the same rights that it claims were expropriated. Nor is there any justification for rejecting them when the

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[546] *Id.*, ¶¶ 348, 377.

[547] *See, e.g.*, *Khan Resources Inc. et al. v. the Mongolian Government*, PCA Case No. 2011-09 (UNCITRAL), Award (March 2, 2015) (Dervaird, Greenberg, Belman), ¶ 310 (CL-008) (concluding that the Claimant never had the intention of returning the suspended rights); *Técnicas Medioambientales TECMED S.A. V. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003) (Grigera Naón, Fernández Rozas, Bernal Verea), ¶ 117 (CL-009) ("The Resolution meets the characteristics mentioned above: undoubtedly it has provided for the non-renewal of the Permit and the closing of the Landfill *permanently and irrevocably*, not only due to the imperative, affirmative and irrevocable terms under which the INE's decision included in the Resolution is formulated, which constitutes an action —and not a mere omission— attributable to the Respondent, with negative effects on the Claimant's investment and its rights to obtain the benefits arising therefrom, but also because after the non-renewal of the Permit, the Mexican regulations issued by INE become fully applicable […]."") (emphasis added); *CME Czech Republic B.V. V. Czech Republic*, UNCITRAL, Award (September 13, 2001) (Dusseldorf, Schwebel, Handl), ¶ 607 (CL-011) ("Expropriation of CME's investment is found as a consequence of the Media Council's actions and inactions as *there is no immediate prospect at hand that ČNTS will be reinstated in a position to enjoy an exclusive use of the license as had been granted under the 1993 split structure* (even if the Czech Supreme Court would re-instate the Regional Commercial Court decision). There is no immediate prospect at hand that ÈNTS can resume its broadcasting operations, as they were in 1996 before the legal protection of the use of the licence was eliminated.") (emphasis added); *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (August 30, 2000) (Lauterpacht, Civiletti, Siqueiros), ¶ 59 (CL-010) (the Claimant arguing that the decree "effectively and permanently precluded the operation of the landfill").

[548] Memorial, ¶¶ 107-108.

period of time to return the rights is reasonable under Uruguayan[549] and international law.[550]

3. The Was No Breach of the Obligations under Article 5 to Provide Fair and Equitable Treatment or Full Protection and Security

287. As explained in Section III.A.4, the Claimant has not proven that the obligation to provide FET contains any standard beyond denial of justice, such as arbitrariness[551] or bad faith.[552] With regard to the compliance with the TCA Judgment, Italba alleges that Uruguay breached these standards that do not apply, as well as the obligation to not deny justice. Italba is wrong. Uruguay did not breach any obligation with respect to FET, even if FET were as broad as the Claimant argues, nor did it breach its obligations to provide full protection and security.

288. *First*, there is no basis for Italba's argument that URSEC's alleged "failure to comply" constitutes a denial of justice in breach of Article 5 of the Treaty. The Article 5 obligation is "not to deny justice *in criminal, civil, or administrative adjudicatory proceedings* […]."[553] It is clear that the obligation only applies to legal proceedings and not to administrative acts such as the acts of URSEC before or after the TCA Judgment.[554] According to the United

[549] Opinion of Dr. Pereira, Section IX.G.

[550] *See supra*, Section III.

[551] *See supra*, Section III.A.4.

[552] *See supra*, Section III.A.4.

[553] BIT between Uruguay and the United States, Article 5(2)(a) (emphasis added) (C-001).

[554] *See, e.g., Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award (May 31, 2016) (Dupuy, Mantilla-Serrano, Thomas), ¶ 248 (RL-114) ("The Tribunal begins by noting the Claimant's observation that a denial of justice can arise under international law by an act of the administrative branch of the State. To the extent that a denial of justice can originate in a State's administrative act, the Tribunal agrees that this is the case. However, as discussed further below, *the Tribunal does not believe that an administrative act, in and of itself, particularly as the level of a first instance decisionmaker, can constitute a denial of justice under customary international law*, when further remedies or avenues of appeal are potentially available under municipal law." (Emphasis added).

States, a denial of justice occurs when "a *State's judiciary administers justice* to aliens in a 'notoriously unjust' or 'egregious' manner 'which offends a sense of judicial propriety.'"[555]

289. Here, the Claimant is not questioning the decision of the TCA. On the contrary, the TCA granted Trigosul a favorable decision. Therefore, the Claimant cannot say that there has been a denial of justice in "criminal, civil, or administrative adjudicatory proceedings."

290. However, Italba considers that the actions of the Executive may be included in the scope of a denial of justice. In its Memorial, the Claimant alleges that the denial of justice in this case "stems from the frustration of a judgement of the TCA, Uruguay's highest administrative court"[556] and that the State's failure to comply with a court judgment "is widely recognized as a denial of justice under international law."[557]

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[555] *Spence International Investments, LLC, Berkowitz, et al. v. the Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Document of the United States of America (April 17, 2015), ¶ 13 (RL-111) (emphasis added) (citations omitted); *see also Mr. Franck Charles Arif v. the Republic of Moldova*, ICSID Case No. ARB/11/23, Award (April 8, 2013) (Cremades, Hanotiau, Knieper), ¶ 445 (RL-99) ("fundamentally unfair proceedings and outrageously wrong […] decisions."); *Jan Oostergetel and Theodora Laurentius v. the Slovak Republic*, UNCITRAL, Final Award (April 23, 2012) (Kaufmann-Kohler, Wladimiroff, Trapl), ¶ 273 (RL-90) (referring to the high threshold needed to prove a claim of denial of justice in international law: "To meet the applicable test, it will not be enough to claim that municipal law has been breached, that the decision of a national court is erroneous, that a judicial procedure was incompetently conducted, or that the actions of the judge in question were probably motivated by corruption. A denial of justice implies the failure of a national system as a whole to satisfy minimum standards.").

The burden of proof to establish a denial of justice is "clear and convincing evidence." *United States of America (B. E. Chattin) v. United Mexican States*, Commission of Claims U.S.-Mexico, Decision (July 23, 1927) (Van Vollenhaven), 4 U.N.R.I.A.A. 282, p. 288 (RL-24) (declaring that "convincing evidence is necessary to fasten liability" for a denial of justice; *Vannessa Ventures v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/0/6, Award (January 16, 2013) (Lowe, Brower, Stern), ¶ 228 (RL-97); *see also Mondev International Ltd. V. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (October 11, 2002) (Stephen, Crawford, Schwebel), ¶ 127 (CL-013) ("In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was *clearly* improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment.") (emphasis added).

[556] Memorial, ¶ 128.

[557] *Id.*, ¶ 129.

291. However, to support this "widely acknowledged" claim, the Claimant only cites two sources: an advisory opinion rendered at the request of the government of Uruguay before the Inter-American Court of Human Rights and an arbitration case. One advisory decision, in the context of human rights, does not reach the level of evidence needed to prove that denial of justice includes acts of the Executive in international arbitration. Furthermore, the only ICSID arbitration cited by Italba is not "on all fours" with the case.[558] In *Siag v. Egypt*, there was not one reference in the treaty between Egypt and Italy clarifying that a denial of justice emerges "criminal, civil, or administrative adjudicatory proceedings," as is the case in this Treaty. With respect to the facts, in that case seven and a half years had passed from the time at which the judgment of the court was rendered and the time at which the State began to discuss compliance.[559] Moreover, in this period, "there were no fewer than eight rulings in Claimants' favour."[560]

292. Here, it is not the case that the means of appeal "are illusory" or that "the alleged victim is denied access to a judicial remedy."[561] The Claimant did not even attempt to make use of the means of appeal available to it.[562] It cannot complain about a denial of justice when it has a favorable ruling and did not attempt to "access [] a judicial remedy" to accelerate compliance.[563] On the contrary, after the TCA's Judgment, Trigosul let some six months pass

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[558] *Id.*, ¶ 130.

[559] *Siag v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (June 1, 2009) (Williams, Pryles, Vicuña), ¶¶ 453-456 (CL-016).

[560] *Id.*, ¶¶ 454.

[561] Memorial, ¶ 129 (citing Inter-American Court of Human Rights, Legal Opinion OC-9/87 (October 6, 1987), ¶34 (CL-043)).

[562] Opinion of Dr. Pereira, Section X.

[563] In fact, the Claimant tries to argue that "there can be no defense of exhaustion of remedies with respect to this matter […]." Memorial, ¶ 130. However, the requirement to exhaust all internal appeals is not limited to direct lines

between February and August 2015, without contacting URSEC regarding the return of frequencies. Meanwhile, URSEC explored how it could comply with the Judgment in a complex situation in which the frequencies were already being used by another company. Ultimately, URSEC complied by offering Trigosul equivalent frequencies. When Trigosul rejected the offer, URSEC promptly offered the same frequencies that Trigosul had been allocated previously. Even in the case that an act or omission by the Executive could constitute a denial of justice under Article 5 of this Treaty, any delay that occurred between the TCA Judgment and URSEC's compliance did not reach the level necessary to uphold a denial of justice.

293. *Second*, Italba alleges that "Uruguay's refusal to comply with the TCA Judgment is wholly arbitrary"[564] and in bad faith.[565] The insistence on a refusal to comply with the TCA Judgment is fundamentally incorrect. The government did comply with the Judgment and never

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of relief. A Claimant needs to exhaust extraordinary appeals as well, provided that, like any other, they are reasonably available and able to provide effective compensation. *Ambatielos (Greece v. United Kingdom and Northern Ireland)*, Award (March 6, 1956) (Alfaro, Bagge, Bourquin, Spiropoulos, Thesiger) 12 UNRIAA 83, p. 120 (RL-29) ("It is the whole system of legal protection, as provided by municipal law, which must have been put to the test."); *see also Apotex Inc. v. United States*, UNCITRAL, Award on Jurisdiction and Admissibility (June 14, 2013) (Landau, Davidson, Smith), ¶ 282 (RL-100) ("A claimant cannot raise a claim that a judicial act constitutes a breach of international law, without first proceeding through the judicial system that it purports to challenge, and thereby allowing the system an opportunity to correct itself."); J. Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005), p. 125 (RL-110) ("National responsibility for denial of justice occurs only when the system as a whole has been tested and the initial delict has remained uncorrected."); International Law Commission, Draft Articles on Diplomatic Protection (2006), Article 14 (2) (RL-51) (in the Articles, which reflect general international law, the obligation is established to exhaust the resources that are "open to an injured person before the judicial or administrative courts or bodies, whether *ordinary or special*, of the State alleged to be responsible for causing the injury.") (emphasis added).

Here, the expert Professor Pereira explains, "Trigosul failed to use the multiple legal instruments at its disposal to obtain compliance with the TCA Judgment, if it had such an urgent interest in that compliance." Opinion of Dr. Pereira, ¶ 311; *see generally id.*, Section X. The Claimant did not take make use of these widely-known and easy to request appeals, because, in fact, it was not interested in its alleged rights—it was only interested in extorting a sovereign country to seek excessive profits to which it has no right. In addition, as Dr. Pereira described in his report, in Uruguay, the judicial appeals were not exhausted. Here, Trigosul "did not filed the corresponding compensation claim in Uruguay, which implies that said company did not exhaust the opportunities provided by Uruguayan law in cases such as this one." *Id.*, ¶ 351.

[564] Memorial, ¶ 146.

[565] *Id.*, ¶ 140.

suggested at any time that it was not going to do so.[566] Therefore, the alleged "refusal to comply" could not be arbitrary or in bad faith, given the fact that such refusal did not exist. For the same reason, it could not be a breach of the obligation to provide full protection and security (even on the assumption that the obligation includes legal protection—which it does not[567]).

294. In short, the actions of the government after the issuance of the TCA Judgment are not breaches of any provision of the Treaty because the government fully complied with its obligations before the TCA, in approximately fifteen months (from the time of the request by Trigosul's legal representative in February 2015 until the time at which Executive Resolution No. 156/016 was issued in April 2016). The only reason Trigosul does not have its supposed rights to the Spectrum is because it rejected them. It is not the fault of the government that the investment has been badly managed by Trigosul and that the company itself took the decision to reject its own alleged rights.

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295. For all these reasons, even in the hypothetical case that this Tribunal would determine that it has jurisdiction over any of Italba's claims that Uruguay breached its obligations under the Treaty, none of these claims have any merit, and all must be dismissed.

[566] Statement of Dr. Cendoya, Section VI.

[567] *See supra*, Section III.A.5.

IV. THE CLAIMANT DOES NOT HAVE ANY RIGHT TO COMPENSATION

296. Even if hypothetically the Tribunal had jurisdiction, it does not have the grounds to decide on damages because Uruguay did not breach any of the Treaty's provisions.[568] In any case, Uruguay will demonstrate in this part of its Counter-Memorial that the Claimant's claim for damages is as artificial as its claim on the merits.

297. After years of inefficient management and the ultimate economic failure of its alleged investment, Italba seeks to achieve in this arbitration what it could not attain in the market: to turn Trigosul, a company with no revenue or operations, into a profit of US$ 62,000,000.[569]

298. But the Claimant is not entitled to receive any form of compensation for two reasons:

1) As explained in Section (A), the Claimant did not suffer any of the damages it claims, due to the alleged wrongful conduct of Uruguay. First, it is not true that Uruguay deprived the Claimant of the value of its investment.[570] The Claimant's alleged investment in Uruguay—understood as Trigosul's business in the data transmission sector—had no value on the date that URSEC revoked the frequency allocation from Trigosul, it also did not have any value on the valuation date proposed by the Claimant in its Memorial. Therefore, as explained in sub-section A (1), the Claimant did not suffer

[568] *See infra*, Section III.

[569] Statement of Dr. Cendoya, ¶ 121.

[570] Memorial, ¶ 176.

any losses even if *quod non* Uruguay had illegally expropriated its alleged investment. Second, the Claimant suffered no lost profits as a result of Uruguay's conduct. Sub-section A (2) shows that the Claimant did not prove that the alleged business opportunities that it cites in its Memorial were frustrated because URSEC denied Trigosul a license in accordance with the 2003 regulations, or because URSEC revoked the frequency allocation from Trigosul. None of the alleged business "opportunities" were even possible—in fact, the Claimant seems to have fabricated at least two of the alleged business opportunities with false documents;[571] and

2) Even if the Court concluded *quod non* that Uruguay had breached the treaty by allegedly failing to comply with the TCA's Judgment of October 2014, Section (B) explains that the Claimant waived its right of compensation for this alleged breach when it refused, first, to receive equivalent frequencies from URSEC,[572] and then, when it rejected URSEC's offer to reallocate the original frequencies to Trigosul.[573]

299. Section (C) shows that the Claimant's request for interest is also not based on economic reality; and Section (D) concludes by summarizing the reasons why the Claimant's claim for damages should be rejected.

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[571] *See* Letter from M. Toma (Office of the President of the Republic) to D. Bobre (Canal 7) (November 7, 2016) (R-78); Letter from D. Bobre (Canal 7), to M. Toma (Office of the President of the Republic) (November 9, 2016) (R-72); Criminal record assigned to the Court of First Instance (October 19, 2016) (C-138).

