

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

ITALBA CORPORATION
Claimant

and

ORIENTAL REPUBLIC OF URUGUAY
Respondent

ICSID Case No. ARB/16/9

DECISION
ON CLAIMANT'S APPLICATION FOR PROVISIONAL MEASURES AND
TEMPORARY RELIEF

Members of the Tribunal

Mr. John Beechey CBE, Arbitrator
Prof. Zachary Douglas, Q.C., Arbitrator
Mr. Rodrigo Oreamuno, President

Secretary of the Tribunal

Ms. Marisa Planells-Valero

Assistant to the President of the Tribunal

Ms. Maria Jose Rojas

Date of dispatch to the Parties: February 15, 2017

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TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
C-[#]	Claimant’s Exhibit
CL-[#]	Claimant’s Legal Authority
Cl. Mem.	Claimant’s Memorial, dated 16 September 2016
Cl. App. Prov. Meas.	Claimant’s Application on Provisional Measures and Temporary Relief, dated 10 November 2016
Cl. Reply Prov. Meas.	Claimant’s Reply in Further Support of Its Application for Provisional Measures and Temporary Relief, dated 24 November 2016
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Investigation	The investigation about alleged forgery / fraud of certain documents related to this case conducted by the Uruguayan authorities.
R-[#]	Respondent’s Exhibit
RL-[#]	Respondent’s Legal Authority
Resp. Res. Prov. Meas.	Respondent’s Response to Claimant’s Application for Provisional Measures and Temporary Relief, dated 21 November 2016
RfA	Request for Arbitration, dated 16 February 2016
Tribunal	Arbitral Tribunal constituted on 27 May 2016
Trigosul	Trigosul S.A.

Treaty	Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, signed on 4 November 2005 and in force on 1 November 2006
URSEC	<i>Unidad Reguladora de Servicios de Comunicaciones</i> (Regulatory Entity of Communications Services)

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) on the basis of the Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, signed on 4 November 2005 and in force on 1 November 2006 (the “Treaty”), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the “ICSID Convention”).
2. The Claimant is Italba Corporation (“Italba” or the “Claimant”), a company incorporated under the laws of the State of Florida, United States of America.
3. The Respondent is the Oriental Republic of Uruguay (“Uruguay” or the “Respondent”).
4. The Claimant and the Respondent are collectively referred to as the “Parties.” The Parties’ representatives and their addresses are listed above on page (i).
5. This decision concerns Claimant’s Application for Provisional Measures and Temporary Relief, dated 10 November 2016.

II. PROCEDURAL HISTORY

6. On 16 February 2016, ICSID received a Request for Arbitration dated 16 February 2016 from Italba against Uruguay (the “Request”). The Request was supplemented by Claimant’s letters dated 10 and 20 March 2016.
7. On 24 March 2016, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible, in accordance with Rule 7(d) of ICSID’s Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

8. In accordance with Article 37(2)(a) of the ICSID Convention, and pursuant to the provisions of the Treaty, the Tribunal was to be constituted by three arbitrators to be appointed as follows: one by each Party and the third, the presiding arbitrator, by agreement of the Parties.
9. The Tribunal was composed of Mr. Rodrigo Oreamuno, a national of Costa Rica, President, appointed by agreement of the Parties; Mr. John Beechey, a national of the United Kingdom, appointed by Claimant; and Professor Zachary Douglas, a national of Australia, appointed by Respondent.
10. On 27 May 2016, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the “Arbitration Rules”), notified the Parties that the three arbitrators had accepted their appointments and that the Tribunal was deemed constituted on that date. Ms. Marisa Planells-Valero, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.
11. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 26 July 2016, by teleconference.
12. Following the first session, on 29 July 2016, the President of the Tribunal issued Procedural Order No. 1, recording the agreement of the Parties on procedural matters and the decision of the Tribunal on disputed issues. Procedural Order No. 1 provided, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006; that the procedural languages would be English and Spanish; and that the place of the proceeding would be Washington, DC. Procedural Order No. 1 also set out a schedule for the proceeding.
13. On 28 July 2016, the Tribunal and the Parties were informed that the Secretary of the Tribunal would be taking temporary leave, and that Ms. Luisa Fernanda Torres would serve as Secretary of the Tribunal during her absence.
14. In accordance with Procedural Order No. 1, on 16 September 2016, Claimant filed a Memorial on the Merits, together with witness statements by Mr. Gustavo Alberelli and

Mr. Luis Herbón; an expert report by Mr. Santiago Dellepiane Avellaneda of Compass Lexecon; Exhibits C-001 to C-136 and Legal Authorities CL-001 to CL-085.

