ARBITRATION UNDER THE RULES OF THE
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ITALBA CORPORATION

Claimant

v.

THE ORIENTAL REPUBLIC OF URUGUAY

Respondent

ICSID Case No. ARB/16/9

RESPONSE OF THE ORIENTAL REPUBLIC OF URUGUAY TO CLAIMANT'S APPLICATION FOR PROVISIONAL MEASURES AND TEMPORARY RELIEF

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21 November 2016

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I. INTRODUCTION

1. Claimant asks the Tribunal to prohibit Uruguay from exercising one of its most fundamental and quintessentially sovereign rights: to enforce its criminal laws by investigating the commission of serious offenses within its own territory.

2. It is not only Uruguay's sovereign right, but also its solemn duty, to maintain public order through the exercise of its police powers to assure that criminal activity is properly investigated, and that the criminal laws are duly enforced.

3. Claimant would have the Tribunal take the extraordinary step of negating this right and duty by ordering Uruguay to suspend its criminal law enforcement activities, notwithstanding that:

(1) There is overwhelming evidence that signatures have been forged and documents, including a purported contract, have been falsified in violation of the Penal Code's sanctions against the crimes of forgery and fraud. The evidence includes the testimony of the victim of the apparent forgery and fraud, given before the Criminal Court charged with investigating the matter, that the signatures on the pertinent documents are not his, that he had not previously seen the documents, and that he did not know and had never met either the addressee of a letter or the co-signer of the contract, both of which bear his false signature.

(2) It is indisputable that Claimant's principal, Dr. Alberelli, and his employee in Uruguay, Mr. Herbón, are material witnesses in regard to the commission of

these criminal offenses, insofar as Dr. Alberelli is the addressee of the apparently fraudulent letter and Mr. Herbón is the co-signer of the apparently fraudulent contract. Thus, it is entirely appropriate for the Criminal Court to have issued summonses calling upon them to answer its questions as part of the investigative process.

(3) There is no evidence, and no reason to suspect, that Uruguay's investigation into these criminal offenses is being conducted in bad faith, or is motivated by a desire to retaliate against Claimant for having initiated these arbitral proceedings, or to hamper Claimant in the presentation of its case; there is thus no basis for questioning Uruguay's good faith.

4. Uruguay is justifiably proud of its reputation for respecting the rule of law, for the independence of its judiciary, and for the transparency and absence of corruption of its law enforcement and other public institutions. As stated currently on the website of the Inter-American Development Bank: "Uruguay is a mature democracy with solid public institutions and a stable political system. Its judiciary system is independent, rule of law is firmly embedded in the country's national culture, and legal safeguards are broadly observed."[1] The World Justice Project currently ranks Uruguay ahead of all other Latin American countries in its 2016 Rule of Law Index.[2] The World Bank and Transparency International also give Uruguay the highest

[1] Inter-American Development Bank (IDB), "Uruguay: A Perspective", *available at* http://www.iadb.org/en/mapamericas/uruguay-old/uruguay-a-perspective,5979.html (last visited 6 November 2016) (R-3).

[2] The World Justice Project, "Rule of Law Index 2016" (2016), p. 5, *available at* http://worldjusticeproject.org/sites/default/files/media/wjp_rule_of_law_index_2016.pdf (last visited 6 November 2016) (R-4).

rating in Latin America for control of corruption, and, in the case of the former institution, ranks Uruguay in the 89th percentile worldwide.[3]

5. Apart from its unsubstantiated fears, Claimant has made no demonstration that Uruguay's ongoing investigation will interfere with its procedural or other rights in this arbitration. Claimant has already presented its case—on jurisdiction, the merits, and damages—in its 108-page Memorial and 136 exhibits. The Memorial's supporting documentation includes witness statements from both Dr. Alberelli and Mr. Herbón, as well as well as numerous documents signed, authored, or received by them.

6. Uruguay recognizes that these witnesses might also be called upon by Claimant to assist in the preparation of its Reply (due in April 2017) or testify at the oral hearings (expected in November 2017). In that regard, and to avoid prejudice to Claimant, Uruguay is prepared to guarantee that its investigation into the circumstances of the apparently forged signatures and fraudulent documents, regardless of its course, will not prevent either Dr. Alberelli or Mr. Herbón from participating in the preparation or presentation of the remainder of Claimant's case.

7. There is thus no justification for the Tribunal to grant the extraordinary relief that Claimant now seeks. Nor is there precedent. Other tribunals have routinely rejected similar applications, holding that a respondent State's sovereign right to investigate criminal activity in its own territory may not be infringed absent a showing of improper motive. Of particular

[3] The World Bank, "Worldwide Governance Indicators: Uruguay," Indicator: Control of Corruption (2015), *available at* http://info.worldbank.org/governance/wgi/index.aspx#reports (last visited 6 November 2016) (R-6); Transparency International, "Corruption by Country: Uruguay" (2015), *available at* http://www.transparency.org/country#URY (last visited 6 November 2016) (R-5) (ranking Uruguay as number 21). For comparison, the United States is ranked as number 16. Transparency International, "Corruption by Country: United States of America" (2015), *available at* http://www.transparency.org/country#USA (last visited 8 November 2016) (R-7).

relevance is *Churchill v. Indonesia*, which also involved a criminal investigation of forged documents.[4] There, the ICSID tribunal refused to enjoin Indonesia's investigation, even though it implicated the claimant's witnesses and potential witnesses, to avoid infringing on the respondent State's sovereign right to investigate criminal activity in its own territory.[5]

8. Numerous tribunals have recognized and deferred to this fundamental sovereign right.[6] As the tribunal emphasized in *SGS v. Pakistan*: "We cannot enjoin a State from conducting the ordinary processes of criminal, administrative and civil justice within its own territory. We cannot therefore purport to restrain the ordinary exercise of these processes."[7] Or, as expressed by the tribunal in *Hamester v. Ghana*: "A state may obviously exercise its sovereign powers to investigate and prosecute criminal actions."[8]

9. Even the cases cited by Claimant support the rejection of its Application for Provisional Measures. In *Quiborax v. Bolivia*, the tribunal emphasized that "Bolivia has the sovereign prerogative to prosecute crimes on its territory, and such prerogative is not barred by

[4] *See generally Churchill Mining PLC and Planet Mining Pty Ltd. v. the Republic of Indonesia*, ICSID Case No. ARB/12/14, Procedural Order No. 14 (22 December 2014) (Kaufmann-Kohler, van den Berg, Hwang) ("*Churchill v. Indonesia*, PO 14"), ¶ 72 (RL-015).

[5] *See generally id.*, ¶¶ 72, 94.

[6] *Id.*, ¶ 72; *Caratube International Oil Compnay LLP v. the Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on Provisional Measures (31 July 2009) (Böckstiegel, Griffith, Hossain) ("*Caratube v. Kazakhstan*"), ¶ 135 (RL-9); *Teinver S.A. et al v. the Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Provisional Measures (8 April 2016) (Buergenthal, Alvarez, Hossain) ("*Teinver v. Argentina*"), ¶ 190 (RL-19); *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Procedural Order No. 2 (16 October 2002) (Feliciano, Thomas, Faures), ¶ 36 (RL-3); *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award (18 June 2010) (Stern, Cremades, Landau), ¶ 297 (RL-11).

[7] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Procedural Order No. 2 (16 October 2002) (Feliciano, Thomas, Faures), ¶ 36 (RL-3).