[572] Statement of Dr. Cendoya, ¶ 94-96.

[573] Communication Services Regulatory Agency, Draft Resolution (May 9, 2016) (C-098); Statement of Dr. Cendoya, ¶¶ 101-102.

A. URUGUAY DID NOT CAUSE ANY DAMAGES TO TRIGOSUL

300. According to Article 24 of the Treaty, the Claimant not only has to demonstrate that Uruguay breached its obligations in order to be able to submit the dispute to arbitration;[574] but the Claimant also has the additional burden of proving that it "has incurred loss or damage by reason of, or arising out of, that breach […]."[575] This provision of the Treaty reflects the standard in customary international law that requires claimants to prove that they have suffered damage,[576] and that the damage was caused directly by the unlawful act.[577]

301. Uruguay shall show in this section that the Claimant did not meet the requirements of Article 24 of the Treaty, because it did not prove that it suffered any of the alleged damages, and it did not prove that these damages were caused by the alleged wrongful conduct of Uruguay.

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[574] BIT between Uruguay and the United States, Article 24 (C-001).

[575] *Id.*

[576] S*ee, for example*, *Ioannis Kardassopoulos and Ron Fuchs v. the Republic of Georgia*, ICSID Case No. ARB/07/15 (March 3, 2010) (Fortier, Orrego Vicuña, Lowe), ¶ 453 (RL-83) ("Whilst the Claimants hold the burden of proving their loss in accordance with international law principles of causation, the Respondent has advanced several positive arguments in respect of causation."); *Víctor Pey Casado and the "Presidente Allende" Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award (September 13, 2016) (Berman, Veeder, Mourre), ¶ 205 (RL-116) ("It is a basic tenet of investment arbitration that a claimant must prove its pleaded loss, must show, in other words, what alleged injury or damage was caused by the breach of its legal rights.").

[577] Article 31 (1) of the Draft Articles of the International Law Commission (ILC) on the responsibility of States sets out this principle as follows: "The responsible State is under an obligation to make full reparation for the injury *caused* by the internationally wrongful act." The United Nations International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries, Article 31 (1) (2001) (CL-072) ("Draft Articles of the ILC") (emphasis added). *See also,* B. Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (2006), p. 253 (RL-50), (where the author states that "the duty to make reparation extends only to those damages which are legally regarded as the consequences of an unlawful act."); *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award (July 25, 2007) (de Maekelt, Rezek, van den Berg), ¶ 41 (RL-60) ("The determination of compensation depends on the identification of the damage caused by Respondent's wrongful acts and the establishment of lost profits."); *United Parcel Service of America Inc. v. Canadian Government*, UNCITRAL, Award on the facts (May 24, 2007) (Cass, Fortier, Keith), ¶ 37 (RL-59) ("damage must flow from some cause.").

302. Specifically, the Claimant alleges that it suffered two forms of damages.

303. The first form, according to the Claimant, consists in the "permanent deprivation" of the value of its supposed investment as a result of the revocation of its frequency allocation and its authorization for data transmission.[578] The Claimant and its expert in damages, Compass Lexecon, estimate that the fair market value (FMV) of its "investment" in 2015 was US $41.9 million.[579] But, as explained in sub-section A(1), this value is artificial because the Claimant's damages expert did not valuate what it had to in this case.[580] Instead of determining the FMV of Trigosul as a data transmission company, the Claimant's expert valuated in the abstract the frequencies that Trigosul had been allocated by incorrectly applying the "comparable transactions" method.[581] In reality, Trigosul had no FMV as a point to point and point to multipoint wireless data transmission company, neither on the valuation date chosen by the Claimant, nor on the appropriate date of January 19, 2011. Furthermore, even accepting the incorrect valuation methodology chosen by the Claimant's expert, the frequency allocation and its service authorization had no value.

304. The second form of damage claimed is the lost profits from five business opportunities which, according to the Claimant, did not materialize due to the wrongful conduct of Uruguay.[582] Two of these alleged businesses—the alleged associations with Phinder and

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[578] Compass Lexecon Report, ¶34; Memorial, ¶ 176.

[579] Compass Lexecon Report, Table III; Memorial, ¶ 195.

[580] Econ One Report, ¶ 10.

[581] Uruguay's damages expert, Econ One, explains in its report that the fundamental error in the valuation of Compass Lexecon was to assess the frequencies that Trigosul had allocated in the abstract, without taking into account the limited use that Trigosul could give these frequencies. *See Id.*, ¶¶ 10-15.

[582] Compass Lexecon Report, Section IV.3; Memorial, ¶ 197.

Telmex—were allegedly frustrated between 2007 and 2009 "because of URSEC's unjustified refusal to issue to Trigosul a license conforming to the 2003 License Regulations."[583] The other three businesses—with Dr. Garcia, Canal 7, and Grupo Afinidad Mary—were allegedly lost after URSEC revoked Trigosul's frequency allocation in January 2011.[584] As will be demonstrated in sub-section A(2), like the supposed "permanent deprivation" of the value of its investment, even if the Claimant could prove that Trigosul lost these business opportunities, it was due to reasons totally unrelated to Uruguay's conduct.

305. In addition to the lack of a causal link between the alleged loss of business and the conduct of Uruguay, the values of the lost profits of these five "opportunities" calculated by Compass Lexecon[585]—Claimant's expert—are speculative, as there is no evidence that they could have generated a profit for Trigosul.[586]

306. Based on Article 24 of the Treaty, the alleged investment's lack of value and the absence of damages attributable to Uruguay is fatal to the Claimant's claim for compensation.

1. Even If It Were Proven That Uruguay Illegally Deprived It of Its Investment, the Claimant Did Not Suffer Damages Because Trigosul Did Not Have Market Value

307. The Claimant's damages expert claims to have assessed the fair market value of Trigosul's "license" using the "comparable transactions" method or "market transaction[s]."[587]

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[583] Memorial, ¶¶ 196-197 (a) and (b).

[584] *Id.*, ¶¶ 70, 197 (c), (d) and (e).

[585] Compass Lexecon Report, Table IX.

[586] Econ One Report, Section IV, ¶¶ 50-53.

[587] Memorial, ¶ 186.

According to the Claimant, this methodology was the most appropriate in this case because it is based on transactions that "reflect[] similar market conditions and *reduc[e] the uncertainty that are necessary for other available valuation methods such as the discounted cash flow (DCF) method*."[588] But that was not the reason why the Claimant and its damages expert did not use the DCF method (or FFD to use its acronym in Spanish). The DCF method in this case does not involve any uncertainty, as the Claimant suggests. To the contrary, as shown in sub-section A(1)(a), and as further explained by Econ One, Uruguay's damages expert, Trigosul's valuation applying a method that assesses its historical performance and its capacity to generate profits would show that Trigosul's FMV was zero.[589]

308. The reality is that the Claimant's expert used the "comparable transactions" method to get around the fact that Trigosul had no value as a data transmission company, and that, therefore, a hypothetical buyer would not pay anything to acquire it. In fact, Trigosul reported no income since at least 2009.[590] In addition to Trigosul's lack of commercial activity, the decline of its business in the future was inevitable. The demand for the type of service that Trigosul was authorized to provide has dropped significantly since 2011 with the emergence of new technologies.[591]

309. The above implies that on both the appropriate valuation date in this case—January 19, 2011, as demonstrated in sub-section 1(b)—and the valuation date chosen by the

[588] *Id.*, ¶ 187 (emphasis added).

[589] Econ One Report, ¶¶ 13, -15.

[590] Trigosul S.A. Statistical Table (2016) (R-54).

[591] Statement of Dr. Cendoya, ¶ 45-51.

Claimant, March 1, 2015, Trigosul had no value.[592]

310. Subsequently, in subsection 1(c), Uruguay demonstrates that the fact that the Trigosul's market value was zero is corroborated even when correctly applying the "comparable transactions" method used by the Claimant's expert, Compass Lexecon.[593]

311. Therefore, regardless of the valuation date that the Tribunal deems appropriate, the alleged wrongful acts of Uruguay were not the reason that the Claimant's investment had no value.

a. The Correct Valuation Method: Trigosul Had No Market Value

312. It is absurd that the Claimant seeks compensation of US $41,900,000 under the pretext that Uruguay revoked a frequency allocation and a data transmission service authorization for which Trigosul did not pay a penny,[594] especially because they were granted on the basis that they could be revoked *at any time and without the right to make a claim or compensation.*[595] In this regard, Uruguayan law excludes the possibility of compensation for the

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[592] Econ One Report, ¶¶ 15.

[593] *Id.*, ¶ 16.

[594] Statement of Dr. Cendoya, ¶ 6, 13, 36.

[595] The Uruguayan law expert, Dr. Santiago Pereira, explains in his expert report that both the data transmission authorization of Trigosul and the allocation of frequencies shared these characteristics. With regard to the authorization, Dr. Pereira says that, on the basis of Uruguayan case law, this is a weakened right, in contrast to a permanent and perfect subjective right, because it can be revoked at any time, without the right to compensation. Opinion of Dr. Pereira, ¶¶ 84-90. According to Dr. Pereira, the mere fact of having received an authorization for a service does not imply that they have a right to receive frequencies in the radio spectrum. *Id.*, ¶¶ 93-94. For its part, the allocation of frequencies to Trigosul was also provisional and revocable without the right to compensation, as specified in the text of the allocation document itself. *See* National Communications Directorate, Resolution No. 444/000 (December 12, 2000) (C-012); Opinion of Dr. Pereira, ¶¶ 95-100. As Dr. Pereira explains, only those allocations that are allocated through auction or any other competitive procedure are not provisional or revocable: "It is relevant to mention that the only exception to the revocable and provisional nature of the allocation of frequencies is the case in which such allocation is made pursuant to a bidding process or other competitive

revocation of these permits.[596]

313. As stated by the Claimant's expert, the fair market value of an asset represents the price that a buyer would have been willing to pay (and a seller would have been willing to accept) for an asset.[597] Therefore, the key question that the Tribunal must resolve in this matter is: How much a hypothetical buyer would have paid for Trigosul in January 2011? The answer is simple, but uncomfortable for the Claimant and its damages expert. Considering its historical performance and its ability to generate profits, a hypothetical buyer would hardly pay anything, let alone US$ 41,900,000 for Trigosul.[598]

314. ***First***, Trigosul reported no income since at least 2009.[599] This means that Trigosul only generated losses.[600]

315. ***Second***, Trigosul reported that it did not have any employees or customers since 2009.[601] On the date of the alleged expropriation, Trigosul supposedly had two customers. But Dr. Alberelli himself admits that these two customers—Dr. Garcia and Canal 7—did not even pay Trigosul for its service.[602] And the evidence clearly shows that neither Dr. Garcia nor Canal

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procedure, which did not occur in the case in question. In fact, Trigosul never participated in any competitive procedure for the allocation of frequencies." Opinion of Dr. Pereira, ¶ 101.

[596] According to Article 42 of the ICSID Convention, Uruguayan law also applicable in this dispute. ICSID Convention, Regulations and Rules, ICSID (April 2006) (CL-001). The TCA recently explained that parties who received frequencies on a provisional and revocable basis have no right to invoke "a legitimate expectation that said allocation would not be revoked, or of the existence of supposed acquired rights to maintain it, because the claimant was aware of the provisional status of the situation" Opinion of Dr. Pereira, ¶ 99.

[597] Compass Lexecon Report, ¶¶ 34-37.

[598] Econ One Report, ¶¶ 15, 43.

[599] Trigosul S.A. Statistical Table (2016) (R-54).

[600] Statement of Dr. Cendoya, ¶ 108; Econ One Report, ¶ 43.

[601] Trigosul S.A. Statistical Table (2016) (R-54).

[602] Statement of Dr. Alberelli, ¶¶ 64, 66.

7 were Trigosul customers: both deny it.[603]

316. ***Third***, URSEC's alleged refusal to issue Trigosul a license is nothing more than a pretext to divert attention from the fact that Trigosul had no intention or capacity to provide the Uruguayan public with the services for which it was authorized.[604] The performance of its competitor, Dedicado, serves as a point of reference.

317. It has already been explained that Dedicado was in the data transmission business, just like Trigosul, and it was operating in very close frequencies.[605] URSEC did not change Dedicado's authorization into a new license.[606] But unlike Trigosul, Dedicado did operate, generate profits, and invest in its business and it also employed many Uruguayans.[607] In the period 2005-2011, Dedicado reported that it had between 12,000 and 16,000 customers. In the same period, it reported average revenues of 178,000,000.00 Uruguayan pesos (equivalent to US$ 9,218,021 in 2011), and employed more than 80 people.[608] Moreover, in the period 2010-2015, Dedicado invested more than 35,000,000.00 Uruguayan pesos (equivalent to US$ 1,694,419.64).[609] Nothing prevented Trigosul from operating its business in the same way Dedicado did. But it certainly did not.[610] In fact, the largest number of customers that Trigosul reported to URSEC was eight in 2005; between 2009 and 2011 it did not report any customers;

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[603] Criminal record assigned to the Court of First Instance (October 19, 2016), pp. 31-32 (C-138); Letter from D. Bobre (Canal 7), to M. Toma (Office of the President of the Republic) (November 9, 2016) (R-72).

[604] Statement of Dr. Cendoya, ¶¶ 40-44, 77-79, 121.

[605] Statement of Dr. Cendoya, ¶ 48.

[606] *See supra*, Section III.A (3); Statement of Dr. Cendoya, ¶¶ 61-63.

[607] Econ One Report, ¶ 34; Dedicado S.A. Statistical Table (2016) (R-52).

[608] Dedicado S.A. Statistical Table (2016) (R-52).

[609] *Id.*

[610] Statement of Dr. Cendoya, ¶¶ 40-44, 77-79, 121.

and it did not report any income since at least 2009.[611] It is clear that Trigosul did not operate, and had no intention of doing so.

318. And ***fourth***, the data transmission business in Uruguay had already begun to decline since at least 2011, several years before the expropriation date chosen by the Claimant.[612] Dedicado's performance—a competing company that invested millions in its business—proves it. In 2013 Dedicado reported that it had 14,662 customers; in 2015, this fell to 7,633 customers. This means that in a period of only two years, the number of customers Dedicado had fell by almost 50%.[613] This figure is significant, especially if we take into account that since 2013 Dedicado had the frequencies that were once allocated to Trigosul. Technological changes, including the aggressive deployment of fiber optic by ANTEL since 2011, are responsible for the severe depression that the fixed wireless data transmission market is undergoing in Uruguay.[614]

319. For these four reasons, the Claimant and its damages expert avoided assessing Trigosul's historical performance and its ability to generate profits using the DCF method.[615] They are well aware that a proper analysis of the FMV of Trigosul based on its ability to generate profits would show that Trigosul had no FMV in 2011 or later. It is no coincidence that the Claimant has not produced a single document concerning the economic performance of Trigosul or its alleged investments in Uruguay, including financial statements, invoices, or

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[611] Trigosul S.A. Statistical Table (2016) (R-54).