15. On 14 October 2016, Respondent advised that it did not intend to request the bifurcation of the proceeding, and that it would file its objections to jurisdiction with its Counter-Memorial.
16. On 31 October 2016, Claimant informed the Tribunal that, one of its witnesses, Mr. Herbón, had received a notice to appear before a criminal court in Montevideo, Uruguay, in connection with the Investigation associated with his and Mr. Alberelli's testimony in this arbitration. Claimant noted that it understood that the Investigation concerned an allegation that certain documents submitted in this arbitration were not authentic, and argued that the Investigation represented an "abuse of the filings in this arbitration and an attempt to harass and intimidate"¹ its witnesses. Italba invited Respondent to confirm that it would terminate these criminal proceedings.
17. On 8 November 2016, Respondent replied to Claimant's communication of 31 October 2016. In that letter, *inter alia*, Uruguay expanded on the background facts underlying the Investigation, and denied that its purpose was to attack the Claimant's witnesses in this arbitration. Respondent emphasized the separation of powers between the Executive and Judicial branches in Uruguay, and defended the independence of its judiciary citing reports by international organizations.² In summary, Uruguay explained that based on inquiries made by officials in the Office of the President (including the Secretary of the Presidency), there was "reason to believe that Mr. Herbón and/or Dr. Alberelli might have committed the crime of forgery or fraud" in falsifying the signature of an individual (Dr. Fernando García) in two exhibits submitted in this arbitration (Ex. C-056 and C-057).³ Referring to obligations imposed on public officials by Article 177 of the Uruguay Criminal Code,⁴ Respondent added that the Office of the President had reported "what could be a serious criminal offense" to "fulfil a well-established legal obligation to report

¹ Cl. Letter (31 October 2016) at. 2.

² Resp. Letter (8 November 2016) at 1-2.

³ *Id.*, at 3.

⁴ *Id.*, at 2.

such circumstances to the appropriate authorities, and to avoid the commission of a separate criminal offense by failing to do so.”⁵ Respondent submitted that Uruguay could not be precluded from its sovereign right of “evaluating, in good faith” evidence relevant to the commission of a crime, when it had reason to believe that one might have been committed in its territory.⁶

18. On 10 November 2016, Claimant filed an Application for Provisional Measures and Temporary Relief (“Claimant’s Application”) pursuant to Article 47 of the ICSID Convention and Rule 39(1) of the Arbitration Rules. The Claimant’s Application sought, *inter alia*, to enjoin the criminal prosecution in Uruguay of Mr. Alberelli and Mr. Herbón pending the resolution of this arbitration. In addition, Claimant requested temporary relief to preserve the *status quo* while the Claimant’s Application was pending, noting that Mr. Herbón was scheduled to appear for a hearing on 1 December 2016. Lastly, Claimant invited the Tribunal to set a schedule for Respondent’s response and Claimant’s reply, and to inform the Parties of its availability for a hearing on this issue in December 2016 or January 2017. The Claimant’s Application is further discussed at Section III *infra*.
19. On 14 November 2016, the Tribunal invited Respondent to provide its observations on Claimant’s Application by Thursday, 17 November 2016.
20. On that same day, the Tribunal issued Procedural Order No. 2, amending certain requirements of Procedural Order No. 1 relating to the submission of hard copies of pleadings and accompanying documents.
21. On 15 November 2016, Respondent applied to the Tribunal for an extension of time until 21 November 2016 to provide its observations on Claimant’s Application.
22. On 16 November 2016, the Tribunal granted the extension requested by Respondent.
23. On that same day, Claimant wrote to the Tribunal advising that, while it did not oppose the extension granted to Respondent, it relied on that extension in order to renew its

⁵ *Id.*, at 5.

⁶ *Id.*, at 5.

request for temporary relief. Claimant argued, *inter alia* that “[g]ranting a temporary order would allow the parties sufficient time to brief this issue fully and the Tribunal sufficient time to deliberate and decide it without the deadline of Mr. Herbón’s hearing on December 1, 2016 looming in the background.”

24. On 17 November 2016, Respondent replied to Claimant’s communication of 16 November 2016. It requested the Tribunal to decline Claimant’s request for temporary relief, arguing that there was no urgency, as the next event in the Investigation in Uruguay was not scheduled until 1 December 2016. Respondent indicated that no developments were expected before then, let alone before the filing of Uruguay’s observations due on 21 November 2016. The Respondent’s position is further summarized at Section III *infra*.
25. On 21 November 2016, Respondent submitted its Response to Claimant’s Application for Provisional Measures and Temporary Relief (“Respondent’s Response”). The Respondent’s position is summarized in Section III *infra*. As further discussed below, in this response Uruguay stated *inter alia* that it was “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
26. On 22 November 2016, the Tribunal invited Claimant to provide its observations on Respondent’s Response by Thursday, 24 November 2016.
27. On 24 November 2016, Claimant submitted its Reply in Further Support of Its Application for Provisional Measures and Temporary Relief (“Claimant’s Reply”). The Claimant’s position is summarized in Section III *infra*.
28. On 25 November 2016, Respondent inquired whether the Tribunal would invite Respondent’s further observations on Claimant’s Reply of 24 November 2016. On that same day, the President of the Tribunal, on behalf of the Tribunal, responded that the

⁷ Resp. Res. Prov. Meas., ¶¶ 6 and 54.