[8] *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award (18 June 2010) (Stern, Cremades, Landau), ¶ 297 (RL-11).

the BIT or ICSID Convention."[9] However, having found that Bolivia's criminal investigation of the claimant's potential witnesses was commenced in bad faith—for the purpose of intimidating them, inducing them not to cooperate with the claimant, and thus obtaining an unfair advantage in the arbitration—the tribunal, on those specific grounds, ordered the suspension of the investigation.[10] To the same effect is the ruling in *Lao Holdings v. Laos*, another case relied on by Claimant.[11] There, too, the tribunal recognized "the general rule that a State ought not be prevented from enforcing its criminal law," but found that Laos acted in bad faith in commencing a criminal investigation on the eve of the oral hearings with the intention of prejudicing the claimant in the presentation of its case.[12]

10. The contrast between those two cases and the present one could not be more pronounced. As underscored by the tribunal in *Teinver v. Argentina*, "[a]s has been held by a number of arbitral tribunals, Respondent clearly has the sovereign right to conduct criminal investigations and it will usually require exceptional circumstances to justify the granting of provisional measures to suspend criminal proceedings by a State."[13] No such circumstances are present here. There is no evidence whatsoever that Uruguay's criminal investigation of serious offenses committed in its own territory is improperly motivated.

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[9] *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award (16 September 2015) (Kaufmann-Kohler, Lalonde, Stern), ¶ 594 (CL-015).

[10] *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures (26 February 2010) (Kaufmann-Kohler, Lalonde, Stern) ("*Quiborax v. Bolivia*, Decision on Provisional Measures"), ¶¶ 164-165 (CL-090).

[11] *See generally Lao Holdings N.V. v. the Lao People's Democratic Republic*, ICSID Case No. ARB(AF)/12/6, Ruling on Motion to amend the Provisional Measures Order (30 May 2014) (Binnie, Hanotiau, Stern) ("*Lao Holdings v. Laos*") (CL-091).

[12] *Id.*, ¶¶ 14, 36, 39-42.

[13] *Teinver v. Argentina*, ¶ 190 (RL-019).

11. Claimant therefore comes nowhere close to meeting the high threshold that has been established for the recommendation of provisional measures: that there is a right that is threatened with irreparable impairment; that the threat is imminent and the need for relief is urgent; and that the relief sought is proportional. Claimant's Application fails this test. In particular, Claimant has no right to insulate its witnesses from Uruguay's good faith investigation of criminal offenses committed in Uruguayan territory; even if, *quod non*, there were such a right, it is not faced with an imminent threat requiring urgent relief; and the relief sought—the enjoining of Uruguay's sovereign right to investigate criminal activity in its own territory—is not proportionate.

12. The Application must be rejected, not only for the reasons presented above—and elaborated more fully below—but also because Claimant has failed to establish the Tribunal's *prima facie* jurisdiction to hear its claims in these proceedings. The Request for Arbitration alleges that Uruguay violated the provisions of its Bilateral Investment Treaty with the United States by its actions against Trigosul, S.A., a Uruguayan company, which, according to Claimant, is owned by Claimant, a U.S. company. However, there is no evidence offered in the Memorial, or otherwise before the Tribunal, demonstrating that Claimant owns Trigosul. Claimant bears the burden of proving that the Tribunal has jurisdiction over the case, but thus far has made no attempt to meet that burden. Since *prima facie* jurisdiction has not yet been established, the Application for Provisional Measures fails on that ground alone.

II. THE INVESTIGATION THAT CLAIMANT SEEKS TO PREVENT

A. The Pertinent Facts

13. Claimant has not disputed the facts concerning the conduct of the criminal investigation that is currently in progress in Uruguay. These facts are set forth below.

- On 12 October 2016, Dr. Francisco García informed the Secretary of the President of Uruguay, Dr. Miguel Ángel Toma, in a telephone conversation that he had no knowledge of the two documents (a letter and a contract) that Claimant presented with its Memorial bearing his purported signature, that he signed no such documents, and that he did not know and had never met either Dr. Alberelli, to whom the letter was addressed, or Mr. Herbón, the co-signer of the contract.
- On 17 October, Dr. García came to Dr. Toma's office, inspected the two documents, and confirmed that he was not the author of the letter, had never signed the contract, had never previously seen either document, and that the signatures on them were definitely not his. The same day, Dr. García gave a sworn statement to an official government notary attesting to these facts.[14]
- After receiving Dr. García's sworn statement, Dr. Toma, in fulfillment of his official duties and his obligations under Uruguayan law, notified the Office of the Criminal Prosecutor of the possible commission of the crimes of forgery and fraud.[15] At his

[14] Criminal File Assigned to *El Juzgado Letrado de Primera Instancia* (19 October 2016), pp. 31-32 (C-138).

[15] The Uruguayan Penal Code imposes strict obligations on all public officials to report unlawful activity that comes to their attention. It requires any official who becomes aware of the possible commission of a criminal offense to report the circumstances to the appropriate law enforcement authorities. An official's failure to report such circumstances is itself a criminal offense, punishable by three to eighteen months' imprisonment. Uruguayan Penal Code, Art. 177 (R-1) ("The same sentence [of three to eighteen months' imprisonment] shall apply to the official, in the same circumstances [of failing or delaying to report a crime of which he has knowledge by virtue of his office], with regard to crimes committed in or with particularly felt effects on his jurisdiction.") (translation of the Republic

instruction an official notification was sent to Dr. Jorge Díaz, the *Fiscal de Corte* ("State Prosecutor"), based on Dr. García's sworn statement.[16]

- Pursuant to established procedures, the State Prosecutor, upon receiving the notification from the Office of the Presidency, informed the *Juzgado Letrado en lo Penal de 3er Turno* ("Criminal Court") of the possible offenses, attaching Dr. García's sworn statement.
- The Criminal Court Judge then issued citations to Dr. García, Dr. Alberelli, Mr. Herbón, and experts in handwriting analysis calling upon them to appear for a hearing on 28 October. To date, Dr. Alberelli has not received his citation because he has not been in Uruguay. Mr. Herbón, who was served with a citation, notified the Court through counsel that he would be out of the country for 30 days.
- The hearing was continued until 1 November, at which time Dr. García and the handwriting experts appeared and gave testimony under oath. Normally, Uruguayan officials would have no knowledge of the testimony, because it is treated as confidential under Uruguayan law. However, Mr. Herbón's counsel managed to obtain a transcript informally, and provided it to Claimant's counsel who cited it and annexed it to the Application for Provisional Measures.[17]

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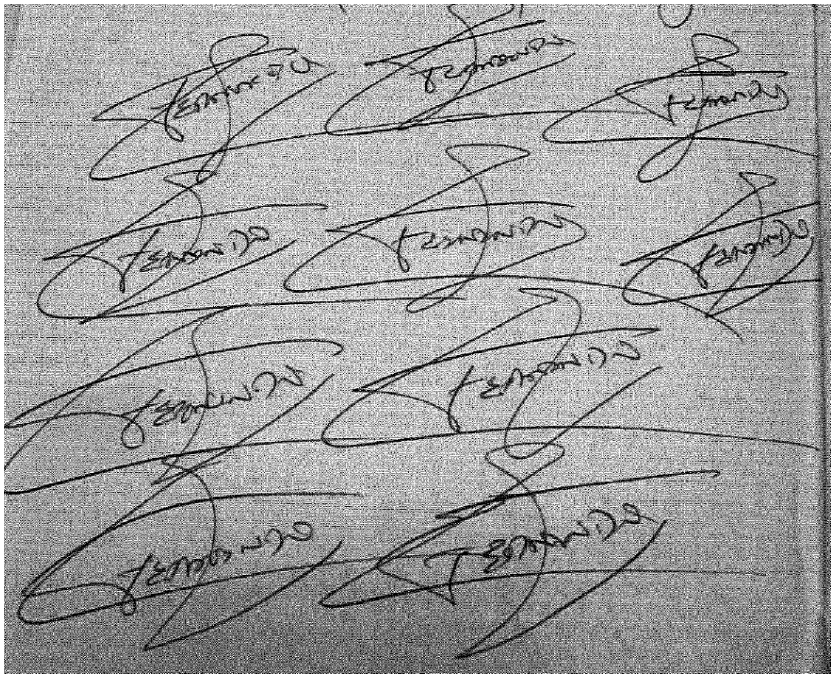
of Uruguay; original text in Spanish: "*La misma pena [de tres a dieciocho meses de prisión] se aplicará al funcionario policial que omitiera o retardare formular la denuncia de cualquier delito de que tuviere conocimiento por razón de sus funciones, y a los demás funcionarios, en las mismas circunstancias, de los delitos que se cometieren en su repartición o cuyos efectos la repartición experimentara particularmente.*").