[612] Statement of Dr. Cendoya, ¶ 47; Econ One Report, ¶¶ 35-38.

[613] Dedicado S.A. Statistical Table (2016) (R-52); Econ One Report, ¶ 37.

[614] Statement of Dr. Cendoya, ¶ 46-49; Econ One Report, ¶¶ 35-38.

[615] Econ One Report, ¶¶ 12-15, 41-44.

accounting records, among other things.[616]

320. Based on the information available about Trigosul, Uruguay's damages expert, Econ One, concludes that Trigosul had no FMV on the date of expropriation in 2011, or on the date chosen by the Claimant (March 2015).[617] This means that, even assuming that Uruguay expropriated the Claimant, or deprived it of its investment, Uruguay's conduct did not cause any damages—Italba did not suffer any loss. There is therefore no causal link between Uruguay's conduct and the loss (or absence) of value of the investment.

321. This was the arbitral tribunal's conclusion in *Biwater Gauff v. Tanzania* despite finding that Tanzania had breached the applicable BIT. The tribunal refused to grant compensation to the investor because it found no causal link between the alleged damage and the State's wrongful conduct.[618] The tribunal reached this decision after verifying that the investment had no value before the occurrence of the wrongful act.

322. In that case, the British company Biwater Gauff Tanzania (BGT), through its local subsidiary, entered into an agreement with a state entity for the provision of water and sewage services for the city of Dar es Salaam.[619] BGT underestimated the magnitude of the project and, as a result, it failed in the first two years. After an unsuccessful attempt to

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[616] Statement of Dr. Cendoya, ¶ 121; Econ One Report, ¶ 42-44. Uruguay reserves rightist right to request that the Claimant provide these andother documents in discovery.

[617] Econ One Report, ¶¶ 43. As the Claimant has not submitted any audited financial statements or any other accounting information about Trigosul, Uruguay and its expert reserve the right to update its analysis on the value of Trigosul in the next round of pleadingsafter the discovery phase.

[618] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania,* ICSID Case No. ARB/05/22, Award, ¶¶ 779, 787 (July 24, 2008) (Born, Landau, Hanotiau) (*"Biwater Gauff v. Tanzania,* Award") (RL- 71).

[619] Under the contract, BGT would be responsible for operating the water and sewerage system for ten years, as well as billing and collecting payment from customers.

renegotiate the contract, the State rescinded it[620] and BGT sued Tanzania for damages under the BIT between Tanzania and the United Kingdom.

323. The tribunal did not find any causal link between Tanzania's breaches and the dispossession of the investment because, before Tanzania "expropriated" the investor, its investment was worthless.[621] Therefore, it was not possible to assume in that case that the alleged damages—that is, the loss of value of the investment— were caused by the treaty breach given that the contested measures had no impact on the investment.[622] As the losses suffered by BGT already existed before the wrongful act took place, the tribunal rejected the claimant's claim for compensation.[623]

324. In our case, Uruguay could not have caused any damages to Italba because, before the alleged expropriatory act, the Claimant's investment was worthless. As in the *Biwater* case, the Claimant's compensation claim for expropriation must be rejected.

b. The Correct Valuation Date: The Day Before the Alleged Expropriation

325. Assuming that Uruguay deprived Italba of its alleged investment, this deprivation occurred on January 20, 2011—the date on which URSEC revoked Trigosul's

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[620] Besides cancelling the contract, Tanzania occupied the premises of the company, took over administrative control and deported the BGT managers.

[621] *Biwater Gauff v. Tanzania*, Award, ¶¶ 798-799 (RL-71).

[622] *Id.*, ¶ 804 ("It is therefore insufficient to assert that simply because there has been a 'taking,' or unfair or inequitable conduct, there must necessarily have been an 'injury' caused such as to ground a claim for compensation. Whether or not each wrongful act by the Republic "caused injury" such as to ground a claim for compensation must be analysed in terms of each specific 'injury' for which BGT has in fact claimed damages.").

[623] *See also, Elettronica Sicula SpA (United States v. Italy)*, Ruling (July 29, 1989), Rep. I.C.J. 1989, p. 15, § 119 (CL-048) (for the special chamber of the ICJ, it was not possible to establish that, in the case of a claim of expropriation "the ultimate result [had been] the consequence of the acts or omissions of the [State's] authorities" when the Claimant "was in so precarious a state that bankruptcy was inevitable.").

allocation of frequencies—and not on March 1, 2015 as alleged by the Claimant. Therefore, for the purposes of calculating the alleged damages, the appropriate valuation date would be January 19, 2011, according to the compensation standard established in Article 6 of the Treaty. On that date—and also at any later date (including the date chosen by the Claimant)—the value of Trigosul as a business was zero. Therefore, Uruguay did not cause any damage to the Claimant even if—*quod non*—it had expropriated its alleged investment.

326. The Claimant seeks to bring forward the date of the alleged expropriation to March 1, 2015, arguing that it was only then that it found out that URSEC had transferred the frequencies to Dedicado.[624] The Claimant pursues two objectives with its valuation date: 1) to prevent the Tribunal from concluding that the statute of limitations on its expropriation claim has passed; and 2) to artificially compare the market value of Trigosul's authorization and allocation of frequencies with the value of mobile telephony licenses auctioned in Uruguay and Argentina since March 2013. If the valuation date was January 2011, as it actually is, the Claimant could not evade the fact that the statute of limitations on its expropriation claim has passed, or consider using these auctions as comparables. In any case, as explained below, the Claimant cannot rely

[624] The main argument of the Claimant seems to be that the revocation of the frequency allocation in 2011 supposedly was not final or irreversible in January 2011. Memorial, ¶ 182. If the "irreversibility" of the act was the determining factor in establishing the valuation date, the majority of arbitral decisions concerning expropriation would be incorrect: almost all expropriations are reversible. A State can take a building or a factory and give it back at a later date (the fact is that this never happens). Only the destruction of an asset is irreversible, because States have the power to reverse their administrative acts at any time. The Claimant does not cite any case where the "irreversibility" of the act of expropriation has been used as a criterion for establishing the valuation date. In the case *Compañía del Desarrollo de Santa Elena v. Costa Rica*, for example, the tribunal established May 5, 1978 as the valuation date, even though the investor was still in possession of the asset and that it also had the right to ask for its return 10 years later. In that case, the key date for the court was the date on which the measure "effectively freezes or blights the possibility for the owner reasonably to exploit the economic potential of the property." *Compañía del Desarrollo de Santa Elena S.A. v. República de Costa Rica*, ICSID Case No. ARB/96/1, Final Award (February 17, 2000) (Fortier, Lauterpacht, Weil), ¶¶ 22, 76, 80, 81 (CL-029). In this case, the Claimant did not return to a position where it could "exploit the economic potential" of its authorization to use the frequencies since January 2011.

on an erroneous compensation standard and valuation date in order to accommodate its theory of damages and its valuation methodology.

(1) The applicable standard of compensation is the "fair market value immediately before the date of expropriation" in accordance with the Treaty

327. The Claimant is wrong to say that "[t]he Treaty does not specify the standard of compensation owed for any form of Treaty breach other than a lawful expropriation."[625] Starting from this premise, it alleges that the Treaty does not provide for a standard of compensation for cases of illegal expropriation and that, therefore, Italba is entitled to "full compensation" that allows it to be compensated as of the date of the award.[626] But this conclusion is baseless.[627]

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[625] Memorial, ¶ 177.

[626] The only effect of applying the standard of full compensation in this case is that the Tribunal may establish the date of the award as the valuation date. In fact, the Claimant reserved, in a footnote in its Memorial, the right to update its valuation, insinuating that the Tribunal could assess its alleged investment as of the date of the award. Memorial, ¶ 181, note 348. But it is inconceivable that this could happen. As has been demonstrated above, Trigosul's business was not worth anything when the Uruguayan authorities revoked the authorization and the allocation of frequencies; it is not worth anything today, and it will surely not be worth anything on the date that the award is made. However, the Claimant only cites two arbitration awards where the courts determined that the standard of full compensation required investment to be valued after the date of expropriation. One such case is *ADC Affiliate Limited v. Hungary*, ICSID Case No. ARB/03/16, Award (October 2, 2006) (Brower, van den Berg, Kaplan), ¶ 496 (CL-014) and the other is *Phillips Petroleum Company Venezuela Limited and ConocoPhillips Petrozuata B.V. v. Petroleos de Venezuela, S.A.*, ICC Case No. 16848/JRF/CA (C-16849/JRF), Final Award (September 17, 2012) (Tercier, Grigera Naón, El-Kosheri) (CL-083). In *ADC v. Hungary* the tribunal acknowledged that the case was exceptional ("almost unique") because the value of the investment had increased considerably since the time of the expropriation. As regards the *ConocoPhillips* case, the tribunal has not yet made a decision regarding damages, so there is no certainty that the valuation date will be on the date of the award. As a consequence, in this case there is no justification for ordering compensation as of the date of the award.

[627] Memorial, ¶ 177. Jeswald Salacuse, a prestigious academic and international arbitrator, has criticized the Arbitral Tribunal in the famous case *ADC v. Hungary* because the arbitrators concluded, in the same way as Claimant has in this case, that the applicable treaty did not provide for the applicable standard for cases of illegal expropriation. This led the tribunal in *ADC v. Hungary* to adopt the full standard of compensation articulated by the Permanent Court of International Justice in the *Case concerning the Factory at Chorzów* Ruling (September 13, 1928), *PCIJ* Series A, No. 17 (CL-070). Salacuse expressed his disagreement with the tribunal's decision in *ADC v. Hungary* in the following passage: "One may question whether the tribunal's interpretation of the applicable BIT was correct. The treaty provision in question provided that '[n]either Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments unless […] the measures are accompanied by

328. The Claimant's error derives from a superficial reading of Article 6 of the Treaty. Contrary to what the Claimant alleges, this provision does not distinguish between legal expropriation or illegal expropriation. Paragraph 1 simply sets out the requirements that the State must comply with in cases of expropriation or nationalization, whether direct or indirect. One of those requirements is "payment of prompt, adequate, and effective compensation."[628]

329. Subsequently, paragraph 2 indicates that compensation should "be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ('the date of expropriation')."[629] There is no term that modifies the phrase "expropriated investment." The expropriation of the investment can be legal or illegal. Therefore, the Claimant cannot infer that the compensation—defined as the FMV of the investment before the date of expropriation—only applies in cases of legal expropriation.[630] As Professor Antonio Cassese stated in one of his speeches as a judge of the International Criminal Tribunal for the former Yugoslavia, "wherever the law does not make any distinction, the interpreter is not allowed to make similar distinctions."[631]

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provision for the payment of just compensation.' As indicated earlier, just compensation was to be market value and the treaty makes no distinction between legal and illegal deprivation measures. The treaty refers only to measures depriving investors of their property. By not making provision for the payment of market value Hungary undouble violated its treaty obligations, *but according to the treaty the proper remedy is the payment of compensation equal to the market value of the investment*." J. Salacuse, THE LAW OF INVESTMENT TREATIES (2010), p. 355 (RL-80) (emphasis added).

[628] BIT between Uruguay and the United States, Article 6.1 (C-001).

[629] *Id.*, Article 6.2(b).

[630] Recently, in the case *Rurelec v. Bolivia*, the Arbitral Tribunal rejected the claimant's request to apply the customary standard of full reparation and, after concluding that the BIT made no distinction between the compensation for legal expropriations and the compensation for illegal expropriations, it applied the compensation standard of the expropriation clause in the BIT between the United Kingdom and Bolivia. *Guaracachi America, Inc. & Rurelec Plc v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award (January 31, 2014) (Júdice, Conthe, Vinuesa), ¶¶ 612-613 (RL-105).

[631] *Tadic*, International Tribunal for the Former Yugoslavia Case IT-94-1, Transcript of public session (April 21, 1999), p. 553 (RL-38). *See also Flegenheimer Case (U.S. v. Italy)*, Italy – U.S.A. Conciliation Commission,

330. The proposition that the expropriation clause of a BIT provides for a single standard of compensation, regardless of whether the expropriation was legal or illegal, has been confirmed in the vast majority of investment arbitration cases to date.[632] The decisions in *Metalclad v. Mexico* and *Tecmed v. Mexico* are particularly instructive in this case because the expropriation clauses of the applicable treaties were similar to the expropriation clause of the Treaty here.[633]

331. In *Metalclad,* the tribunal decided that the denial of a municipal permit for the construction of a landfill breached the NAFTA expropriation clause because Mexico stripped the investor of its investment without paying any compensation.[634] Even though the expropriation was illegal, the tribunal applied the treaty's standard of compensation, that is, the fair market value before the date of expropriation, without any need to make reference to the standard of full

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Decision No. 182 (September 20, 1958), 14 UNRIAA 327, 366 (RL-30) (applying the principle "ubi lex non distinguit, nec nos distinguere debemus" to avoid reading an exception in a standard that does not provide for exceptions).

[632] After an extensive analysis of international case law, Professor Brigitte Stern concluded that "in the overwhelming majority of cases having dealt with an unlawful expropriation, the date of the expropriation was adopted in order to calculate damages, based on what was foreseeable at that date. It cannot be contested that the decisions adopting an ex post valuation – in the extensive interpretation used by the majority – are extremely few: as a matter of fact, the majority itself, in the footnote relating to the "several investment arbitration tribunals," mentions only four treaty cases: *ADC v. Hungary, Siemens v. Argentina, ConocoPhillips v. Venezuela and Yukos v. Russia*. These are – to the best of my knowledge – the ONLY cases in almost thirty years of investment arbitration adopting the date of the award and ex post data, *compared to the hundreds of cases relying on the date of expropriation and what was foreseeable on that date, in other words, the hundreds of awards which have granted, in case of expropriation, both lawful and unlawful, the fair market value of the expropriated property, evaluated at the date of the expropriation, with the knowledge at that time*." *Quiborax SA, Non Metallic Minerals SA, and Allan Fosk Kaplún v. The Plurinational State of Bolivia,* ICSID Case No. ARB/06/2, Partial Dissenting Opinion of Brigitte Stern, ¶ 43 (September 7, 2015) (Kaufmann-Kohler, Lalonde, Stern) (RL-118).

[633] North American Free Trade Agreement (NAFTA) (December 17, 1992), Article 1110 (RL-36); Agreement for the Reciprocal Promotion and Protection of Investments between the United Mexican States and the Kingdom of Spain (October 10, 2006), Article 5 (RL-119).

[634] *Metalclad Corp. v. the United States*, ICSID Case No. ARB(AF)/97/1, Award (August 30, 2000) (Lauterpacht, Civiletti, Siqueiros), ¶ 104 (CL-010).

compensation in customary law.[635]

332. The analysis of the tribunal in *Tecmed* was almost identical. The tribunal concluded that Mexico illegally deprived the investor of its investment because it acted in a discriminatory manner in revoking the investor's license to operate a waste plant, without any public interest justification, and without paying any compensation. These are the characteristics of an illegal expropriation. But in the end, it did not make a difference to the tribunal because it applied the standard of compensation of the treaty.[636]

333. There is no reason for this Tribunal to rely on customary law or the formula of full compensation articulated by the Permanent Court of International Justice (PCIJ) in the *Chorzów Factory* case to define the standard of compensation for an expropriation.[637] The compensation clause of Article 6 of the Treaty is *lex specialis* for both legal and illegal

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[635] *Id.*, ¶ 122.