Tribunal considered that both Parties had had ample opportunity to present their views, and announced that an additional communication from the Tribunal would follow shortly.

29. Thereafter, also on 25 November 2016, the President of the Tribunal sent the following communication to the Parties, in Spanish, on behalf of the Tribunal:

“1. Independently from the eventual decision concerning the Claimant’s pending application, the Tribunal understands that the testimony of Messrs. Herbon and Alberelli are central to support the Claimant’s claims and, therefore, their eventual detention would be extremely prejudicial to the interests of that party.

2. During the briefing of this Application for Provisional Measures and Temporary Relief, Respondent has put forward its view and, in connection with the various matters in dispute, it has also stated:

‘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.’

3. In order to concretize the Respondent’s guarantee, the Tribunal requests that, no later than 28 November 2016, Respondent confirm such guarantee to the Tribunal and communicate the concrete steps that it will take to provide certainty to Mr. Herbon and Mr. Alberelli that they will not be detained in the criminal investigation that [Respondent] is conducting, or in any other proceeding that the Respondent might initiate. The Tribunal also asks the Republic of Uruguay to ensure that it will not take any measure that will prevent those gentlemen from freely providing, without any limitation, the testimony that Claimant has requested.

Although in this proceeding, in normal circumstances, the Tribunal’s communication with the Parties should be made through the ICSID Secretariat, in light of the existing urgency, the Tribunal decided to communicate directly with the Parties.” (Tribunal’s translation.)

30. On 28 November 2016, Respondent filed observations in response to the President of the Tribunal's communication of 25 November 2016, confirming the above-mentioned guarantee. This communication is further described at Section III *infra*.
31. On 30 November 2016, the Tribunal wrote to the Parties inviting Claimant to:

“[...] confirm, on or before Monday, 5 December 2016, whether or not it accepts that the guarantees set out in the Respondent's letter of 28 November, 2016 are sufficient to protect its ability to present witness evidence from Mr. Herbon and Mr. Alberelli in these proceedings. If the Claimant does not accept the adequacy of these guarantees, the Claimant is invited to provide reasons for the same.”
32. On 5 December 2016, Claimant filed observations in response to the Tribunal's communication of 30 November 2016. In short, Claimant argued that the Respondent's “guarantee” was a “vague promise”, “inadequate” and “effectively worthless.” This communication is further described at Section III *infra*.
33. On 6 December 2016, Respondent filed a further communication addressing certain allegations in Claimant's communication of 5 December 2016. On that same day, Claimant sent a further communication in response. These communications are further described at Section III *infra*.
34. On 9 December 2016, the President of the Tribunal wrote on behalf of the Tribunal, inviting the Parties to provide an update on whether “Mr. Herbon had, in fact, appeared before the Uruguayan Criminal Court [on 1 December 2016] and, if so, what were the circumstances of his appearance.”
35. On 13 December 2016, Respondent informed the Tribunal that “Mr. Herbón did not appear in court on 1 December 2016, as required by his summons” adding that “[n]o reason for his failure to appear was given to the Court or the Prosecutor by Mr. Herbón or his counsel.” Uruguay added, however, that “the guarantee that Uruguay has given — in its Response to Claimant's Request for Provisional Measures (filed on 21 November

2016) and its correspondence with the Tribunal of 28 November 2016 — remains in place.”⁸

36. Also on 13 December 2016, Claimant reported that “[b]ecause the Tribunal did not rule on the application before the December 1 hearing date, Mr. Herbón retained independent counsel to assist him in the criminal proceedings [...]”, adding that such “[...] counsel has now appeared for Mr. Herbón and was successful in rescheduling Mr. Herbón’s hearing date until February.” Claimant, however, while reporting that Mr. Herbón’s counsel had been able to reschedule his court appearance for a date in February 2017, argued that “Mr. Herbón and Dr. Alberelli remain unable to return to Uruguay to gather evidence and conduct business without the threat of pretrial incarceration.” Italba went on to argue that “the investigation will continue to impede Italba’s ability to compile evidence in support of its case and speak to witnesses who could testify on Italba’s behalf”, and referred also to “Uruguay’s attempts to influence or coerce potential witnesses in this arbitration into refusing to provide testimony for Italba.” Claimant reiterated its request for provisional measures.
37. On 5 January 2017, the Tribunal and the Parties were informed that Ms. Marisa Planells-Valero was reassuming her functions as Secretary of the Tribunal in this matter.
38. On 30 January 2017, in accordance with Procedural Order No. 1 as modified by Procedural Order No. 2, Respondent filed a Counter-Memorial on the Merits and Memorial on Jurisdiction, together with witness statements by Mr. Nicolás Cendoya, Ms. Elena Grauert, Ms. Alicia Fernández, Mr. Fernando García Piriz, Mr. Fernando Pérez Tabó, Mr. Gabriel Lombide, Mr. Juan Piaggio, and Mr. León Lev; expert reports by Prof. