INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES

ITALBA CORPORATION

Claimant

v.

THE ORIENTAL REPUBLIC OF URUGUAY

Respondent

ICSID Case No. ARB/16/9

COMMENTS OF THE ORIENTAL REPUBLIC OF URUGUAY ON THE SUBMISSION OF THE UNITED STATES OF AMERICA

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25 September 2017

[*The Spanish version of the Comments dated 25 September 2017 is the original version. In the event of a discrepancy between the original text and the English translation, the original Spanish text prevails.*]

1. On 11 September 2017, in accordance with Article 28(2) of the Treaty between the United States of America and the Oriental Republic of Uruguay concerning the Encouragement and Reciprocal Protection of Investment ("Treaty"), the United States filed with the Tribunal its written submission with respect to the interpretation of the Treaty ("the United States' submission").[1]

2. The United States' submission confirms the position that Uruguay has maintained since the beginning of this arbitration proceeding: the tribunal lacks jurisdiction in this case.

3. These comments on the United States' submission focus on two jurisdictional points of particular importance: the definition of investment in Article 1 of the Treaty and the limitations period in Article 26. Uruguay considers that the United States' interpretation of these

[1] Submission of the United States of America (11 September 2017) ("Submission of the United States of America").

two provisions of the Treaty is correct and leads to the conclusion that all of Italba's claims should be dismissed for lack of jurisdiction.[2]

I. ARTICLE 1: DEFINITION OF INVESTMENT

4. Although the definition of investment in Article 1 of the Treaty includes "licenses, authorizations, permits, and similar rights conferred pursuant to domestic law,"[3] the respective footnote states that "[a]mong 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."[4] In this case, the permits that made up the alleged investment were the permits that authorized Trigosul to operate in the Spectrum and allocated frequencies thereto.

5. The United States stated in its submission that "[a] license revocable at will by the State – which generally does not confer any protected rights – would exemplify the kind of license that is unlikely to constitute an investment."[5]

6. The United States' interpretation is in full agreement with Uruguay's interpretation of the same provision of the Treaty. In its briefs, Uruguay stated that "[a] license revocable at will by the state would exemplify the kind of license that is unlikely to constitute an investment."[6] It further explained that this interpretation is directly applicable to Trigosul's permits, which were "provisional and revocable," and were therefore revocable at will by the State, did not confer protected rights, and do not constitute an investment.[7]

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[2] Given the limited nature of these comments, no inference can be drawn from Uruguay's lack of comment on any issue discussed in the United States' submission. Uruguay reserves its right to comment more fully on the interpretation of the Treaty at the hearing.

[3] Treaty between the United States of America and the Oriental Republic of Uruguay concerning the Encouragement and Reciprocal Protection of Investment, signed 4 November 2005, entry into force 1 November 2006 ("Uruguay-U.S. BIT"), Art. 1 (C-001) (definition of investment).

[4] *Id.*, note 3 (C-001).

[5] Submission of the United States of America, ¶ 3.

[6] Rejoinder of the Oriental Republic of Uruguay (11 August 2017) ("Rejoinder"), note 221 (citing K. Vandevelde, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (2009), p. 124 (CL-117)). *See also* Counter-Memorial of the Oriental Republic of Uruguay (30 January 2017) ("Counter-Memorial"), ¶¶ 127-135.

[7] *See* Rejoinder, Section II.D; Counter-Memorial, Section II.D.

7. Italba does not dispute the fact that Trigosul's permits were provisional and revocable.[8] Nor could it do so. The revocability and provisionalness of both permits was clearly established in their express terms and in the absence of a term of validity: the allocation of frequencies and the authorization to operate in the Spectrum were "provisional and revocable at any time without a right to a claim or compensation of any kind whatsoever[.]"[9]

8. In view of the shared understanding of the State Parties to the Treaty, there is no question that Trigosul's provisional and revocable permits do not constitute an investment protected by the Treaty. Pursuant to this understanding, all of Italba's claims, which are based on the aforesaid permits, must necessarily be dismissed for lack of jurisdiction.[10]