[16] Letter from Mariana Errazquin (Office of the President) to Jorge Díaz (Prosecutor's Office) (19 October 2016) and Letter from Andrea Canabal (Office of the President) to Jorge Díaz (Prosecutor's Office) (20 October 2016) (R-2).

[17] Testimony of Dr. Fernando García before the Uruguayan Criminal Court (1 November 2016) (C-141).

- Thus, as a result of Mr. Herbón's counsel's unauthorized disclosure, it is now known that Dr. García confirmed to the Court, under questioning from the Prosecutor and the Judge, that he had not signed either of the two documents, that the signatures on them were not his, that he did not know and had never met Dr. Alberelli or Mr. Herbón, that he had never sent a letter to Dr. Alberelli, and that he had never signed a contract with Mr. Herbón.[18]
- At the request of the Judge, Dr. García provided the court with samples of his true signature, shown below:



Source: Testimony of Dr. Fernando García before the Uruguayan Criminal Court (1 November 2016), p. 11 (C-141).

- His actual signature bears no resemblance to his purported signature on either the letter addressed to Dr. Alberelli or the contract co-signed by Mr. Herbón:

[18] *Id.*, pp. 3-6.

Source: Letter from F. García to G. Alberelli (4 October 2011) (C-056); Data Transmission and Equipment Loan Agreement (December 2010) (C-057).

- At the conclusion of the hearing, the summons to Mr. Herbón was extended to 1 December, at which time the proceedings are scheduled to resume with the taking of his testimony, should he appear on that date. If Mr. Herbón chooses to remain out of the country, the hearing will necessarily be further adjourned.

B. What the Facts Demonstrate

14. The Application for Provisional Measures does not challenge any of these facts. From them, five conclusions can be drawn:

15. *First*, there is very strong evidence that the purported signatures of Dr. García on the two documents are forgeries.

16. *Second*, if they are forgeries, then those persons responsible for them have committed serious criminal offenses under Uruguay's Penal Code, which makes it unlawful to falsify another person's signature.[19]

[19] The forging or alteration of a private document is a criminal offense in Uruguay, as elsewhere. The Penal Code states: "The creation of a false private document, or the alteration of a real one, if used, is punishable by twelve months' to five years' imprisonment." Uruguayan Penal Code (2014), Art. 240 (R-1) (Translation of the Republic of Uruguay, original text in Spanish: "*(Falsificación o alteración de un documento privado). El que hiciere un documento privado falso, o alterare uno verdadero, será castigado, cuando hiciere uso de él, con doce meses de prisión a cinco años de penitenciaría.*"). Similarly, the Penal Code criminalizes fraud. *Id.*, Art. 347 ("(Fraud). Anyone who uses any scheme or false pretense, to induce in error any person, in order to gain for himself or a third

17. *Third*, based on Dr. García's sworn statement of 17 October, as confirmed by his court testimony on 1 November, Uruguay has good reason to conduct a criminal investigation to determine whether, in fact, the crimes of forgery and fraud have been committed and, if so, by whom.

18. *Fourth*, it was entirely reasonable for the Court to issue citations to Dr. Alberelli and Mr. Herbón, given their relationships to the two documents in question, and to solicit their testimony on how Dr. García's signature came to appear on the documents.

19. *Fifth*, Uruguay has a sovereign right to carry out its investigation of whether, and if so by whom, the crimes of forgery or fraud were committed in its own territory, and there is no basis for questioning Uruguay's good faith in doing so.

20. The Application for Provisional Measures does not attempt to explain or refute the evidence, described above, that Dr. García's signatures on the two documents annexed to its Memorial are forgeries. It says only: "The allegations against Mr. Herbón and Dr. Alberelli are false, and Italba looks forward to the opportunity to prove the authenticity of the evidence it submitted in this arbitration at the hearing on the merits of this arbitration."[20]

21. In fact, there are no pending allegations against Mr. Herbón or Dr. Alberelli. They have been cited by the Criminal Court as witnesses, to address the evidence provided by Dr. García of the falsification of his signature. There is ample justification for this. Since Dr.

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person an unjust benefit, at the harm of another, shall be punished with six months to four years of prison.") (translation of the Republic of Uruguay; original text in Spanish: "*(Estafa). El que con estratagemas o engaños artificiosos indujere en error a alguna persona, para procurarse a sí mismo o a un tercero, un provecho injusto, en daño de otro, será castigado con seis meses de prisión a cuatro años de penitenciaría.*").

[20] Claimant's Application for Provisional Measures and Temporary Relief (10 November 2016) ("Application for Provisional Measures"), ¶ 5.

Alberelli is the addressee of the letter purportedly signed by Dr. García, and Mr. Herbón signed the contract, it is reasonable to believe that they might have information on how Dr. García's purported signature came to be affixed to each of these documents. Claimant does not dispute this. It therefore cannot seriously be doubted that both men are material witnesses whose testimony may be critical to the investigation.

22. In response to the substantial evidence of forgery and fraud, Claimant offers only the empty promise that a year from now it will present evidence of the authenticity of the documents to the Tribunal at the hearing on the merits. Claimant does not explain what evidence it will introduce, or how it will show that Dr. García is mistaken about the authenticity of his own signatures.[21]

23. Claimant is free, of course, to litigate its case before the Tribunal in any way it chooses. But that is not a sufficient reason for seeking to deprive Uruguay of its sovereign right to investigate apparent criminal activity in its own territory in a timely manner. There can be no doubt that Uruguay has such a right, as well as a legitimate interest in enforcement of its criminal laws. Claimant does not deny this.

24. Claimant nevertheless argues that Uruguay's exercise of this sovereign right, by investigating the activity in question, "usurp[s] the Tribunal's fact-finding role in evaluating the

[21] In its Application for Provisional Measures, Claimant purports to find a "contradiction" in Dr. García's testimony. In fact, there is none. According to Claimant, Dr. García told the Court he knew a Dr. Tellez, but had previously denied knowing him in his sworn statement to the official government notary. Claimant is incorrect. In his written statement, Dr. García testified that he did not know Dr. Tellez. Before the Court, Dr. García testified that he knew Dr. Tellez only by name. There is no contradiction. More to the point, Claimant did not call attention to any contradictions in Dr. García's testimony on the main issues of the investigation: that the purported signatures on the two documents were forgeries; that he did not write or send a letter to Dr. Alberelli or sign a contract with Mr. Herbón; and that he did not know and had never met either one of them

evidence before it."[22] But that is simply untrue. As Uruguay explained in its letter to the Tribunal of 8 November 2016, it fully accepts that the Tribunal has the exclusive competence to evaluate the evidence presented to it by the Parties—including the two documents with Dr. García's purported signature—for the purpose of ruling on all claims and defenses presented in these arbitral proceedings. A finding by the Uruguayan Criminal Court that the signatures on the two documents are inauthentic forgeries would have consequences, to be sure, in any criminal proceedings conducted in Uruguay. But it would not be binding on the Tribunal, which would be free to reach the opposite conclusion, based on its own evaluation of the evidence pertaining to the authenticity of these documents. Thus, it is unfounded for Claimant to assert that Uruguay hopes to "present to this Tribunal the 'findings of fact' that court renders as a *fait accompli.*"[23] Uruguay has no such hope or intention.

25. Claimant argues that Uruguay should not be allowed to conduct a criminal investigation based on documents that it received as part of this arbitration. But why not? Uruguay fully respects Claimant's right to arbitrate its claims under the Bilateral Investment Treaty between Uruguay and the United States. But invoking this right does not permit Claimant—or its principals or employees—to violate Uruguayan criminal law. An ICSID claimant does not automatically enjoy immunity from the application of the host State's criminal law. Regardless of whether criminal activity in the territory of the host State occurs within the proceedings or outside of them, the State has a sovereign right to investigate it. No arbitral tribunal has held otherwise.

[22] Application for Provisional Measures, ¶ 5.

[23] *Id.*, ¶ 5.

26. No one could reasonably argue that if a claimant entered a hearing room and assaulted the court reporter, the host State would be unable to investigate or prosecute the offense because the crime took place within the arbitration proceeding. To be sure, the level of gravity of that crime and the ones apparently committed in Uruguay might be different. But the principle is the same. The fact that the crime took place within the arbitration proceedings is of no moment. In either case, the host State has a right, indeed a duty, to investigate and, if appropriate, prosecute the offender.[24]

27. Of course, no State may abuse the sovereign right to enforce its criminal laws by exercising them in bad faith, including for the purpose of obtaining unfair advantage in an arbitration. But that is not the case here, and there is no evidence of it. Claimant offers none. Nor does Claimant argue that Uruguay lacks a reasonable basis for conducting a criminal investigation into the authenticity of Dr. García's signatures on the two documents in question, including whether, how and by whom they might have been forged. Nor does Claimant dispute that Dr. Alberelli and Mr. Herbón are legitimate subjects for questioning about the authenticity of the documents, and how they came to be signed. Claimant's only problem is that its two witnesses find themselves in such a position. But that is not a valid justification for this Tribunal to interfere with Uruguay's exercise of its sovereign right to investigate criminal activity in its own territory.

28. Claimant argues that Uruguay's investigation will interfere with its ability to present its case to the Tribunal. But that is mere assertion, and Claimant offers nothing of

[24] Uruguay notes that it could not have commenced its investigation any earlier, because it had no knowledge of the existence of the apparently forged documents, which are not public documents, until it received them from Claimant and attempted to verify their authenticity with Dr. García.

substance to back it up. The Memorial contains only two witness statements, those of Dr. Alberelli and Mr. Herbón. They are both interested parties, and there is no reason to believe they will refrain from providing further support to Claimant. Further, as indicated above, Uruguay is prepared to guarantee that it will not restrain their ability to do so. Claimant has not identified any other witnesses or potential witnesses, and thus no grounds have been offered for concluding that any such persons would be "chilled" from cooperating with Claimant as a result of a well-grounded and good faith investigation into the possible forgery of two documents. Claimant's unsubstantiated fears cannot serve as the basis for preventing Uruguay from exercising its sovereign right to enforce its criminal laws.

29. In assessing the alleged "impact" of the criminal investigation on Claimant's case preparation, it might be helpful to compare the significance of the apparently forged documents to each proceeding. In Uruguay, the forgery of documents is a major criminal offense that imposes an obligation on the State to investigate. The two documents are the centerpiece of the investigation. By contrast, in this arbitration, the documents are tangential to Claimant's case.

30. *First*, they have no bearing on whether the Tribunal has jurisdiction over Claimant's claims. This turns largely on whether Claimant can meet its burden of proving that it owned Trigosul, S.A. at the time of the alleged treaty violation by Uruguay—a burden that Claimant did not meet in its Memorial, where it presented no proof of its ownership of Trigosul, or in its Application for Provisional Measures.[25]

31. *Second*, the two documents have no bearing on the merits of Claimant's claims. They do not address the question of whether Uruguay unlawfully revoked Trigosul's frequencies

[25] This issue is addressed in Section IV, at ¶¶ 70-74.

in 2011, or whether Uruguay failed to comply with the decision of the *Tribunal de lo Contencioso Administrativo* in 2014. In these circumstances, the relevance of the documents to these proceedings is only to the question of damages, where it is marginal, at best. Even so, Claimant will not be deprived of its right to defend the documents before the Tribunal.

32. Uruguay regrets that Claimant is unable to resist resorting to smear tactics to impugn Uruguay's commitment to the rule of law and attempt to tarnish its image before the Tribunal. An example is the snide comment that "the irony of Uruguay's sudden respect for the independence of its judiciary in a case that is based on the Uruguayan executive's admitted refusal to abide by a final and non-appealable ruling of its judiciary is unmistakable."[26] This is not only uncalled for, but patently false. In response to the ruling of the *Tribunal de lo Contencioso Administrativo* that the government had improperly revoked Trigosul's data transmission frequencies, Uruguay offered Trigosul equivalent frequencies. After Trigosul refused to accept them, Uruguay offered Trigosul the very same frequencies that had been revoked. But Trigosul refused to accept them, either. Contrary to Claimant's assertion, the *Tribunal de lo Contencioso Administrativo* acknowledged that the government has complied with its judgment.[27]

33. Claimant also appears to cast aspersions on the intentions of the Criminal Court that is managing the investigation. Specifically, Claimant suggests there is something inappropriate in the summons the Court issued to Ms. Alicia Fernández. She was, indeed, summoned by the Court, but not in relation to the investigation of the forgery of Dr. García's

[26] Application for Provisional Measures, ¶ 6.

[27] Because this is an issue for the merits, Uruguay will say no more about it here, but will address the matter fully in its Counter-Memorial.

signature. Ms. Fernández, a former public official, was accused by Claimant of demanding a bribe from Trigosul in 2006, in exchange for favorable action on its then pending license application. Upon receiving Claimant's accusation, Uruguay promptly commenced a criminal investigation to determine whether Ms. Fernández, in fact, solicited or accepted such a bribe, in violation of the Penal Code. This was Uruguay's response, even though the accuser is a claimant against Uruguay, and the accused is a former government official. Contrary to Claimant's insinuation, Uruguay's actions demonstrate the evenhandedness of its approach to criminal wrongdoing, and the strength of its commitment to the rule of law.[28]

III. THE REQUIREMENTS FOR PROVISIONAL MEASURES ARE NOT MET

34. The requirements for provisional measures in ICSID cases are well established, and not a subject of disagreement between the Parties here.