[636] *Técnicas Medioambientales TECMED S.A. v. the United States*, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003) (Grigera Naón, Fernández Rozas, Bernal Verea), ¶¶ 188-189 (CL-009).

[637] The Claimant has not demonstrated that the *Chorzów Factory* case is applicable to this dispute. It is not. The wrongful act in *Chorzów Factory* was the seizure or confiscation of assets that could not have been taken, even against the payment of compensation. Worse still, the seizure was made despite a categorical prohibition imposed by the Geneva Convention, a treaty negotiated by the League of Nations to restore international peace after the partition of Upper Silesia between Poland and Germany and "to provide for the maintenance of economic life [in that region] on the basis of respect for status quo". *Case Concerning the Factory at Chorzow, Germany v. Poland (Claims for Indemnity), Merits (1928)* PCIJ Series A No 9, Judgment 13, p. 47 (CL-070) (emphasis added). In light of these circumstances, the PCIJ states that "the dispossession of an industrial undertaking – the expropriation of which is prohibited by the Geneva Convention – then involves the obligation to restore the undertaking and, if this be not possible, *to pay its value at the time of the indemnification*, which value is designed to take place of restitution which has become impossible." *Id.*, p. 47-48 (RL-48) (emphasis added). By contrast, the Court highlighted that if Poland "had the right to expropriate" and if its wrongful act had been less unlawful, then it only would have been liable to pay "the value of the undertaking at the moment of dispossession, plus interest to the day of payment." *Id.*, p. 47 (emphasis added). There is no similarity between the *Chorzów Factory* case and Italba's claim. Unlike Poland, in the *Chorzów Factory* case, Uruguay and the United States have not undertaken an absolute obligation to not expropriate. To the contrary, Article 6 of the Treaty in this case expressly takes into account the possibility of expropriation of foreign investments. BIT between Uruguay and the United States, (C-001). Furthermore, the Claimant cannot demonstrate that the behavior of Uruguay was inherently illegal to justify further damages or that this case entails breaches of international legal interests that go beyond the alleged economic damage to the purely commercial interests of the Claimant, as opposed to the type of interest at stake in the *Chorzów Factory* case.

expropriation. In short, even assuming that Claimant's alleged investment had been illegally expropriated, the compensation should be equal to the market value of the investment before the alleged expropriation.

334. As Trigosul's own statements to URSEC demonstrate, the day before the alleged expropriation, and at least a little more than two years before that date, Trigosul had no customers and no income, and was not operating commercially. In other words, Trigosul had no market value. Its main asset, the allocation of certain frequencies, was provisional and revocable at any time without the right to a claim or compensation.

c. Even Applying the Incorrect Valuation Methodology Proposed by the Claimant, the Fair Market Value of the "Lost" Investment is Zero

335. Despite the fact that Trigosul neither generated income nor had any customers that paid for its services since at least 2009, Compass Lexecon estimated the market value of Trigosul at US $41,900,000. This figure is far-fetched.

336. While Compass Lexecon suggests that the valuation approach based on discounted cash flow (DCF) is very useful to set its value, it says that, in this case, this approach was not necessary because it had "timely, regionally comparable, market transactions."[638] What it does not say is that, as Trigosul was not operating commercially and its business was in decline, Trigosul had no ability to generate income and no hypothetical buyer would pay a penny

[638] Compass Lexecon Report, ¶¶ 38-40.

for that company.[639] If the Claimant did not submit documents about the financial status of Trigosul, it is because they do not help its case.

337. To evade this reality, Compass Lexecon—who offers no explanation for the absence of Trigosul's financial statements—avoided valuing Trigosul as a company authorized to transmit wireless data without connection to the public network, and instead, attempted to give value to the spectrum that Trigosul was allocated as if Trigosul had a "license" to provide 4G LTE services to mobile phones.[640]

338. In its desperate attempt to evade the fact that the Claimant's alleged investment was not worth anything, Compass Lexecon invented "comparable market transactions" with licenses that are in no way comparable with Trigosul's service authorization.[641] Its fundamental error was to calculate Trigosul's FMV by focusing on the value of a type of "license" that it never had, while at the same time ignoring Trigosul's inefficient, if not complete lack of, performance as a data transmission company. As noted by its counterpart, Uruguay's damages expert:

> Compass Lexecon does not seem to be troubled by Claimant's failure to produce the information necessary to assess the FMV of Trigosul. For example, Compass Lexecon does not say that it did not use an income approach (such as the DCF method) due to a lack of information, but simply because it was "unnecessary" to do so, under the premise that "timely, regionally comparable, market transactions" are available. We strongly disagree with Compass Lexecon's faulty premise. In reality … the licenses auctioned in Uruguay and Argentina do not constitute comparable market

[639] Econ One Report, ¶¶ 15, 41-43.

[640] Compass Lexecon Report, ¶ 52; Econ One Report, ¶¶ 10-12, 41, 142-143.

[641] Econ One Report, ¶¶ 44, 141-142.

> transactions and have no bearing whatsoever on the FMV of Italba's investment in Uruguay.[642]

339. The "comparable transactions" methodology proposed by the Claimant and its damages expert is irrelevant in this case because it does not assesses Trigosul's FMV, *i.e.* its ability to generate value for its owners or for a hypothetical buyer;[643] furthermore, Compass Lexecon also incorrectly applied this methodology.

340. First, Compass Lexecon completely ignored the fact that both the allocation of frequencies of Trigosul and its data transmission authorization had no value in themselves because they were granted on a provisional basis and were revocable at any time without compensation. And, second, Compass Lexecon assumed that Trigosul had the authority to use the frequencies for 4G LTE services for mobile phones in perpetuity.[644] But Trigosul only had an authorization to provide point to point and point to multipoint wireless data transmission, which was subject to cancellation at any time without the right to receive compensation of any kind.[645] Trigosul never had the authorization to provide 4G LTE services to mobile phones, much less in perpetuity.[646]

341. The comparable valuation method is appropriate only where there is an asset that is comparable with the valued asset. As Professor Salacuse explains, "this approach makes a value determination by engaging in a process of making comparisons. The principal problem in

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[642] Econ One Report, ¶¶ 44.

[643] Econ One Report, ¶¶ 10-15; 39-43.

[644] Statement of Dr. Cendoya, ¶¶ 13-14, 140, 142, 144; Compass Lexecon Report, ¶ 62.

[645] National Communications Directorate, Resolution No. 444/000 (December 12, 1999) (C-012).

[646] Econ One report, ¶ 148-150; Statement of Dr. Cendoya, ¶¶ 11, 142.

applying this approach is finding an appropriate comparator […].”[647]

342. Contrary to what the Claimant and its expert suggest, the licenses for 4G LTE services resulting from auctions held in Uruguay and Argentina between 2013 and 2015, respectively, are not nearly comparable with the data transmission authorization that Trigosul had for at least the following five reasons:

(1) Trigosul was not authorized to provide mobile telephony services

343. Trigosul’s authorization was limited to services concerning “*dedicated wireless digital lines, without connection to the public telephone network for the transmission of point-to-point and point-to-multipoint data*” at the frequencies 3425-3450 MHz and 3525-3550 MHz.[648] In contrast, the licenses auctioned in Uruguay and Argentina with which Compass Lexecon compares Trigosul’s authorization were to provide 4G data services for mobile phones, as Compass Lexecon itself recognizes.[649]

344. Article 3 of the terms and conditions for bidding in the tender in Uruguay, for example, indicate that only “those having proper authorization to provide mobile communications services in [Uruguay]” may participate in the tender.[650] Meaning that only operators that are authorized to provide mobile phone services—which requires connection to the public telephone network—could provide 4G LTE services for mobile phones. At no time has

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[647] J. Salacuse, THE LAW OF INVESTMENT TREATIES (2010), p. 449 (RL-80.

[648] National Communications Directorate, Resolution No. 444/000 (December 12, 1999) (C-012) (emphasis added)

[649] Compass Lexecon Report, ¶¶ 43, 52.

[650] Ministry of Industry, Energy and Mining, Decree No. 390/012 (December 13, 2012) (CLEX-032).

Trigosul been authorized to use the frequencies that were allocated to it for mobile telephony services.[651]

345. Compass Lexecon omitted this important distinction in its valuation analysis because it calculated "the value of Trigosul's license as of March 1, 2015 from the amounts paid for licenses auctioned in Argentina and Uruguay to provide 4G data service to mobile devices."[652] In other words, Compass Lexecon calculated the market value of Trigosul, a company only authorized for *point to point and point to multipoint wireless data transmission without connection to the public telephone network,* as if it were a mobile phone company authorized to connect to the public network.

346. To justify this comparison, Compass Lexecon argues that, despite the fact that the 3400-3600 MHz spectrum that Trigosul was allocated has traditionally not been used for 4G LTE services, "increases in data usage have resulted in strain on mobile networks in recent years, leading mobile operators to increase the demand for additional spectrum in bands such as the 3400-3600 MHz."[653] Based on the above, Compass Lexecon alleges that both because of its potential uses and its technical capacity, "the spectrum held by Trigosul is directly comparable to

[651] Article 2 of Annex I (Technical Specifications) of the terms and conditions for bidding in the tender in Uruguay is even more specific, as it indicates that the frequencies in the 900 MHz, 1900 MHz and 1700/2100 MHz bands covered by the tender were reserved for the deployment of IMT ("International mobile telecommunications") mobile telecommunication systems. *See* Ministry of Industry, Energy and Mining, Decree No. 390/012 (December 13, 2012) (CLEX-032). Dr. Nicholas Cendoya confirms in his testimony that Trigosul had "no authorization to provide IMT services. Its authorization is restricted to the transmission of fixed wireless data without connection to the public network, which is typical of mobile telephone operators (nowadays technologically inseparable from Internet Access since the appearance of intelligent telephones)." Statement of Dr. Cendoya, ¶ 144.

[652] Compass Lexecon Report, ¶ 52.

[653] *Id.*, ¶ 50.

the spectrum auctioned in Uruguay and Argentina."[654]

347. But Compass Lexecon's comparison based on the "terms of use and technical capability" of the part of the spectrum that Trigosul was allocated is invalid. First, and contrary to what Compass Lexecon suggests, Trigosul was not the owner or title holder of the 3400-3600 MHz bands. Therefore, Trigosul could not do what it wanted with the allocated spectrum.[655] As has already been explained, Trigosul was only allowed to transmit wireless data point to point or multipoint without connection to the public network. The Claimant omits this fact and seems to suggest that, from one day to another, Trigosul could change its business and start offering mobile telephone services that it was never authorized to offer.[656]

348. As Econ One points out, "[e]ven if, from a technical point of view, the frequencies allocated to Trigosul could be used for the provision of 4G LTE services, Trigosul's Authorization did not allow for the provision of mobile telephony [...]."[657] Subsequently, in the following passage of its report, Econ One reveals that the main error in Compass Lexecon's comparison was that it forgot about the regulatory aspects of Trigosul's authorization:

> any comparison based solely on the technical properties of the radio spectrum, ignoring the regulatory comparability of the authorizations and licenses, is fundamentally wrong and, in this instance, results in an overestimation of the value of Trigosul.[658]

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[654] *Id.*

[655] Statement of Dr. Cendoya, ¶ 144; Econ One Report, ¶ 10.

[656] Econ One Report, ¶¶ 10-11, 142-145.

[657] *Id.*, ¶ 144.

[658] *Id.*, ¶ 147.

349. In its report, Econ One provides an example that vividly illustrates why Compass Lexecon's comparative exercise is incorrect:

> imagine that a company has leased public land under a permit to graze cattle on that land, but later realizes that it could generate more profit by using the land for construction. The company would not be allowed to build on the land simply because that would be [a] more profitable activity: the potential profit to be made from the land is directly tied to the permit under which is leased. That is, the fact that the company is only authorized to use the land for a limited type of activity, grazing cattle directly impacts the land's value. Similarly, in Uruguay, a company's use of frequencies to provide profit-generating services is limited by the authorization the company holds. Trigosul's ability to use its allocated frequencies was bound by its authorization, so it is incorrect to compare the value of Trigosul's allocated frequencies to frequencies held by companies that were authorized to provide more lucrative services, such as mobile telephony services.[659]

350. Even assuming that the frequencies allocated to Trigosul could be used for the provision of 4G LTE services to mobile phones, Trigosul could not provide these services. Therefore, Trigosul's authorization cannot be valued based on the price of 4G LTE telephony licenses.

(2) Trigosul's authorization could be revoked at any time without any compensation

351. The allocation of frequencies to Trigosul was on a "*provisional and revocable basis, without the right to claim or compensation of any type*."[660] By contrast, the licenses auctioned for mobile phone services that Compass Lexecon uses in its comparison are granted

[659] *Id.*, ¶ 145.

[660] National Communications Directorate, Resolution No. 444/000 (December 12, 2000), p. 2, Res. 1 (C-012) (emphasis added).

for a period of 15 to 20 years, which makes them highly valuable.[661] For Econ One, this sharp contrast between Trigosul's authorization and the licenses auctioned in Uruguay and Argentina leaves no room for a valuation through "comparable transactions." In its opinion,

> while Trigosul's Authorization could have been revoked at any moment, in the auctions in Uruguay and Argentina, the auction winners, through a competitive process, paid millions of dollars to obtain exclusive rights to certain frequencies for 15-20 years, making them significantly more valuable than Trigosul's precarious Authorization.[662]

352. In fact, all frequency allocations in Uruguay are granted on a provisional and revocable basis.[663] That is the reason why the allocation is discretionary[664] and at no cost.[665] The only exception to this rule are the frequency allocations made through auction or a competitive tender process.[666] These types of licenses, in contrast, are granted for a fixed term through a competitive process and in exchange for the payment of millions of dollars. Trigosul never participated in a public auction nor did it pay anything for its authorization or frequency allocation.[667]

353. The marked difference between the value of Trigosul's authorization for data transmission and the value of licenses auctioned in Uruguay for the deployment of international

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[661] It is quite extraordinary that, despite the fact that the allocation of frequencies to Trigosul expressly states that is of a "provisional basis and revocable at any time without compensation," the Claimant's damages expert has assumed uncritically that the frequencies allocated to Trigosul were allocated in perpetuity, and that, therefore, they were worth even more than licenses granted for periods of 15 or 20 years. Econ One Report, ¶¶ 148, -150.

[662] Econ One Report, ¶ 151.

[663] Opinion of Dr. Pereira, ¶ 97.

[664] *Id.*, ¶ 74.