II. ARTICLE 26: LIMITATIONS PERIOD

9. Uruguay also agrees with the United States in the interpretation of Article 26(1) of the Treaty, which establishes a limitations period of three years.[11] According to the United States, "[this provision] imposes a *ratione temporis* jurisdictional limitation on the authority of a tribunal to act on the merits of the dispute."[12] The United States added that the critical date for this jurisdictional limitation is, "in an ICSID case, the date falling three years prior to the Secretary-General's receipt of the claimant's request for arbitration."[13]

10. Uruguay considers that the United States' interpretation is correct. As Uruguay stated in its briefs, Article 26(1) imposes a jurisdictional limitation, since "Uruguay's consent to

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[8] *See* Claimant's Reply Memorial (12 May 2017) ("Reply"), ¶¶ 101-102 (alleging that the Treaty does protect its permits since, according to Italba, the Treaty does not distinguish between provisional and revocable rights and rights of any other kind).

[9] National Communications Directorate, Resolution No. 227/97 (4 August 1997), p. 5 (R-12); First Expert Opinion of Dr. Santiago Pereira Campos (20 January 2017) ("First Expert Opinion of Dr. Pereira"), ¶ 90 ("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 time, for reasons of general interest.") (emphasis omitted).

[10] It should be noted that Italba claims damages *exclusively* for the value of the authorization to operate in the Spectrum and Trigosul's frequency allocation. *See, generally*, Second Expert Report of Mr. Santiago Dellepiane Avellaneda, Compass Lexecon (12 May 2017) ("Second Compass Lexecon Report") (appraising only Trigosul's authorization and frequencies); Reply, ¶ 344 (b) (requesting only the value of the authorization and frequencies calculated by Mr. Dellepiane). Therefore, if the authorization and frequencies are not a protected investment, there is no other asset for which Italba could be compensated.

[11] Uruguay-U.S. BIT, Art. 26(1) (C-001) ("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.").

[12] Submission of the United States of America, ¶ 9.

[13] *Id.*, ¶ 8.

submit this dispute to arbitration in accordance with the Treaty is contingent on strict compliance with this limitations period of three years."[14] In this arbitration proceeding, compliance with the limitations period is counted from the critical date of 16 February 2013, three years before the filing of the Request for Arbitration by Italba.[15] Italba does not dispute the use of this date.[16]

11. Italba has failed to comply with this limitations period. It has filed claims based on the alleged failure to update Trigosul's permit between 2003 and 2011, and the revocation of its permits in 2011—actions that, even accepting them as Italba describes them, occurred years before the critical date.[17] Moreover, Italba and its President expressly confirmed that they were aware of Uruguay's alleged breach and the resulting loss in or before 2011—long before 16 February 2013.[18]

12. To revive these claims, Italba alleges that the failure to update and the revocation of the permits, together with actions subsequent to the critical date, constitute "continuous […] mistreatment," which "would toll […] [the] limitation period."[19]

13. Italba's position contradicts the interpretation of the Treaty advanced by its drafters. The United States stated that "knowledge [of the alleged breach and the resulting loss] is acquired as of a particular 'date' [...] [and] cannot *first* be acquired at multiple points in time or on a recurring basis."[20] Uruguay fully agrees with this interpretation; it is not possible to renew the limitations period by alleging the existence of "continuous mistreatment."[21] In the words of the United States, "a continuing course of conduct by the host State does not renew the limitations period[.]"[22] Therefore, Italba's claims related to the failure to update and the revocation of the permits were no longer viable years before the start of this arbitration.

14. Italba's claims based on the allocation to Dedicado in 2013 and compliance with the judgment of the *Tribunal de lo Contencioso Administrativo* ("TCA") in 2014 are also time-barred. Both events arose from the revocation of the permits in 2011, and therefore they are closely related to that prior event. The allocation to Dedicado took place as a result of the 2011

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[14] Counter-Memorial, ¶ 87.

[15] *See id.*, ¶ 88; Rejoinder, ¶ 137.