35. *First*, the Claimant must demonstrate the existence of a right that is threatened with irreparable impairment by the actions of the respondent State.[29]

[28] In another cheap shot at Uruguay, Claimant cites, in a footnote, a newspaper article about Uruguay's alleged mistreatment of certain foreign investors, in regard to a matter entirely unrelated to Claimant or its claims, and which did not involve any arbitration proceedings. *See* Application for Provisional Measures, note 49. International tribunals are appropriately loath to accept newspaper articles as evidence, especially where, as in this one, the account reflects only one side of the story. *See, e.g.*, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment (27 June 1986), ICJ Rep. 1986, ¶¶ 62-63 (RL-1); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia v. Serbia)*, Merits, Judgement (3 February 2015), ICJ Rep. 2015, ¶ 344 (RL-16); *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Merits, Judgment (19 December 2005), ICJ Rep. 2005, ¶ 68 (RL-5); *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Order of the Tribunal on Further Proceedings (17 December 2007) (El-Kosheri, Crawford, Crivellaro), ¶ 17 (RL-8) ("an isolated press report" can "only be treated as background information and not at all as proof of its contents"). In any event, Uruguay emphatically denies that it investigated or prosecuted the individuals named in the article in bad faith, or without sufficient cause to believe they had engaged in fraudulent activities in violation of its criminal laws.

[29] *See, e.g.*, *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Provisional Measures (3 March 2010) (Guillaume, Abi-Saab, Mehren), ¶¶ 40-41 (RL-10); *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Decision on Provisional Measures (6 April 2007) (Stern, Bucher, Fernández-Armesto) ("*Phoenix v. Czech Republic*"), ¶ 33 (RL-7); *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of*

36. *Second*, the Claimant must demonstrate that the impairment is imminent, such that remedial measures are urgently required.[30]

37. *Third*, the Claimant must demonstrate that the measures sought are proportionate, such that they do not excessively impair the rights of the respondent State.[31]

38. Moreover, ICSID tribunals have uniformly recognized that the imposition of provisional measures is an "extraordinary" remedy, and that there is a "high bar" that must be reached before they can be imposed.[32] The bar is particularly high when the requested measures would interfere with the respondent State's sovereign right to carry out criminal investigations of offenses committed within its own territory.[33] As explained by the tribunal in *Caratube v. Kazakhstan*, criminal investigations and related measures "are a most obvious and undisputed part of the sovereign right of a state to implement and enforce its national law on its territory."[34]

Ecuador, ICSID Case No. ARB/06/11, Decision on Provisional Measures (17 August 2007) (Fortier, Stern, Williams) ("*Occidental v. Ecuador*"), ¶ 59 (CL-073); *Tokios Tokelės v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 3 (18 January 2005) (Mustill, Bernardini, Price) ("*Tokios v. Ukraine*"), ¶ 8 (CL-093); *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Order on Provisional Measures (6 September 2005) (Salans, van den Berg, Veeder) ("*Plama v. Bulgaria*"), ¶¶ 38, 40 (RL-4).

[30] *See, e.g.*, *Occidental v. Ecuador*, ¶¶ 61, 87 (CL-073); *Phoenix v. Czech Republic*, ¶ 32 (RL-7) (saying: "It is common understanding that provisional measures should only be granted in situations of absolute necessity and urgency, in order to protect rights that could, absent these measures, be definitely lost."); *Tokios v. Ukraine*, ¶¶ 8, 12, 13, 15, 18 (CL-093); *Plama v. Bulgaria*, ¶ 38 (RL-4).

[31] *See, e.g.*, *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Order on Provisional Measures (3 March 2016) (Pryles, Glick, Poncet) ("*Hydro v. Albania*"), ¶ 3.20 (CL-089); *Lao Holdings v. Laos*, ¶ 50 (CL-091); *Quiborax v. Bolivia*, Decision on Provisional Measures, ¶ 113 (CL-090); *City Oriente Ltd. v. Republic of Ecuador and Petroecuador*, ICSID Case No. ARB/06/21, Decision on Provisional Measures (19 November 2007) (Fernández-Armesto, Naón, Thomas), ¶ 54 (CL-088).

[32] *See, e.g.*, *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Procedural Order No. 2 (28 October 1999) (Vicuña, Buergenthal, Wolf), ¶ 10 (RL-2); *Plama v. Bulgaria*, ¶ 38 (RL-4) ("[p]rovisional measures are extraordinary measures which should not be recommended lightly"); *Phoenix v. Czech Republic*, ¶ 33 (RL-7); *Valle Verde Sociedad Financiera S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/18, Decision on Provisional Measures (25 January 2016) (Barros, Ferrari, Vinuesa), ¶ 86 (RL-18).

[33] *See, e.g.*, *Caratube v. Kazakhstan*, ¶ 135 (RL-9); *Churchill v. Indonesia*, PO 14, ¶ 72 (RL-15); *Teinver v. Argentina*, ¶ 190 (RL-19).

[34] *Caratube v. Kazakhstan*, ¶ 135 (RL-9).

Therefore: "a *particularly high threshold* must be overcome before an ICSID tribunal can indeed recommend provisional measures regarding criminal investigations conducted by a State."[35] In *Churchill v. Indonesia*, the tribunal, in addition to underscoring the "particularly high threshold" that must be overcome when it comes to criminal proceedings, added that "[a]n allegation that the status quo has been altered or that the dispute has been aggravated *needs to be buttressed by concrete instances of intimidation or harassment.*"[36]

39. On these bases, ICSID tribunals have routinely refused to recommend provisional measures that would interfere with criminal investigations of alleged offenses committed within the territory of the respondent State. The exceptions, discussed below, are cases in which the respondent State was expressly found to have initiated or conducted the investigation in bad faith, by, in particular, retaliating against the Claimant for bringing the arbitration, or preventing it from properly presenting its case.

40. Because there is no evidence that Uruguay's criminal investigation is infected by such improper motive—to the contrary, all the evidence points to Uruguay's good faith—Claimant does not come close to meeting the "high threshold" for the imposition of provisional measures.

A. The Right That Is Alleged To Be Impaired

41. Uruguay readily acknowledges that Claimant has a right to freely present its case before this Tribunal. This includes the right to gather and present documents, and to identify and present witnesses. Claimant has exercised these rights in presenting its Memorial, to which

[35] *Id.*, ¶ 137 (emphasis added).

[36] *Churchill v. Indonesia*, PO 14, ¶ 72 (RL-15) (emphasis added).

Claimant annexed numerous documents, including witness statements, in relation to its claims on the merits and for damages.

42. Claimant's rights, however, do not include immunity for its witnesses from the exercise, in good faith, of Uruguay's sovereign right to conduct a criminal investigation of offenses committed in Uruguayan territory. This was recognized by the tribunal in *Rompetrol Group v. Romania*:

> [T]he tribunal acknowledges the validity of the Claimant's argument that the pursuit of crime – or even its mere invocation – cannot serve on its own as a justification for conduct that breaches the rights of foreign investors under applicable treaties. To all of which the Tribunal adds a rider of its own, namely that association with the management of a foreign investor cannot serve to immunize individuals from the normal operation of the criminal law, irrespective of whether the individual is a local national [] or a foreign national [].[37]

43. Thus, a respondent State does not impair the rights of a claimant investor by the mere fact of calling its witnesses, including its executives and employees, for questioning as part of a criminal investigation of offenses committed in its own territory. An illustrative case is *Churchill v. Indonesia*, in which, as mentioned above, Indonesia was conducting a criminal investigation of the forgery of documents. The claimant sought provisional measures to prevent Indonesia from summoning its witnesses to testify as part of the investigation. The ICSID tribunal described in the following terms the right that the claimant was seeking to protect: "[T]he Claimants seek to secure their right to provide evidence through witness testimony. To

[37] *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award (6 May 2013) (Berman, Donovan, Lalonde), ¶ 152 (RL-13).

this end, they seek to avoid that such right be impaired by investigations brought against actual and potential witnesses."[38]

44. Notwithstanding its recognition of such a right, the tribunal refused to recommend provisional measures. It began by observing that the subject matter of the criminal investigation ("to impose sanctions for the alleged criminal act of document forgery") was different from that of the arbitration ("to grant monetary relief for alleged breaches of the investment treaty").[39] It then concluded that Indonesia's criminal investigation of "conduct with respect to the alleged document forgery does not impinge on the exclusivity of the present proceedings, nor does it undermine the Tribunal's jurisdiction to resolve the Claimants' claims."[40] There was no evidence that Indonesia's investigation was intended to prejudice the claimants' presentation of their case before the tribunal, or to obtain unfair advantage in those proceedings.

45. The situation is similar here. The matter being investigated by Uruguay—the forgery of signatures and the falsification of documents—is very different from the subject matter of this arbitration: whether Uruguay breached its treaty obligations by revoking Trigosul's frequencies in 2011 or by (allegedly) failing to comply with the 2014 judgment of the *Tribunal de lo Contencioso Administrativo*. As has been pointed out, the two documents at issue in the

[38] *Churchill Mining PLC and Planet Mining Pty Ltd. v. the Republic of Indonesia*, ICSID Case No. ARB/12/14, Procedural Order No. 9 (8 July 2014) (Kaufmann-Kohler, van den Berg, Hwang), ¶ 79 (RL-14).

[39] *Id.*, ¶ 86.

[40] *Id.*, ¶ 87; *see also Teinver v. Argentina*, ¶ 193 (RL-19) ("As has been recognized previously, the right to exclusivity of ICSID proceedings under Article 26 of the ICSID Convention can be protected by way of provisional measures.[] This right of exclusivity relates to the resolution of investment disputes only and does not include or extend to criminal proceedings which deal with criminal liability and not with investment disputes.[] As a result, in principle, the criminal proceedings commenced by way of the Complaints and the Federal Prosecutor's preliminary investigation do not address the investment dispute before the Tribunal and, therefore, do not threaten the exclusivity of these ICSID proceedings."). *See also Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award (2 March 2015) (Bernardini, Dolzer, Gharavi), ¶ 22 (RL-17) (finding that "it agrees with Romania that the pending criminal proceedings against Mr. Awdi will not prevent the decision of the legal issues brought before it") (internal citations omitted).

investigation are entirely irrelevant to these claims. The investigation, therefore, in no manner infringes on the exclusivity of the arbitral proceedings or undermines the Tribunal's jurisdiction. Nor is there any evidence of improper motive on Uruguay's part.

46. Also pertinent is *Caratube v. Kazakhstan*, another case in which an ICSID tribunal refused to issue provisional measures to enjoin criminal proceedings that engaged the claimant's witnesses.[41] The tribunal rejected the claimant's argument that the criminal proceedings, which addressed issues involved in the arbitration, impaired its right to the exclusivity of the arbitral process. The tribunal observed that the claimant was seeking only money damages, not specific performance.[42] On that basis, it found that there was no right in need of protection, and refused to recommend the provisional measures that the claimant sought.

47. Here, too, Claimant seeks only money damages. It does not seek the return of its former frequencies (it has already rejected Uruguay's effort to return them) or any other form of specific performance.

48. In *Tokios Tokeles v. Ukraine*, the respondent State's criminal investigation targeted not only the claimant's witnesses but its managing director, obliging him "to leave Ukraine, which has harmed the operations of [the claimant], reduced its profits, inhibited Claimant's ability to finance the present proceeding, and thus, Claimant argues, jeopardized the rendering of an ultimate ICSID award."[43] The tribunal rejected a request for provisional

[41] *See generally Caratube v. Kazakhstan*, ¶ 135 (RL-9).

[42] *Id.*, ¶ 139 ("Since, in the present case, Claimant is not claiming specific performance, but money damages, this Tribunal does not have to deal with the question whether other considerations have to be applied in specific performance claims as in the Burlington case […].").

[43] *Tokios v. Ukraine*, ¶ 9 (CL-093).

measures to enjoin Ukraine's investigation. It found that the claimant "failed to show that a provisional measure is either necessary or urgent to protect [its] rights" because it was not proven that the managing director's absence "caused [the claimant's] decline in profits, or, certainly, that it has caused a decline in profits of such magnitude as to impair Claimant's ability to finance the present ICSID proceeding."[44]

49. In the present case, Claimant has not argued that Uruguay's criminal investigation has caused or may cause a decline in profits of its alleged Uruguayan subsidiary, Trigosul. Trigosul has not operated in Uruguay, to Uruguay's knowledge, since at least 2011. It does not appear to have any ongoing business operations in Uruguay that could be affected by the summonses issued to Dr. Alberelli and Mr. Herbón.

50. The Tribunal may not find it particularly helpful that Claimant, in its Application for Provisional Measures, ignored the three cases discussed above, as well as all of the other cases previously cited in this pleading.[45] For Claimant, it appears, the only cases that exist are the three exceptional ones in which provisional measures were granted to enjoin criminal investigations.

51. But those cases only serve to underscore that Claimant's request for provisional measures here is unfounded. In all three cases, the tribunal took pains to underscore that the

[44] *Id.*, ¶ 12. The tribunal also rejected the claimant's argument that the criminal proceedings affected "its right to have this proceeding be the exclusive remedy for the dispute or under the facts adduced, to be free from action by the Respondent that aggravates the dispute." *Id*.

[45] The only reference to any of these cases is the citation, in a footnote, of *Tokios Tokeles v. Ukraine* as standing for the proposition that a tribunal *may* grant a provisional measure to protect a party from the actions of the other party that threaten to aggravate the dispute or prejudice the rendering or implementation of an eventual decision or award. Application for Provisional Measures, note 25. Even there, however, Claimant fails to mention that the tribunal in that case *rejected* the claimant's request for provisional measures on those grounds.

respondent State has the sovereign right to prosecute crimes on its territory, and that such prerogative is not barred by the BIT or ICSID Convention. Statements to this effect in *Quiborax v. Bolivia* and *Lao Holdings v. Laos* have been quoted above.[46] In *Hydro v. Albania*, the third case cited by Claimant, the tribunal emphasized that:

> It is trite to say that criminal law and procedure are a most obvious and undisputed part of a State's sovereignty. That (trite) fact supports the approach adopted here by the Tribunal, namely that any obstruction of the investigation or prosecution of conduct that is reasonably suspected to be criminal in nature should only be ordered where that is absolutely necessary.[47]

52. As pointed out previously, the tribunals in *Quiborax* and *Lao Holdings* recommended the requested provisional measures because they found that the respondent States had acted in bad faith, and were conducting the criminal proceedings precisely in order to prejudice the claimants in their respective arbitral proceedings. In *Quiborax*, the evidence showed that Bolivia conducted its criminal proceedings with the intention of harassing and intimidating the claimant's witnesses, and for the purpose of gaining the upper hand in the arbitration. It was on this basis that provisional measures were recommended.[48] In *Lao Holdings*, the tribunal found that the principal purpose of Laos' criminal investigation was to obtain evidence to support its defense in the arbitral proceedings; this was even admitted by Laos.[49] Laos' actions were particularly prejudicial to the claimant's rights in the arbitration because the investigation was launched only one month before the oral hearings and involved the seizure of

[46] *See supra*, ¶ 9.

[47] *Hydro v. Albania*, ¶ 3.16 (CL-089).

[48] *Quiborax v. Bolivia*, Decision on Provisional Measures, ¶¶ 164-165 (CL-090).

[49] *Lao Holdings v. Laos*, ¶ 26 (CL-091) ("the primary purpose for which the Respondent intends to use the powers of criminal investigation, at least in the first instance, is to collect evidence for use at the arbitration"); *Id.*, ¶ 28 ("Laos has admitted that at least one of the objectives of the threatened criminal proceeding is to enable it to develop evidence that will serve as part of its defense in the present arbitration proceedings").

the claimant's documents.[50] Here again, the bad faith of the respondent State was found to constitute the justification for provisional measures.

53. In *Hydro*, Albania sought to extradite (from the United Kingdom) and prosecute two of the individual claimants, based on allegations of financial crimes in the way they managed the investments that were the subject of the dispute.[51] The tribunal distinguished the case from one in which the alleged criminal offenses were not directly related to the claims disputed in the arbitration:

> The tribunal notes that there may be situations where incarceration of a claimant would disrupt an arbitration but where it would be improper for the tribunal to intervene. An example given by counsel is where a person is charged with a serious offense totally unrelated to the factual circumstances of the dispute being arbitrated, such as murder. But that is not the situation here […]. The extradition and criminal proceedings here concern or relate to the factual circumstances at issue in this arbitration.[52]

54. Further distinguishing *Hydro* from the present case is the finding, on which the provisional measures order was based, that the incarceration of the two individual claimants whose extradition was sought "would affect the ability of these two claimants and indeed other claimants to adequately put their cases and participate in the arbitration."[53] No such showing has been, or could be, made here, especially in light of Uruguay's willingness to guarantee that,

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[50] *Id.*, ¶¶ 14, 36, 39-42.

[51] *Hydro v. Albania*, ¶¶ 3.28, 3.32, 3.36 (CL-089).

[52] *Id.*, ¶¶ 3.19, 3.41. Without saying so directly, the tribunal's order appears to reflect a concern that Albania's motives in prosecuting the claimants might not have been entirely pure. In that regard, it is not without interest that two of the three States against which provisional measures have been recommended calling for the suspension of criminal investigations or prosecutions are Albania and Bolivia, whose rankings in the Global Justice Project's Rule of Law Index are, respectively, 72 and 104, out of 168 States (Laos was not ranked). Uruguay's rank, on the same scale, is 20. *See* The World Justice Project, "Rule of Law Index 2016" (2016), *available at* http://worldjusticeproject.org/sites/default/files/media/wjp_rule_of_law_index_2016.pdf (last visited 6 November 2016) (R-4).

[53] *Hydro v. Albania*, ¶ 3.41 (CL-089).

whatever the course of its investigation, neither Mr. Herbón nor Dr. Alberelli would be prevented from participating in the preparation or presentation of Claimant's case.

55. For these reasons, Claimant has failed to meet its burden of demonstrating that it has a right that is threatened by Uruguay with irreparable impairment. On this basis alone, the Application for Provisional Measures must be rejected.

B. Urgency and Proportionality

56. Since there is no threat of irreparable harm to any of Claimant's rights, it follows that there is no urgent need for protection, and that the imposition of *any* provisional measures that might diminish Uruguay's sovereign rights would be disproportionate. However, for the sake of completeness it remains to be underscored that there is no urgent need for the protection Claimant seeks—the suspension of Uruguay's criminal investigation—which would, in any event, disproportionately impact the rights of Uruguay.

57. In regard to "urgency," Claimant's only point is that Mr. Herbón has been summoned to appear before the Criminal Court on 1 December. Dr. Alberelli is not required to appear on that date, or as yet any other, because he lives in the United States and has not been served with his summons. Mr. Herbón, apparently, has been outside Uruguay since shortly after he received his summons. To accommodate him, the Criminal Court changed the date of his appearance from 28 October to 1 December. It bears repeating that requiring him to appear, to answer questions from the Court about his knowledge of the documents that Dr. García considers to bear his false signatures—including the purported contract that Mr. Herbón himself signed—does not deprive Claimant of any of its rights in this arbitration. There is thus no "urgency" that

would require the Tribunal to even consider, let alone impose, the extreme measures Claimant is requesting.[54]

58. The measures are not only extreme, but grossly disproportionate. Even if, *quod non*, Claimant were able to identify a right in this arbitration that is potentially harmed by Uruguay's criminal investigation, the remedy it seeks would cause far greater harm to Uruguay's rights. On one side of the balance is Claimant's dubious contention that it has a "right" not to have its witnesses questioned by the Criminal Court; on the other side is Uruguay's indisputable sovereign right to conduct criminal investigations of the commission of serious offenses in its own territory. There is no comparison.

59. In *Churchill v. Indonesia*, the tribunal had no difficulty determining that the balance of similar interests required it to reject the claimant's request for provisional measures recommending the suspension of Indonesia's criminal investigation of the forgery of documents, so that the claimant's witnesses would be relieved from testifying in that investigation:

> [A]ny third-party effort to delay the criminal investigation 'would be detrimental to its progress because it would sideline the existing investigative team, risk the loss of witnesses or documents and prolong an already long delayed inquiry, all making an ultimate prosecution more challenging'.[55]

Uruguay's interests in enforcing its criminal laws would be similarly prejudiced if it were

[54] Mr. Herbón has merely been summoned; the alleged harm from which Claimant seeks protection remains speculative. The tribunal in *Occidental Petroleum v. Ecuador* explained that there was no urgency or necessity for provisional measures where the outcome of the State action was unclear. It stated that "Claimants [did] not know what course of action Ecuador intend[ed] to take with respect to the future operator of Block 15", meaning that claimants "[were] seeking a provisional measure in order to prevent an action which they [were] not even sure [was] being planned". *Occidental v. Ecuador*, ¶¶ 88-89 (CL-073). The tribunal further explained that "[t]his is not the purpose of a provisional measure", as they "are not meant to protect against any *potential* or *hypothetical* harm susceptible to result from uncertain actions. Rather, they are meant to protect the requesting party from *imminent harm.*" *Id.*, ¶ 89.

[55] *Churchill v. Indonesia*, PO 14, ¶ 59 (RL-15).

ordered to suspend its investigation for a year or more, as Claimant requests.

60. As the tribunal stated in *Hydro*, ordering the suspension of a sovereign State's criminal proceedings is such an extreme measure that "any obstruction of the investigation or prosecution of conduct that is reasonably suspected to be criminal in nature should only be ordered where that is *absolutely necessary*."[56] Claimant comes nowhere close to demonstrating the *absolute* necessity, or *any* necessity, for the extraordinary measures it wants imposed on Uruguay.

C. The Request for Temporary Relief

61. Claimant assumes that the Tribunal will not be able to rule on its Application for Provisional Measures by 1 December, the date that Mr. Herbón has been summoned to appear before the Criminal Court as part of its investigation of forged documents. On the basis of that assumption, Claimant requested, on 10 November, that the Tribunal issue a temporary order, immediately, compelling Uruguay to suspend its criminal investigation until the Application has been decided.

62. Uruguay is grateful to the Tribunal for reserving its ruling on the request for a temporary order until it has had an opportunity to receive and consider this pleading.

63. For the reasons already stated, Uruguay regards Claimant's request as entirely unjustified. In sum, as explained above, there is no factual or legal basis for Claimant's Application for Provisional Measures. If that Application so obviously fails, then there are no grounds for a temporary order to be imposed on Uruguay, or for Uruguay to suffer the harm to

[56] *Hydro v. Albania*, ¶ 3.16 (CL-089) (emphasis added).

its sovereign rights resulting from such an order, pending the ultimate disposition of the Application.