[665] *See, for example,* Authorization to Dedicado S.A. (September 7, 1999) *(R-16).;* National Communications Directorate, Resolution No. 444/000 (December 12, 2000) (C-012).

[666] Opinion of Dr. Pereira, ¶ 101.

[667] National Communications Directorate, Resolution No. 444/000 (December 12, 2000) (C-012); Opinion of Dr. Pereira, ¶¶ 9514.

mobile telecommunications (IMT) can also be seen from the perspective of the consequences of a revocation. Dr. Nicholas Cendoya explains that, while the Uruguayan authorities had the power to revoke the allocation of frequencies from Trigosul at any time without paying compensation, URSEC would have had to pay substantial compensation to revoke a license granted through an auction for a specified period.[668]

(3) The license auctions in Uruguay and Argentina occurred after the valuation date

354. Compass Lexecon is also wrong to compare the value of Trigosul's authorization to the value of auctioned licenses because these auctions occurred after the appropriate valuation date in this case. Both technology and expectations in the telecommunications market when the auctions took place between 2013 and 2015 were very different compared to the period in which Trigosul was authorized to operate, that is between 2000 and 2011.[669] As Econ One points out, 4G LTE technology "was still in its infancy when Trigosul had its Authorization revoked."[670] Therefore, a hypothetical buyer would never have taken into account the possibility of being able to provide these services at the time of buying Trigosul.

355. Under international law, any change in the market that occurs after the valuation date cannot be taken into account in the valuation period of the expropriated asset.[671] Given that

[668] Statement of Dr. Cendoya, ¶ 142.

[669] Econ One Report, ¶¶ 151, -152.

[670] *Id.*, ¶ 151.

[671] *See* S. Ripinski & K. Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW (2008), p. 243 (RL-67) ("an investment is assessed as it existed at [the date of valuation] and changes to the investment subsequent to the valuation date are ignored.").

the licenses for mobile telephony services used as comparables by Compass Lexecon[672] were auctioned after Trigosul lost its authorization, the values of these auctions cannot be taken into account for the purposes of valuation.

(4) The value of high frequency bands is less than the value of frequencies in the lower part of the Spectrum

356. Even if we assume the fiction that Trigosul had a license that would allow it to provide 4G LTE services to mobile phones—which it did not—the frequencies allocated to Trigosul were in a higher band than the frequencies allocated for the licenses auctioned in Uruguay and Argentina. On the one hand, URSEC allocated the 3400-3600 MHz bands to Trigosul; while the auctioned licenses were for the 700-2200 MHz bands. [673]

357. It is contradictory that the Claimant rejected URSEC's offer to allocate it the 3600-3700 MHz bands in compliance with the TCA Judgment with the excuse that they "are virtually worthless,"[674] while in this arbitration it values equivalent frequencies, *i.e.* frequencies which it was originally allocated in the 3400-3600 MHz bands,[675] at more than US $40,000,000 by reference to the value of frequencies in a much lower range (700-2200 MHz).[676] By making this equivalence, in rejecting URSEC's offer to allocate frequencies in the 3600-3700 MHz band with the pretext that they had no value, the Claimant admitted that the frequencies that were

[672] Compass Lexecon Report, ¶ 43.

[673] Econ One Report, ¶¶ 161.

[674] Letter from A. Yanos to P. Reichler et al (May 6, 2016) (C-096).

[675] Statement of Dr. Cendoya, ¶ 96-97. In fact, in Europe these frequencies are harmonized, demonstrating their equivalence. Econ One Report, ¶¶ 166, 178.

[676] Econ One Report, ¶¶ 161, 177.

originally allocated to it had no value. Italba cannot now try to contradict this position before this Tribunal.

358. In any case, the Claimant cannot base its valuation on the auction price of lower frequencies because, as indicated by Econ One, the high frequencies originally allocated to Trigosul are much less desirable than the frequencies auctioned in Uruguay and Argentina.[677] One reason for this difference is the compatibility of the frequencies with technology. For example, the popular iPhone 7 is not compatible with the frequencies originally held by Trigosul.[678] It is inconceivable that a telephone operator with authorization to provide 4G LTE services would operate today at a frequency incompatible with the iPhone 7. Instead, the lower frequencies, like the ones auctioned in Uruguay and Argentina, are compatible with this and other new technologies, which makes them very valuable.

(5) The Argentine telecommunications market is not comparable to the Uruguayan market

359. The prices of the license auctions in the Argentine market cannot be used as a reference to calculate the value of the frequencies originally allocated to Trigosul because the Uruguayan market is very different from the Argentine market. As Econ One points out, any similarity between the *mobile telecommunications* market in Uruguay and Argentina is *irrelevant.* In any case, Compass Lexecon needed to make a comparison with the market for *point to point or point to multipoint wireless data transmission.*[679]

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[677] *Id.*, ¶ 163.

[678] *Id.*, ¶ 164.

[679] Econ One Report, ¶¶ 144.

360. But, even putting this aside, the telecommunications market in Uruguay cannot be compared to the telecommunications market in Argentina, in particular because of the role of the Uruguayan State-owned company ANTEL in the development of telecommunications.[680] First, in Uruguay, the state company ANTEL is a leading legal monopoly company in the provision of mobile and fixed telephony and broadband Internet services.[681] In contrast, in Argentina, the fixed telephony market was privatized in the 90s and the mobile market is split between four different competitors.[682]

361. Second, Uruguay is one of the only countries in Latin America—along with Cuba—that does not provide cable modem Internet.[683]

362. Third, in contrast to Argentina, Uruguay has very few internationally connected Internet service providers.[684]

363. Fourth and finally, ANTEL has aggressively invested in fiber optic and LTE networks with the aim of providing access to broadband Internet to the entire nation. The greater coverage ANTEL has, the lower the potential customers in the data transmission industry will be,

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[680] *Id.*, ¶ 154.

[681] *Id.*, ¶ 155; *see also* Statement of Dr. Cendoya, ¶¶ 138-139. In the foot note number 178 of the Memorial, the Claimant attributes the alleged discriminatory conduct of Uruguay in relation to the TCA judgment to URSEC's desire to protect ANTEL's monopoly. As an example, the Claimant cites the media law of January 2015 which declared ANTEL as the only company authorized to provide "triple play" services. This is irrelevant. Any law or regulation involving "triple play" services did not affect Trigosul because Trigosul was never authorized to provide "triple play" services. *See* Statement of Dr. Cendoya, ¶ 160. In paragraph 79 of the Memorial, the Claimant also suggests that URSEC discriminated against Trigosul in the period 2006-2011 due to supposed refusal of Dr. Alberelli to sell Trigosul's license to ANTEL. However, Dr. Alberelli cites no documentary evidence of the supposed offer from ANTEL to buy Trigosul, much less does he identify the officials of ANTEL who called him to make the alleged offer.

[682] Econ One Report, ¶¶ 155.

[683] *Id.*, ¶ 157.

[684] *Id.*, ¶ 158.

which means that the business of private operators in this sector is increasingly restricted. According to Econ One, today Uruguay has 63% more fixed broadband subscribers per 100 inhabitants than Argentina, and fewer service providers.[685]

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364. But even if *quod non* the methodology suggested by the Claimant's expert was accepted, and if it were applied correctly, the result would be the same: Trigosul was not worth anything. If there is a "comparable transaction" in this case to determine the value of the authorization and the allocation of frequencies that Trigosul originally had, it is URSEC's transfer to Dedicado in September 2013 of the same frequencies.[686] First, Dedicado used these frequencies for the same service that Trigosul was authorized to provide.[687] Second, the frequencies allocated to Dedicado were exactly the same frequencies Trigosul had.[688] Third, the allocation was granted on a provisional and revocable basis, just like the original allocation to Trigosul.[689] And fourth, like Trigosul, Dedicado did not participate in a public auction for those frequencies.[690] Therefore, the "price" paid by Dedicado to receive the frequencies, is a better indication of the value of Trigosul than the prices paid at the auctions cited by the Claimant.[691] In

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[685] *ID.*, ¶ 159.

[686] *See* S. Ripinski & K. Williams, Damages in International Investment Law (2008), p. 216 (RL-67) ("Valuation can be performed on the basis of past transactions with the evaluated asset itself. Such transactions, whether actually executed or only contemplated by the parties' arm's length, represent strong evidence of the asset's [fair market value], provided that no value-affecting factors have interfered between the date of the transaction and the valuation date.").

[687] Statement of Dr. Cendoya, ¶¶ 48, 63.

[688] *Id.*, ¶ 85.

[689] *See* Communication Services Regulatory Agency, Resolution No. 220/013 (September 5, 2013) operative part 2(a) (C-084).

[690] *Id.*

[691] Econ One Report, ¶¶ 16.

fact, URSEC allocated to Dedicado the frequencies originally allocated to Trigosul *for free*.[692] That is to say, the "price" was zero.[693]

365. Therefore, a correct application of the Claimant's expert's valuation methodology, even if *quod non* it was relevant in this case, leads to the conclusion that the market value of Trigosul's authorization and the allocation of frequencies was zero and, therefore, there are no compensable damages in this case.

2. Trigosul Did Not Lose a Single Business Opportunity Because of Uruguay

366. The Claimant blames Uruguay for its poor economic performance. On the one hand, the Claimant suggests that Trigosul did not operate because URSEC unjustifiably refused to grant it a new license.[694] As has already been demonstrated, this is totally false.[695]

367. On the other hand, the Claimant states that the revocation of its frequencies and its authorization in 2011 frustrated its hopes of forging new business relationships with other entities (DirecTV, Canal 7, Dr. Fernando García and Grupo Afinidad Mary).[696] This is false, too.

368. Uruguay's conduct had nothing to do with Trigosul's failure. Trigosul had not started operating its business because it had no intention of making use of its data transmission authorization. Moreover, as will be seen below, the alleged business opportunities were mere

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[692] *See* Communication Services Regulatory Agency, Resolution No. 220/013 (September 5, 2013) operative part 2(a) (C-084).

[693] Econ One Report, ¶¶ 16.

[694] Memorial, ¶ 182.

[695] *See supra,* Section III.A.

[696] Memorial, ¶ 70.

fantasies or lies of Dr. Alberelli. In fact, the few documents that the Claimant submitted to demonstrate the feasibility or existence of these business "opportunities" are in many cases unsigned drafts, in other cases they have nothing to do with the proposed business opportunities, and in other cases they are even fraudulent.

369. As will be demonstrated in this section, if these business opportunities were frustrated, it was for reasons other than Uruguay's conduct. Sub-section (a) explains that Trigosul did not lose a single business opportunity because of the lack of an updated license. Subsequently, subsection (b) explains that Trigosul did not lose a single business opportunity because of the revocation of its allocation of frequencies and its authorization to provide services. Finally, subsection (c) demonstrates that the Claimant has no evidence to support the calculated values for these ephemeral business opportunities.

a. Trigosul Did Not Lose a Single Business Opportunity Because of the Lack of an Updated License

370. The Claimant claims the sum of lost profits from five frustrated business projects as specific loss incurred as a result of Uruguay's conduct.[697] But lost profits are only

[697] Memorial, ¶ 196; Econ One Report, ¶ 46. Although it does not expressly say so, the Claimant seems to attribute the historical damage (lost profits) to the breach of guarantees of the Treaty other than the expropriation clause. The Claimant would only be entitled to receive compensation for the specific losses incurred as a result of the wrongful act. This is the standard of compensation that international tribunals apply to compensate for damages for breaches other than the expropriation guarantee. In *Feldman v. Mexico,* for example, the tribunal found that the amount owed due to the breach of the guarantee of national treatment was "the amount of loss or damage that is adequately connected to the breach." At the same time, the tribunal assumed the power to "direct compensation in the amount of the loss or damage actually incurred" in cases that the breach is of a guarantee different from the expropriation guarantee. *Marvin Roy Feldman Karpa v. the United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (December 16, 2002) (Feliciano, deMestral, Lamm), ¶ 194 (CL-056).

compensable when they are not "speculative or uncertain - *i.e.*, that the profits anticipated were probable or reasonably anticipated and not *merely possible*."[698]

371. In Trigosul's case, it is not necessary to wonder if the alleged lost profits were reasonably forecasted because it is clear that they were not even possible.

372. Even assuming *quod non* that URSEC had been forced to adapt Trigosul's authorization or frequencies to a Class B license under the 2003 regulations, and that the license was necessary for Trigosul to be able to continue operating after the 2003 Regulations, none of its supposed business opportunities were frustrated by not having this type of license. These

[698] *Archer Daniels Midland Company et al. v. the United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (November 21, 2007) (Cremades, Rovine, Siqueiros), ¶ 285 (CL-055). *See also, PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award (January 17, 2007) (Orrego Vicuña, Fortier, Kaufmann-Kohler), ¶ 313 (RL-57) (refusing to award damages for lost profits as being speculative: "in this case the exercise becomes moot because the parties never finalized the essential commercial terms of the Contract, and as a result neither could the additional agreements concerning the sale of electricity, the Fund payments and the Treasury guarantee be finalized. Relying on cash flow tables that were a part of proposals that did not materialize does not offer a solid basis for calculating future profits either. The future profits would then be wholly speculative and uncertain. By definition, the concept of *lucrum cesans* requires in the first place that there is a *lucrum* that comes to an end as a consequence of certain breaches of contract or other forms of liability. Here such an element is not only entirely absent but impossible to estimate for the future."); *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award (September 23, 2003) (Kaufmann-Kohler, Cremades, Böckstiegel), ¶ 362 (RL-45) ("In the present case, the fact remains that Aucoven had no record of profits and that it never made the investments in the project nor built the Bridge required by the Concession Agreement. In these circumstances, the Tribunal considers that Aucoven's claim for future profits does not rest on sufficiently certain economic projections and thus appears speculative. Hence, it does not meet the standards for an award of lost profits under Venezuelan law, nor would it meet these standards under international law, if the latter were applicable."); M. Whiteman, DAMAGES IN INTERNATIONAL LAW, Vol. 3 (1937), p. 1837 (RL-25) ("In order to be allowable, prospective profits must not be too speculative, contingent, uncertain, and the like. There must be proof that they were reasonably anticipated; and that the profits anticipated were probable and not merely possible. *If the evidence shows that there is doubt that profits would have been realized if the wrongful act had not occurred, damages will be disallowed*."); *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award (December 11, 2013) (Lévy, Alexandrov, Abi-Saab), ¶ 1009 (CL-080) ("In the case of lost profits, this can only mean that the claimant must have been deprived of profits that would have actually been earned but for the internationally wrongful act. Accordingly, before they are entitled to request a more lenient application of the standard of proof, the Claimants must first prove that they would have actually suffered lost profits, i.e., that they have been deprived of profits that would have actually been earned.").

alleged business opportunities, in chronological order, are: 1) EPIC;[699] 2) Starborn;[700] 3) Phinder/Zupintra;[701] and 4) Telmex.[702] Interestingly, the Claimant did not include the projects with EPIC and Starborn in its calculations of lost profits.

373. Of these four projects, EPIC proposed Voice over IP (VoIP) services.[703] However, VoIP service can only be provided by operators with a Class A license, meaning that this service involves the use of numbering and interconnection with public networks.[704] Trigosul never had a Class A license, and it had never applied for one. Therefore, even if URSEC had granted Trigosul the license that it says it asked for —Class B—the Claimant would not have been able to provide the services contemplated in its business alliance with EPIC.[705]

374. As for the purported project with Starborn, Dr. Alberelli alleges that in 2005 the company Brasil Telecom contacted him to discuss a possible association ("joint venture") with a U.S. investment group called Starborn.[706] In its Memorial, the Claimant says that between

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[699] Statement of Dr. Alberelli, ¶ 26.

[700] *Id.*, ¶ 36.

[701] *Id.*, ¶ 45-47.

[702] *Id.*, ¶ 54.

[703] *Id.*, ¶ 26.

[704] Statement of Dr. Cendoya, ¶ 72.

[705] Another supposed business project where Trigosul intended to provide VoIP services is the business with the company Worldstar. Memorial, ¶¶ 19-20. However, the Claimant said that this project was lost as a result of the reallocation in 2000 of the first frequencies that were allocated to Dr. Alberelli. So, URSEC's alleged refusal to not issue a license to Trigosul had nothing to do with the failure of this supposed project with Worldstar. In addition to the fact that Trigosul was not authorized to provide VoIP services, another reason for which Italba cannot blame Uruguay for the alleged failure of the project with Worldstar is that, according to the evidence cited in the Memorial, Trigosul's authorization was not part of this business. Dr. Alberelli alleges that the contribution of Italba to the association with Worldstar consisted of assigning Trigosul's license for the project. *See* Statement of Dr. Alberelli, ¶ 19. However, the documents of the alleged association make no mention whatsoever of Trigosul or its "license." These documents mention another company, Sumitel, which would contribute its telecommunications licenses in Uruguay. *See* Econ One Report, ¶ 127.

[706] Memorial, ¶ 33; Statement of Dr. Alberelli, ¶ 36.

January and March 2006 representatives of Trigosul warned URSEC in writing that this business opportunity could not come to fruition if URSEC did not grant Trigosul a Class B license.[707] However, the two letters that Mr. Herbón addressed to URSEC did not identify Starborn or Brasil Telecom, much less did they mention what kind of project Trigosul would develop with these companies.[708] Furthermore, one of the letters Mr. Herbón sent to URSEC only mentions an investment in fiber optic transmission systems from Cologne to Montevideo.[709] Therefore, even assuming that this letter concerned the Starborn project, a fiber optic transmission project would have required a Class C license, for which Trigosul never applied.[710] In other words, the lack of a Class B license had nothing to do with the fact that the alleged business with Starborn did not come to fruition.

375. The business with Phinder/Zupintra, on the other hand, was supposedly conceived initially to provide three types of services in different stages: 1) GSM telephony services; 2) the unification of the Argentina-Uruguay backbone network; and 3) WIMAX and VoIP services.[711] In the end, the parties decided to remove stages 2) and 3), leaving only the plan to offer GSM telephony services.[712] But this service could only be provided by operators with a Class A license.[713] Trigosul never had and never requested an authorization to provide telephony

[707] Memorial, ¶ 34.

[708] Statement of Dr. Cendoya, ¶ 134; Econ One Report ¶ 136.

[709] Letter from L. Herbón (Trigosul S.A.) to L. Lev (Communication Services Regulatory Agency) (March 23, 2006) (C-023).

[710] Statement of Dr. Cendoya, ¶¶ 71, 131.

[711] Statement of Dr. Alberelli, ¶ 48.

[712] *Id.*, ¶ 49.

[713] Statement of Dr. Cendoya, ¶ 150.

services. Therefore, the lack of an updated authorization did not have anything to do with the fact that the negotiations failed.

376. Finally, the business with Telmex implied that Trigosul would become a "carrier" (or provider of its network to other service providers), for which it needed a Class C license.[714] Trigosul never had a Class C license and never applied for one,[715] so the lack of a Class B license was not what frustrated this business.

377. In conclusion, the alleged "unjustified" decision by URSEC not to issue Trigosul a Class B license was not the reason for the failure of any of these businesses.[716] If Trigosul had no value at the date of valuation, the only responsible party is Trigosul itself.

b. Trigosul Did Not Lose a Single Business Opportunity as a Result of the Revocation of Its Frequency Allocation and Its Authorization

378. According to the Claimant, the revocation of its authorization and frequency allocation in 2011 meant that Trigosul lost two potential additional business opportunities (DirecTV and Grupo Afinidad Mary), and two businesses that were supposedly finalized (Dr. García and Canal 7).[717] Uruguay denies that its conduct frustrated any of these supposed commercial projects.

379. As for DirecTV, through an official communication dated November 1, 2016, the Uruguayan government investigated with DirecTV representatives the supposed negotiations

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[714] *Id.*, ¶ 71; Econ One Report, ¶¶ 72-73.

[715] Statement of Dr. Cendoya, ¶ 71.

[716] *Id.*, ¶ 73.

[717] Memorial, ¶ 70.

between the company and Italba between October 2010 and January 2011.[718] The response was immediate and conclusive. Just two days later, the manager of institutional relations of DirecTV in Uruguay responded: "after the pertinent review, we cannot attest to the occurrence of the events described in your letter referring to Italba with DIRECTV […]; [n]or can we attest to the existence of the commercial proposals and connections described in the excerpt."[719] This means that the Claimant's allegation that it had an opportunity to do business with DirecTV is categorically refuted by DirecTV itself, its alleged commercial partner in this project. Uruguay cannot be blamed for the frustration of a business opportunity that does not exist.

380. For its part, the alleged business with the Grupo Afinidad Mary was just another of Dr. Alberelli's lies. In Uruguay, an organization called "Grupo Afinidad Mary" does not even exists.[720] On the basis of the evidence provided by the Claimant, this "Group" that was supposedly made up of about 2,100 retired Americans in the city of Maldonado,[721] consisted of only one person—Richard Weber—who expressed his personal interest in the telemedicine services that Trigosul hoped to provide.[722] However, according to Dr. Alberelli's description, the supposed business included the provision of services that Trigosul was not authorized to provide, namely: telephone and satellite TV, in addition to telemedicine. Trigosul did not have URSEC's

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[718] Letter from M. Toma (Office of the President of the Republic) to DIRECTV (November 1, 2016) (R-70).

[719] Letter from M. Ros (DIRECTV) to M. Toma (Office of the President of the Republic) (November 3, 2016) (R-71).

[720] Certification of the General Registries Office of Uruguay (November 11, 2016) (R-68).

[721] Statement of Dr. Alberelli, ¶ 69.

[722] Letter from R. Weber to G. Alberelli (Italba) (May 1, 2012) (C-065). In the letter that Mr. Richard Weber allegedly addressed to Dr. Alberelli in May 2012 expressing his interest in Trigosul's telemedicine project, Mr. Weber signs off as a permanent resident in Uruguay on that date. But some notes written by Mr. Weber himself in an online forum seem to suggest that in May 2012 he was not a resident in Uruguay. In fact, according to these notes, Mr. Weber was still a resident in the United States and had not yet decided whether he would move to Uruguay, Chile or Paraguay. This raises serious doubts about the letter from Mr. Weber that the Claimant uses to project its alleged profits from the business with Grupo Afinidad Mary. *See* Econ One Report, ¶ 102.

authorization to offer mobile telephone and satellite television services, and it did not have authorization from the Ministry of Public Health to offer telemedicine services.[723] Therefore, this business project had no chance of success or coming to fruition, even without Uruguay's alleged wrongful conduct.

381. Dr. Fernando García, on the other hand, denies having had any contacts with Trigosul or any of its representatives. On October 12, 2016, Dr. García informed the Secretary of the Presidency of Uruguay, Dr. Miguel Angel Toma by phone that he had never signed the two documents that the Claimant submitted in this arbitration to prove the existence of the negotiations between him and Trigosul. During this conversation, Dr. García also denied that he knew Dr. Alberelli or Mr. Herbón.[724]

382. Five days after their conversation, on October 17, 2016, Dr. García visited the offices of Dr. Toma to check these two documents—one letter apparently signed by Dr. García on October 2010 in which he asks Dr. Alberelli about the conditions under which his clinic could participate in the supposed telemedicine program of Trigosul;[725] and a test contract for the loan of data transmission and equipment dated December 1, 2010, which is signed by Mr. Luis Herbón of Trigosul and Dr. García.[726] After examining these two documents, Dr. García confirmed that he had never seen them and that the signature that appears above his name on the

[723] Statement of Dr. Cendoya, ¶ 162.

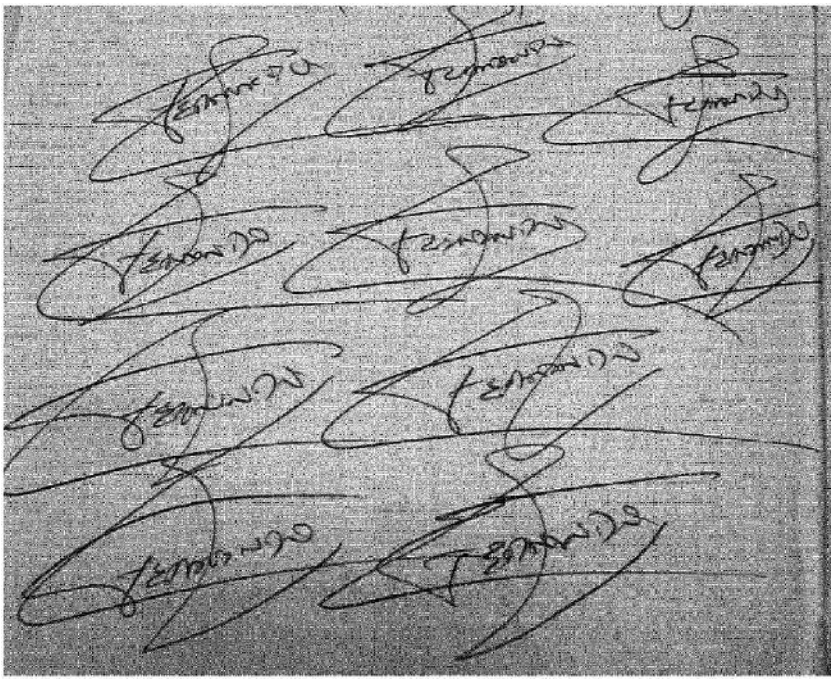
[724] Response to the Request for Provisional Measures, ¶ 13; Testimony of Dr. García before the Criminal Court (November 1, 2016) (C-141).

[725] Letter from F. García to G. Alberelli (Italba) (October 4, 2010) (C-056).

[726] Data Transmission and Equipment Trial Loan Agreement (December 1, 2010) (C-057).

letter and on the contract was not his. That same day, Dr. García submitted an affidavit before a notary public to attest to these facts.[727]

383. In fulfilling his obligations as a public official, and based on the affidavit provided by Dr. García, Dr. Miguel Angel Toma notified the Office of the Attorney General of Uruguay about the possible fraud and forgery of Dr. García's signature.[728] Dr. García even testified orally before a judge on November 1, 2016, and confirmed again that he did not know Dr. Alberelli or Mr. Herbón, and that he never signed the two documents.[729] The judge asked Dr. García for several samples of his signature, which are reproduced below:[730]



[727] Criminal record assigned to the Court of First Instance (October 19, 2016), pp. 31-32 (C-138).

[728] Response to the Request for Provisional Measures, ¶ 13.

[729] Testimony of Dr. García before the Criminal Court (November 1, 2016) (C-141).

[730] *Id.*, p. 11.

384. Dr. García's real signature reproduced above does not bear even the slightest resemblance to the signatures that appear above the name of Dr. García in the letter addressed to Dr. Alberelli in October 2010 and in the contract allegedly signed by Dr. García and Mr. Herbón in December of that same year. The false signatures are reproduced below. The difference is indisputable:[731]

385. The Claimant cannot maintain that it lost profits for a business project that invented from forged signatures.

386. Regarding Canal 7, Dr. Alberelli argues that, in late 2010, Trigosul began providing wireless data transmission services to Canal 7 to transmit data between Canal 7's headquarters and local reporters in the city of Maldonado.[732] According to the Claimant, this project was frustrated after URSEC revoked Trigosul's frequency allocation.[733] But the revocation was not the reason why this project failed. The truth is that the project could not fail because it never existed. It was just as fictitious as the supposed business with Dr. García. In his capacity as Secretary of the Presidency of Uruguay, Dr. Miguel Angel Toma contacted the

[731] Letter from F. García to G. Alberelli (Italba) (October 4, 2010) (C-056); Trial Contract to Loan Data Transmission and Computer Equipment (December 1, 2010) (C-057).

[732] Statement of Dr. Alberelli, ¶ 65.

[733] Memorial, ¶ 70.

representatives of Canal 7 to see if Claimant's assertions about the relationship between Trigosul and Canal 7 were true.

387. Through a letter dated November 7, 2016, Dr. Toma asked the Director of Canal 7, Mr. Daniel Bobre, to answer three specific questions:

> a) If Trigosul actually provided data transmission services to Canal 7, providing details of any contract that had been signed for that purpose.
>
> b) If Trigosul began providing services to Canal 7 in December 2010.
>
> c) If it is true that Trigosul did not charge Canal 7 for those services.[734]

388. Two days later, Mr. Bobre of Canal 7 answered Dr. Toma's letter as follows:

> In reply to question "a," Telesistemas Uruguayos S.A (which at that time was called Telesistemas Uruguayos S.R.L.), authorized Trigosul S.A. to install radio equipment for wireless data transmission in the tower located in its building […] [in the city of Maldonado], so that it could perform *technical tests.* This authorization was given orally and, therefore, was not recorded in writing. All that exists is a communication sent by [Canal 7] to Trigosul S.A. on March 14, 2011, reporting on technical trials performed by the company that installed the equipment during November and December 2010. *Therefore, it can be said that Trigosul S.A. did not provide data transmission services to Channel 7.*
>
> In reply to question "b," […] Trigosul S.A. used the equipment that it installed to perform tests or technical trials. Therefore, Trigosul S.A. did not provide [Canal 7] with a commercial service and the period in which these tests were carried out was limited to the months of November and December 2010. In view of this, there is no document (whether a commercial contract or an accounting invoice) in the records of [Canal 7] relating to the provision of any service by Trigosul S.A to [Canal 7].
>
> In reply to question "c," since no service was provided by Trigosul S.A. to [Canal 7], there was nothing to be charged.[735]

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[734] Letter from M. Toma (Office of the President of the Republic) to D. Bobre (Canal 7) (November 7, 2016) (R-78).

[735] Letter from D. Bobre (Canal 7), to M. Toma (Office of the President of the Republic) (November 9, 2016) (R-72) (emphasis added)

389. This letter confirms that Canal 7 and Trigosul never had a business relationship, that Trigosul never provided services to Canal 7, and that there is not a single document proving the existence of a business plan or project in the future between the two entities. The Claimant not only has failed to demonstrate that the revocation of the allocation of frequencies to Trigosul has affected a business relationship with Canal 7; the Claimant cannot prove that there were ever any negotiation between Canal 7 and Trigosul to set up a joint project.[736]

c. The Lost Profits Calculation by the Claimant's Damages Expert is Speculative

390. As mentioned previously, out of all the fictitious business opportunities discussed above, the Claimant only includes five of them in its lost profits calculation. Compass Lexecon calculates the total amount of lost profits to be US $12,955,426.[737] In addition to the fact that it has already been demonstrated that these businesses did not exist in some cases, and that in other cases they did not come to fruition for reasons that had nothing to do with Uruguay, in this section Uruguay will demonstrate that the Claimant is also not entitled to the amounts that it claims for historical damages, because Compass Lexecon's lost profits calculation is entirely speculative.

391. Uruguay's damages expert, Econ One, explains that to calculate the value of the business projects in a but-for scenario, projects must meet at least the following requirements: 1) the projects' business plans must be based on valid and credible documents; and 2) there must be

[736] Letter from D. Bobre (Canal 7), to M. Toma (Office of the President of the Republic) (November 9, 2016) (R-72).

[737] Compass Lexecon Report, Table IX; Memorial, ¶¶ 196-197.

sufficient evidence that the parties reached an advanced stage in the negotiations.[738] But none of these supposed businesses meet these minimum requirements.

392. With regard to the business plans, Econ One's conclusions are devastating for the Claimant. According to Econ One, Compass Lexecon based the lost profits projections for four of the five businesses (with Phinder/Zupintra,[739] Dr. García,[740] *Canal* 7[741] and Grupo Afinidad Mary[742]) on four business plans.[743] In Econ One's view, these business plans are not valid for the purpose of calculating lost profits for the following reasons:

i. There is no author, signature or stamp to determine their origin or legitimacy. In addition, these business plans contain grammatical and formatting errors which suggest that they are simply provisional.[744]

ii. It is suspicious that the values contained in the four business plans appear solely in dollars. In order to provide more precise earnings projections, business plans normally contain a combination of costs and income in both dollars and Uruguayan pesos. The business plans do not even reflect the dollar-Uruguayan peso exchange rate and certainly not the rate of inflation in Uruguay.[745]

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[738] Econ One Report, ¶¶ 49, -53.

[739] Bs. Aires – Colonia – Montevideo Microwave Link Investment Plan (December 30, 2007) (CLEX-073).

[740] Dr. Fernando García X-Ray Clinical Radiology Business Plan (December 8, 2010) (CLEX-084).

[741] Business Proposal to *Canal* 7 (March 21, 2011) (CLEX-089).

[742] Grupo Afinidad Mary – Income, Investment and Cost Forecast (undated) (CLEX-091).

[743] Econ One Report, ¶ 113.

[744] *Id.*, ¶ 114.

[745] *Id.*, ¶ 115.

iii. The values contained in each business plan are excessively speculative. For example, the case of "Grupo Afinidad Mary" is particularly striking because the business plan assumes without any evidence—other than a letter from an individual—that Trigosul would provide services to all the 2,100 North American retired persons, when only one person had expressed an interest in the idea —not even a formal proposal—of having access to telemedicine services that Trigosul would apparently implement at some stage.[746]

iv. The Claimant has not submitted any evidence to support the values contained in the four business plans.[747]

393. We examine below the validity of the lost profits calculation for each of the commercial projects valued by the Claimant from the perspective of their financial terms and the status of the alleged negotiations.

(1) Alleged "materialized" businesses

i. Dr. García

394. The Claimant maintains that it failed to receive a nominal amount of earnings in the amount of US $2,985,984 as a consequence of the termination of the commercial relationship between Trigosul and Dr. García.[748] Dr. Alberelli alleges that he was contacted by Dr. García at the end of 2010 to use the Trigosul network to expand his radiology services.[749] As evidence of the negotiations between Trigosul and Dr. García, the Claimant mentions a letter in which Dr.

[746] *Id.*, ¶ 116.

[747] *Id.*, ¶ 118.

[748] Compass Lexecon Report, Table IX.

[749] Dr. Alberelli's Statement, ¶ 63.

García allegedly asks Dr. Alberelli for information about a telemedicine program that Trigosul was going to implement in the country.[750] The letter—which appears to be a fabrication by Dr. Alberelli and not a legitimate communication—demonstrates nothing more than an initial contact and gives no prices or details about the service that would be provided.

395. The second document consists of an alleged "trial" agreement for data transmission and loan of equipment.[751] This agreement was free and for a term of 90 days, after which Dr. García had an option to terminate it definitively or seek signature of a further agreement. As we explained above, Dr. García declared before a Uruguayan criminal judge that he did not know anything about this agreement and that the signature was not his. Even if it had been legitimate, the trial agreement did not contain any reference to possible prices in the new agreement and the Claimant has not shown that Dr. García was interested in entering into it.[752]

ii. Canal 7

396. The Claimant states that it failed to receive a nominal amount of earnings in the amount of US $403,572 because its business with *Canal* 7 was undermined before it started.[753] But, according to Econ One, the Claimant did not produce any specific and credible evidence that *Canal* 7 was interested in receiving services from Trigosul and certainly no evidence of the

[750] Letter from F. García to G. Alberelli (Italba) (October 4, 2010) (C-056).

[751] Trial Data Transmission and Computer Equipment Loan Agreement (December 1, 2010) (C-057).

[752] Econ One Report, ¶ 80.

[753] Compass Lexecon Report, Table IX.

type of service agreed between the parties or of the price of the alleged agreement.[754] Accordingly, any projection of lost earnings with respect to *Canal* 7 is illusory.[755]

(2) Unmaterialized business projects

i. Phinder/Zupintra

397. The Claimant attributes a nominal loss of earnings of US $441,365 to the failure of the negotiations with Phinder.[756] As we have explained, even if URSEC had granted Trigosul a Class B license, it would have been impossible to implement the project because the envisaged services could only be provided by operators with Class A licenses. In any event, the real cause of its frustration was the serious financial crisis that afflicted Phinder/Zupintra in 2008.[757] Phinder's statements to the United States Securities Exchange Commission (SEC) indicate that its association with Italba and also its association with other telecommunications corporations in other parts of the world ended because of Phinder's financial problems and not because URSEC failed to grant a license to Trigosul.[758] It was for this reason that Phinder terminated its association with Italba just one year after their negotiations started.[759] The earnings expectations that the Claimant derives from this project are clearly false.

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[754] Econ One Report, ¶¶ 87-95.

[755] *Id.*, ¶ 95.

[756] Compass Lexecon Report, Table IX.

[757] Econ One Report, ¶¶ 60-67.

[758] *Id.*

[759] *Id.*, ¶ 65.

ii. Telmex

398. The Claimant alleges that it failed to receive a nominal amount of earnings in the amount of US $2,945,984 because of the loss of this commercial project.[760] But the alleged project between Telmex and Italba would not have been possible even if Trigosul had a Class B license because it involved "carrier" services, which may only be provided by operators with Class C licenses.[761]

399. According to Dr. Alberelli, the negotiations between Telmex and Trigosul commenced in 2007. Two years later, in October 2009, the parties had not even identified their negotiators, the area covered by the project had not been defined, Telmex did not know the terms of Trigosul's "concession" and, as if this were not enough, there is no evidence that Telmex had approved the project prices that Trigosul had proposed and that form the basis of the lost profits calculation by the Claimant's damages expert.[762] Since the negotiations had barely passed the initial stage, any lost profits calculation in this case would be too speculative.[763]

iii. Grupo Afinidad Mary

400. According to Dr. Alberelli, in January 2011, Trigosul conceived a plan to offer Internet, telephone, satellite television and telemedicine services to the Grupo Afinidad Mary, an organization of 2,100 North American retired people in the city of Maldonado.[764] The Claimant

[760] Compass Lexecon Report, Table IX.

[761] Dr. Cendoya's Statement, ¶ 71.

[762] Email from V. Cortés (Telmex) to G. Alberelli (Italba) (October 16, 2009) (C-125); Econ One Report, ¶¶ 70-75.

[763] Econ One Report, ¶¶ 75-77.

[764] Dr. Alberelli's Statement, ¶ 69.

argues that it lost the opportunity to serve Grupo Mary after URSEC revoked Trigosul's frequency allocation, which caused it a loss of income of US $4.6 million.[765]

401. The only evidence to the effect that Trigosul would serve these 2,100 people is a letter signed by a single individual, Mr. Richard Weber, more than one year after Trigosul allegedly offered its services to the Grupo Afinidad Mary.[766] The letter does not mention any Grupo Afinidad Mary—this group is not even registered as a legal person in Uruguay[767]—let alone any agreement to serve 2,100 people in Maldonado. On the contrary, the letter suggests that Mr. Weber had heard of a telemedicine project and was asking Dr. Alberelli for information to "bring[] this concept [of telemedicine] into reality."[768] At that stage, the project had not even been conceived of.[769] For these reasons, the calculation of lost profits for US $4 million on the basis of Mr. Weber's letter is not compensable because it is completely speculative.[770]

402. In conclusion, none of the alleged lost businesses was realistic, nor much less, real. Accordingly, the alleged historical damages calculated by the Claimant have no causal or financial basis.

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[765] Compass Lexecon Report, Table IX.

[766] Letter from R. Weber to G. Alberelli (Italba) (May 1, 2012) (C-065).

[767] Certificate from the General Registries Office of Uruguay (November 11, 2016) (R-68).

[768] Letter from R. Weber to G. Alberelli (Italba) (May 1, 2012) (C-065).

[769] *Id*.

[770] Econ One Report, ¶¶ 99-100.

B. TRIGOSUL RELINQUISHED ITS RIGHT TO COMPENSATION BY REJECTING URUGUAY'S OFFERS TO REINSTATE ITS FREQUENCIES

403. The Claimant is not entitled to compensation for any damage caused by URSEC's alleged failure to comply with the TCA Judgment of October 23, 2014. It is not true that URSEC failed to comply with the Judgment.[771] Uruguay offered to allow Trigosul to carry out its data transmission services on similar frequencies, as well as on the frequencies originally allocated to it.[772] But the Claimant rejected these offers based on its alleged right to "choose" monetary compensation instead of restitution.[773]

404. By rejecting the frequencies, the Claimant relinquished its right to be compensated even if the Tribunal decides *quod non* that Uruguay violated the Treaty in this case. The reason is that the Claimant is not entitled to choose the type of remedy to which it is entitled. Only the Court, under Article 34(1) of the Treaty, has the power to order the most appropriate remedy.[774] In this case, the most appropriate remedy was restitution of the authorization and reallocation of frequencies because these types of authorizations are "provisional and revocable at any time without a right to a claim or compensation." Moreover, Trigosul only generated losses.[775]

405. Accordingly, monetary indemnification would not put Trigosul in the same position that it would have been in, if not for the alleged illegal acts by Uruguay. On the

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[771] *See supra*, Section IV.D.

[772] Dr. Cendoya's Statement, ¶¶ 94-95, 101.

[773] Memorial, ¶ 84.

[774] BIT between Uruguay and the United States, Art. 34 (C-001).

[775] Dr. Cendoya's Statement, ¶ 108.

contrary, an indemnity of this nature would put the Claimant in a financial situation in which it had never been in, and in which it would have never been because Trigosul did not generate income and had no clients.[776]

[776] Dr. Cendoya's Statement, ¶ 77-80.

C. THE CLAIMANT'S REQUEST FOR INTEREST BASED ON ITALBA'S COST OF CAPITAL OR, ALTERNATIVELY, URUGUAY'S BORROWING RATE IS EXAGGERATED AND GROUNDLESS

406. For all the reasons stated above, there is no need for the Tribunal to consider the issue of any applicable interest in this case. However, Uruguay will demonstrate that the Claimant's petition is exaggerated and groundless.

407. The Claimant asks the Tribunal to award interests at a rate of 8.77% calculated on the basis of Italba's Weighted Average Cost of Capital (WACC) or, alternatively, at a rate of 4.79% calculated on the basis of Uruguay's "borrowing rate", from the valuation date until the payment date.[777] The Claimant also asks for the interest to be capitalized on a six-month basis from the valuation date. Both claims are mistaken.

408. As we will show below, these rates are not "commercially reasonable" as the Treaty requires. Nor are they appropriate because they include risks that Trigosul never incurred. Therefore, if the Tribunal finds *quod non* that Uruguay harmed Trigosul and that an order against it for interest is necessary in this case, the interest rate should be a risk-free rate. Moreover, the Claimant has not shown that the circumstances of this case warrant the capitalization of interest.

1. The Applicable Interest Rate Should Be a Risk-Free Rate

409. According to the Claimant, Italba's WACC represents the opportunity cost of not having at its disposal the cash flows that Uruguay allegedly prevented it from generating. In

[777] Memorial, ¶ 211.

other words, the Claimant argues that the lost cash flows "would have earned returns at that rate had they been reinvested."[778]

410. But Italba's WACC does not represent a "commercially reasonable" rate as required by Article 6(3) of the Treaty.[779] Recently, in *Guaracachi v. Bolivia*, the tribunal rejected the investor's application to use the WACC as the basis for the calculation of interests for this same reason. The tribunal specifically said that the WACC "does not constitute '*a normal commercial or legal rate*'" required by the BIT applicable in that case.[780]

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[778] Memorial, ¶ 205. In order to justify the "opportunity cost" or "investment alternatives" approach for fixing the interest rate in this case, the Claimant cites the *Santa Elena v. Costa Rica* and *Saur v. Argentina* cases. *See* Memorial, ¶ 203, note 387. But in neither of those cases did the tribunals adopt the WACC as the interest rate. In the *Santa Elena v. Costa Rica* case, the tribunal did not even explain what the basis of the interest rate was and it only concentrated on the discussion concerning simple and compound interest. *See Compañía del Desarrollo de Santa Elena S.A. v. República de Costa Rica,* ICSID Case No. ARB/96/1, Final Award (February 17, 2000) (Fortier, Lauterpacht, Weil), ¶¶ 96-107 (CL-029); *See also,* British Institute of International and Comparative Law, "Summary of the Case: *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*," pp. 5-6 (RL-68) ("Without specifying the applied interest rate or setting out its calculation (in particular, the adjustment of compound interest to make it less than 'full'), the Tribunal stated simply that the compensation and interest together equaled US$ 16,000,000 (thus the interest for the period of more than 20 years amounted to US$ 11,850,000). According to one estimate, the award was mathematically equivalent of applying a simple interest rate of 13.13% or a compound interest rate of 6.40%."). In the other case, *Saur v. Argentina,* the tribunal chose as interest a profitability rate (WACC) of 6% that the parties had agreed to. In any event, the BIT, in that case, did not require a "commercial" or "commercially reasonable" rate but simply required "interest calculated at an appropriate rate" and so the tribunal had greater discretion. *EDF International S.A., SAUR Int'l S.A.,andy Leon Participaciones Argentinas S.A. v. Argentine Republic,* ICSID Case No. ARB/03/23, Award (June 11, 2012) (Park, Kaufmann-Kohler, Remón), ¶¶ 427-430 (CL-082). In fact, tribunals that have had to order interest on the basis of a clause similar to that of the Treaty in this case have been reluctant to apply the WACC as the interest rate. *See, for example, TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award (December 19, 2013) (Mourre, Park, Wobeser), ¶ 766 (RL-103) ("The Arbitral Tribunal agrees with the Respondent that applying EEGSA's WACC post-October 2010 would not make sense since the Claimant had sold its interest in EEGSA and ceased to assume the company's operating risks. The Arbitral Tribunal thus agrees with the Respondent that a risk-free rate should be applied.").

[779] BIT between Uruguay and the United States, Art. 6(3) (C-001). As we explained in Section IV.A.1 above, Article 6 of the Treaty is *lex specialis* and so it regulates all aspects of compensation, including interest.

[780] *Guaracachi America, Inc. & Rurelec Plc v. Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award (January 31, 2014) (Júdice, Conthe, Vinuesa), ¶ 615 (RL-105). In its report, Econ One defines what is understood as commercially reasonable interest rates: "Although the BIT does not provide a definition for that term, from an economic point of view commercial interest rates can be defined as interest rates that are generally available to investors. The specific commercial interest rate will depend on the risk profile of the financial product generating the interest payments. For example, "junk" bonds typically offer a relatively high interest rate because of the perceived higher risks. Given the fact that, as explained above, the amount of a damages award is not exposed to

411. So it is not surprising that the Claimant has not cited a single investor-State case where a tribunal has applied the WACC as the interest rate. The only case that the Claimant mentions to support its position is *Phillips Petroleum Company Venezuela Limited y ConocoPhillips Petrozuata B.V. v. PDVSA*, which was a commercial arbitration case in which the contract specifically excluded the LIBOR interest rate.[781] Furthermore, the claimant in that case was "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."[782] In this case, the Claimant never invested in its business[783] and rejected the possibility of continuing in operation or reinvesting in Uruguay[784] and so application of a return rate based "opportunity cost" is groundless and speculative and would overcompensate the Claimant.

412. As the Tribunal explained in *Guaracachi v. Bolivia*, relying on the opinion of Econ One—who was also the respondent's expert in that case—the WACC is not an appropriate interest rate both because it measures the risk of a going concern—something that Trigosul was not—from an *ex ante* perspective, and because of the money value in time:

> The Tribunal must therefore reject the application of EGSA's May 2010 WACC as the applicable interest rate […] *as well as for the precisely the reasons set forth by Econ One's Dr Flores: the WACC includes an ex ante*

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business risk, the yield of 6-month or 1-year U.S. Treasury bills constitutes a reasonable commercial rate in this case." Econ One Report, ¶ 191.

[781] *Phillips Petroleum Company Venezuela Limited y Conocophillips Petrozuata B.V. v. Petroleos de Venezuela, S.A.*, CCI Case No. 16848/JRF/CA (C-16849/JRF), Final Award (September 17, 2012) (Tercier, Grigera Naón, El-Kosheri), ¶ 295 (ii) (iii) (CL-083).

[782] *Phillips Petroleum Company Venezuela Limited y Conocophillips Petrozuata B.V. v. Petroleos de Venezuela, S.A.*, CCI Case No. 16848/JRF/CA (C-16849/JRF), Final Award (September 17, 2012) (Tercier, Grigera Naon, El-Kosheri), ¶ 295 (ii) (CL-083).

[783] Trigosul S.A. Statistical Table (2016) (R-54).

[784] URSEC, Draft Resolution (May 9, 2016) (C-098).

> *allowance for forward-looking business risks which should not be applied ex post, since Rurelec has not faced them since May 2010.*[785]

412. Although exact rates can vary, international tribunals have applied interest rates based on guaranteed, short term United States Treasury bills (or similar risk-free rates), instead of speculating about what claimants might hypothetically have earned from alternative investments.[786] The tribunal in *Sistem v. Kyrgyz Republic*, which applied a one-year LIBOR rate, explained the wisdom of applying a risk-free rate: "The proper role of the payment of interest is to fulfil the duty to compensate the Claimant for the whole of its loss. One cannot know what a Claimant would have done had it been paid USD8.5 million in June 2005. It might have made spectacularly good, or disastrously bad decisions on the investment of such a sum."[787] As a consequence, the tribunal decided that the prudent approach was to assume, in the absence of evidence to the contrary, that "its loss would have been at least that of the principal sum plus interest gained from risk-free investments."[788]

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[785] *Guaracachi America, Inc .and Rurelec Plc v. Plurinational State of Bolivia,* CNUDMI, CPA Case No. 2011-17, Award (January 31, 2014) (Júdice, Conthe, Vinuesa), ¶ 615 (RL-105) (highlight added).

[786] *See, for example, Yukos Universal Ltd. (Isle of Man) v. Russian Federation,* CNUDMI, CPA Case No. AA 227, Final Award (July 18, 2014) (Fortier, Poncet, Schwebel), ¶¶ 1684-1685 (United States Treasury bonds rate) (CL-069); *Anatolie Stati et al. v. Kyrgyz Republic*, SCC Case No. V116/2010, Award (December 19, 2013) (Böcksteigel, Haigh, Lebedev), ¶¶ 1854-1855 (RL-102) (United States Treasury 6-month bond rate); *BG Group Plc. v. Argentine Republic*, UNCITRAL, Final Award (December 24, 2007) (Aguilar Álvarez, Garro, van den Berg), ¶ 455 (RL-65) (United States six-month Treasury Certificates of Deposit were "highly secure, dollar denominated, liquid and short-term instrument," which indicated reasonably invested funds); *Archer Daniels Midland Company & Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award (November 21, 2007) (Cremades, Rovine, Siqueiros) ("*Archer Daniels v. Mexico*"), ¶ 300 (CL-055) (United States Treasury bonds); *LG&E Energy Corp. et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award (July 25, 2007) (de Maekelt, Rezek, van den Berg), ¶ 102 (RL-61) (United States Treasury one-month bonds); *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (February 6, 2007) (Rigo Sureda, Brower, Bello Janeiro), ¶ 396 (RL-58) (United States six-month Certificates of Deposit); *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award (July 14, 2006) (Rigo Sureda, Lalonde, Martins), ¶ 440 (RL-53) (United States six-month Certificates of Deposit); *CMS Gas Transmission Co. v*, ICSID Case No. ARB/01/8, Award (May 12, 2005) (Orrego Vicuña, Lalonde, Rezek), ¶ 471 (CL-051) (United States Treasury bonds).

[787] *Sistem Mühendislik Inşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award (September 9, 2009) (Lowe, Elaraby, Patocchi), ¶ 194 (RL-77) (highlight added).

[788] *Id.*

414. The application of a higher interest rate than a risk-free rate necessarily means speculating about the nature and success of the investments that the Claimant might have made and, in reality, would give it a higher benefit from riskier investments. Econ One properly explains that applying the WACC, as Compass Lexecon does, is incorrect because it

> incorporates a remuneration *ex ante* for risks to which the projected cash flows would have been exposed, such as lower operating margins in case of higher than expected competition, or an increase of taxes that was not anticipated in the projections, just to mention two examples […]. As such, calculating interest on a fixed amount determined by the Tribunal using the WACC would put Claimant in a better position than it would have been but-for the alleged measures because Claimant would be compensated for risks it has not faced.[789]

415. In addition, Uruguay's "borrowing rate" suggested by the Claimant as an alternative interest rate is also inappropriate because "[l]enders to a sovereign of an emerging economy require interest above the risk-free rate to compensate for the *ex ante* risk that the sovereign state will default on its debt at some point in the future."[790] Econ One explains that "we know today that Uruguay did not default on its debt between the Valuation Date and today. Thus, it would be incorrect to increase pre-award interest for a risk which, *ex post*, has not occurred."[791]

416. For these reasons, the Tribunal should apply a risk-free rate. In its report, Econ One considers that the appropriate rate in this case should be fixed based on the performance of

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[789] Econ One Report, ¶ 191.

[790] *Id.*, ¶ 193.

[791] *Id.*

United States Treasury six-month or one-year bonds because this is a commercially reasonable rate.[792]

2. Compound Interest Is Inappropriate in View of the Absence of Special Circumstances

417. Apart from the exaggerated interest rates that it seeks, the Claimant is demanding six-month capitalization of that interest.[793] According to the Claimant:

> The award of compound interest reflects the economic reality of modern investment and therefore represents the applicable 'commercial rate' contemplated under the Treaty. Arbitral tribunals have consistently applied compound interest, concluding that a presumption now exists in favor of the award of compound interest.[794]

418. The general rule of international law establishes that the victim of an unlawful act does not have "any entitlement to compound interest, in the absence of special circumstances which justify some element of compounding as an aspect of full reparation."[795] It is hard to see that Uruguay and the United States contemplated interest capitalization in this Treaty—which does not mention the term "compound interest"—when they ratified it, especially if we take into account the stage of development of international law on this point at that time.[796]

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[792] *Id.*, ¶ 191.

[793] Memorial, ¶ 210.

[794] *Id.*

[795] ILC Draft Articles, Comment (9) to Art. 38 (CL-072); J. Crawford, Third Report on State Responsibility, International Law Commission, U.N. Doc. A/CN.4/507/Add.1 (June 15, 2000), ¶ 211 (RL-40) ("[C]ompound interest is not generally awarded under international law or by international tribunals."). In the *Arif v. Republic of Moldova* case, the Court considered the issue and, in reference to the ILC's Draft Articles, it awarded simply interest at the EURIBOR rate. *See Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award (April 8, 2013) (Cremades, Hanotiau, Knieper), ¶¶ 616-620 (RL-99).

[796] There is absolutely no doubt that, if the negotiators had intended that interest should accrue according to a compound interest rate, which is contrary to the usual practice of international law, they would have expressly said so.

419. The ILC properly notes in its Draft Articles[797] that it is only in exceptional circumstances that international tribunals will grant compound interest and so tribunals have repeatedly applied a simple interest rate when such circumstances do not exist.[798] In this case, the Claimant has not argued any special circumstance that would justify repudiation of the general rule under international law which requires a simple interest rate. The main features of the cases the Claimant cites to justify interest capitalization are either the seriousness of the infringement or the duration of the deprivation of the investment.[799]

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[797] *See* note 794.

[798] The court in the *RosInvestCo v. Russian Federation* case noted that a court "must consider the damage done and nature of Claimant's investment in its assessment of the interest due." *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. V079/2005, Final Award (September 12, 2010) (Böckstiegel, Steyn, Berman), ¶ 689 (RL-85) (ordering the Defendant to pay simple interest on LIBOR rates); *Antoine Abou Lahoud and Leila Bounafeh-Abou Lahoud v. Democratic Republic of Congo*, Award, ICSID Case No. ARB/10/4 (Park, Hafez, Ngwe), ¶¶ 631-633 (RL-106) (ordering the Defendant to pay simple interest on LIBOR rates); *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award (June 30, 2009) (Kaufmann-Kohler, Otton, Schreuer), ¶ 212 (RL-76) (simple interest at an annual rate of 3.375%); *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award (August 18, 2008) (Kaufmann-Kohler, Gómez Pinzón, van den Berg), ¶ 491 (RL-72) (interest at the active simple rate of the *Banco Central de Ecuador*); *Archer Daniels v. Mexico*, ¶ 300 (simple interest rate for United States Treasury bonds) (CL-055); *CMS Gas v. Argentina*, ¶ 471 (CL-051) (simple interest rate on Treasury bonds before the award date and arithmetical rate average on six-month United States Treasury bonds, compounded six-monthly); *Occidental Exploration & Prod. Co. v. Republic of Ecuador*, UNCITRAL, LCIA Case No. UN 3467, Final Award (July 1, 2004) (Orrego Vicuña, Brower, Barrera Sweeney), ¶ 217 (RL-47) (simple interest prior to the judgment at a rate of 2.75%, and simple interest of 4% after the judgment which will start to accrue 30 days after issue of the award until payment); *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award (September 23, 2003) (Kaufmann-Kohler, Böckstiegel, Cremades), ¶¶ 387, 397 (RL-45) simple interest on the average loan rate of the five main Venezuelan banks; *Marvin Roy Feldman v. Mexico*, ¶ 211 (CL-056) (simple interest on Mexican Treasury bonds).

[799] In the case *Siag v. Egypt*, for example, the tribunal granted compound interest but, at the same time, it stressed that, in the specific context of the case, a simple interest rate would not be "adequate compensation for the deprivation of an asset for more than 12 years." *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (June 1, 2009) (Williams, Pryles, Orrego Vicuña), ¶ 595 (CL-016). In *Gold Reserve v. Venezuela*, on the other hand, the tribunal explained that compound interest corresponded to "the serious nature of the infringement" implicated in the case. *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (September 22, 2014) (Bernardini, Marie Dupuy, Williams), ¶ 854 (CL-071). The Claimant also cites the *Total S.A. v. Argentina* case to justify the award of compound interest. However, in that case, the tribunal justified an order for compound interest on the basis of the "full reparation" standard which, as already stated, does not apply in this case. *See Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Award (November 27, 2013) (Sacerdoti, Álvarez, Marcano), ¶ 261 (RL-101). Moreover, the tribunal in that case suggested that the award of compound interest was particularly appropriate for investors who operated in the financial sector. *Id.* This is not the case with Trigosul.

420. In this case, Uruguay even offered to put the Claimant back into the same situation it was in before the alleged infringement, by offering it equivalent frequencies and even the same frequencies that it once held. But the Claimant rejected these offers without reason. As a consequence, the interest that should be awarded to the Claimant, if necessary, should be simple and not compound.

D. CONCLUSION

421. The Claimant has the burden of proving that its alleged investment was damaged by the alleged unlawful acts. But it did not do so. In fact, Trigosul had no market value when URSEC revoked its authorization and allocation of frequencies in 2011, or afterwards. Accordingly, if Uruguay deprived it unlawfully of any right—which it did not do—that deprivation did not cause it any damages.

422. Nor did the Claimant sustain any lost profits as a result of Uruguay's conduct. None of the business projects that it argues failed because of Uruguay's alleged unlawful acts were remotely possible and so any calculation of lost profits based on expectations concerning those businesses is fictitious.

423. Thus, the Claimant's claim for damages should be rejected in its entirety.

V. CONCLUSIONS AND REQUEST FOR RELIEF

For all the reasons stated here, the Oriental Republic of Uruguay respectfully requests the Tribunal to issue an Award:

1. Rejecting all the Claimant's claims for lack of jurisdiction;

2. If the Tribunal does decide that it has jurisdiciton, *quod non*, rejecting all the Claimant's claims on the merits;

3. Denying that the Claimant has suffered compensable damages as a result of any act by Uruguay in violation of the Treaty, and

4. Ordering the Claimant to pay all the costs of this arbitration, including the expenses and fees incurred by Uruguay.

Respectfully,

[signature]

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