[16] According to Italba, using the Request for Arbitration or Notice of Arbitration for the critical date does not affect the outcome of the limitations period analysis. Reply, note 410.

[17] *See* Counter-Memorial, Parts II.C.2.a and II.C.2.b; Rejoinder, II.C.1.

[18] *See* Rejoinder, ¶¶ 140-146.

[19] Reply, ¶ 170.

[20] Submission of the United States of America, ¶ 10.

[21] Rejoinder, ¶¶ 141-148.

[22] Submission of the United States of America, ¶ 10.

revocation. And that same revocation was also the subject of the proceedings before the TCA, which culminated in its 2014 judgment.

15. The United States explained in its submission that an investor cannot evade the limitations period by basing its claim on the "most recent transgression" in a "series of similar and related actions" by a State.[23] Uruguay agrees, as it expressed in its briefs when it explained that it is not possible to take actions after the critical date in isolation, separating them from closely related actions that precede the critical date, in order to create the appearance that the resulting claim is not time-barred.[24] Therefore the claims based on the allocation to Dedicado and the TCA judgment are no more than more recent (alleged) transgressions in a "series of actions" related to revocation of the permits in 2011, and consequently they became time-barred before the commencement of the arbitration.

16. Given the shared understanding of the United States and Uruguay regarding the correct application of the limitations period, all of Italba's claims should be dismissed. The claims based on the alleged failure to update and the revocation of the permits are time-barred, because in 2011 at the latest, well before the critical date, Italba was already aware of the breaches and losses it alleges. The claims based on the allocation to Dedicado and the TCA judgment are also time-barred because, although those events took place after the critical date of 16 February 2013, they are part of a series of related actions whose true origin is the revocation which occurred in 2011, of which Italba was also aware years before the critical date, that is, also in 2011.

III. EFFECT OF THE AGREEMENT BETWEEN THE STATE PARTIES ON THE INTERPRETATION OF THE TREATY

17. The interpretation of the Treaty must be in accordance with the rules of interpretation contained in the Vienna Convention on the Law of Treaties, which requires an interpretation "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[25] The Vienna Convention also establishes that, together with the context, "there shall be taken into account […] any subsequent agreement between the parties regarding the interpretation of the treaty or the

[23] *Id.*

[24] Rejoinder, ¶¶ 153, 157; Counter-Memorial, ¶¶ 112, 117-118.

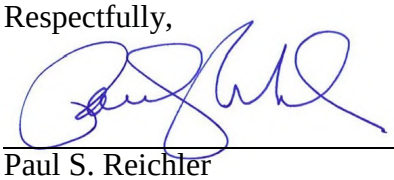
[25] Vienna Convention on the Law of Treaties (23 May 1969), 1155 U.N.T.S. 331, Art. 31(1) (RL-32).

application of its provisions."[26] This is because the "primary duty" in treaty interpretation is "seeking to ascertain, and giving effect to, the common intention of the parties."[27]

18. The shared understanding of the parties to a treaty regarding a provision therein "is not only particularly reliable, it is also endowed with binding force. It provides *ex hypothesi* the 'correct' interpretation among the parties in that it determines which of the various ordinary meanings shall apply."[28] Therefore, "the agreement of the parties on an interpretation trumps other possible meanings [...] given the nature of a treaty as an international agreement between its parties."[29]

19. In accordance with these principles, the interpretation of the Treaty must take into account the understanding of the text of the Treaty shared by the two State Parties—the United States and Uruguay. This shared understanding is reflected in the agreement between the United States' submission dated 11 September 2017 and Uruguay's briefs. The correct application of the Treaty thus requires that the intention and common understanding of both State Parties be given effect.

Respectfully,



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[26] *Id.*, Art. 31(3).

[27] A. McNair, THE LAW OF TREATIES (1961), p. 380 (RL-156).

[28] M. Villiger, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES (2009), p. 429 (RL-158).

[29] R. Gardiner, TREATY INTERPRETATION (2008), p. 32 (RL-157).