64. The cases cited by Claimant do not support the issuance of a temporary order in the circumstances presented here. Each of those claimants sought provisional measures to prevent Ecuador from committing alleged treaty violations, including unlawful expropriations, during the pendency of the arbitration. Because the seizures of their investments were imminent, and would have deprived them of the rights they sought to vindicate in the arbitration proceedings, they each sought a temporary order preserving the *status quo* until their applications for provisional measures could be decided.[57]

65. Claimant here cannot point to anything even remotely like the imminent seizure of its investment. The only imminent event is the appearance of Mr. Herbón before the Criminal Court on 1 December. Uruguay submits that it has already demonstrated, in this pleading, that provisional measures to suspend the criminal investigation are not justified. If that is the case, then there are no grounds for a temporary order suspending the investigation until the

[57] *See Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Provisional Measures (29 June 2009) (Kaufmann-Kohler, Stern, Vicuña), ¶¶ 17-24 (CL-097); *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Provisional Measures (8 May 2009) (Bingham, Brower, Thomas) ("*Perenco v. Ecuador*"), ¶¶ 26-28 (CL-099); *City Oriente Ltd. v. Republic of Ecuador and Petroecuador*, ICSID Case No. ARB/06/21, Decision on Provisional Measures (19 November 2007) (Fernández-Armesto, Naón, Thomas), ¶ 19 (CL-088). Further, in *Burlington*, the temporary order was not issued until the claimant's third request for them, and after it produced a copy of a judicial order indicating that the seizure of its assets was imminent. *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Provisional Measures (29 June 2009) (Kaufmann-Kohler, Stern, Vicuña), ¶¶ 17-24 (CL-097). In *Perenco* and *City Oriente*, the tribunals likewise found that the seizures were imminent, and would have rendered the applications for provisional measures useless. *Perenco v. Ecuador*, ¶¶ 26-28 (CL-099).

Application for Provisional Measures is decided. ICSID Tribunals do not issue temporary orders where there are uncertain grounds for provisional measures.[58]

66. In any event, there is no need for the temporary order Claimant requests. If Mr. Herbón does not wish to testify on 1 December, he can remain outside Uruguay temporarily until the Tribunal rules on the Application for Provisional Measures. That need not be much beyond 1 December.

67. Uruguay submits that Claimant's Application of 11 November, and this Response by Uruguay, constitute a sufficient basis for the Tribunal to rule on the Application prior to 1 December. The positions of both Parties are now fully elaborated, and there is no need for a second round of briefing, or an oral hearing. However, if the Tribunal determines that a hearing is appropriate, there is no reason why it could not be completed within one day. It could even be conducted by teleconference, if that would be convenient for the Tribunal. Depending on the Tribunal's availability, it could be held on any date between 28 and 30 November.

68. But even if the Tribunal were unavailable for such a hearing prior to 1 December, the alternatives of (a) Mr. Herbón appearing for the hearing, or (b) remaining outside Uruguay temporarily until the Tribunal rules on the Application for Provisional Measures, are far less

[58] *See, e.g.*, *Tethyan Copper Company Pty. Ltd. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Provisional Measures (13 December 2012) (Sachs, Hoffmann, Alexandrov), ¶¶ 21, 151 (RL-12) (rejecting both the request for immediate relief as a "temporary restraint" pending disposition of the Request and ultimately the request for provisional measures, concluding that there is "insufficient evidence on record to show that provisional measures are necessary to avoid irreparable harm"); *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision on Provisional Measures (16 May 2006) (Derains, Dolzer, Lee), ¶¶ 10, 32-34 (RL-6) (rejecting both urgent relief sought and provisional measures, holding that the temporary relief mirrors the final relief sought "to a large extent"); *Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania*, ICSID Case No. ARB/10/13, Award (2 March 2015) (Bernardini, Dolzer, Gharavi), ¶ 19 (RL-17) (denying Claimants' request for a TRO, "finding that the circumstances of the case and the evidence proffered by Claimants did not convincingly support their request for a TRO").

onerous than the extreme measure of ordering Uruguay to refrain from exercising its sovereign rights. Claimant's request also fails, therefore, because of its lack of proportionality.

69. For all of these reasons, Claimant's request for temporary relief should be denied.

IV. LACK OF *PRIMA FACIE* JURISDICTION

70. In order for the Tribunal to exercise jurisdiction over Claimant's claims, it must find that Claimant is an investor protected by the Bilateral Investment Treaty between Uruguay and the United States. This raises the question of whether Claimant, a U.S. company, had, at the relevant time, an investment in Uruguay that was adversely affected by Uruguay in violation of the Treaty. Before an ICSID tribunal may consider the recommendation of provisional measures, it must be satisfied that, at a minimum, its *prima facie* jurisdiction has been established. Claimant, therefore, bears the burden of showing, at least *prima facie*, that it is the owner of Trigosul.[59]

71. Claimant purports to satisfy this jurisdictional requirement by *asserting* that it is the owner of Trigosul. However, all that Claimant offers in its Memorial is its *assertion*. It offers no *proof* of ownership. This is a remarkable omission.

72. It is customary in ICSID cases for claimants to submit proof of ownership with their Memorials, if not earlier with their Requests for Arbitration. Normally, a tribunal would expect to receive corporate records of both the U.S. parent company and the Uruguayan subsidiary demonstrating the parent company's ownership of the subsidiary; sometimes copies of

[59] *See, e.g.*, *Quiborax v. Bolivia*, Decision on Provisional Measures, ¶¶ 109-112 (CL-090) (finding *prima facie* jurisdiction under the *ratione materiae*, *ratione personae*, *ratione temporis*, and *ratione voluntatis* requirements); *see also Perenco v. Ecuador*, ¶ 39 (CL-099).

the share certificates themselves are submitted. Additionally, or alternatively, claimants submit official government records showing the ownership of the subsidiary. Claimant produced none of the above. Nor did it submit any other record or document proving that it is, or was, the owner of Trigosul.

73. Claimant's entire submission on this threshold jurisdictional issue consists of a single document that proves nothing. It is a copy of a form filled out by Mr. Herbón and presented to the U.S. Embassy in Montevideo soliciting assistance in promoting the business of Trigosul on the ground that it is a subsidiary of a U.S. company.[60] But, other than Mr. Herbón's unsupported assertion in this document, no proof of ownership of Trigosul was provided. There is nothing else in Claimant's 108-page Memorial, or its 136 exhibits, that addresses the fundamental jurisdictional question of whether, in fact, Claimant owns Trigosul and, if so, whether it was the owner at the time of Uruguay's alleged treaty violations. Nor has Claimant presented any such proof of ownership in its Application for Provisional Measures.

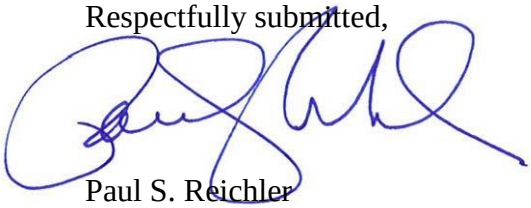
74. In the circumstances, it can only be concluded that it has not been even minimally established that Claimant is an investor protected by the Uruguay-U.S. Bilateral Investment Treaty, or that the Tribunal has even *prima facie* jurisdiction in these proceedings. Unless and until Claimant comes forward with proof of its ownership of Trigosul, sufficient to establish the *prima facie* jurisdiction of the Tribunal, there is no basis for the Tribunal to even consider, let alone grant, the Application for Provisional Measures or the request for a temporary order.

[60] Advocacy Questionnaire Submitted by Trigosul to the U.S. Embassy in Uruguay (11 June 2001) (C-102).

V. CONCLUSION

75. For the foregoing reasons, Uruguay submits that both the Application for Provisional Measures and the request for a temporary order be denied, and that Claimant be required to reimburse Uruguay for its costs and attorney's fees.

Respectfully submitted,



Paul S. Reichler

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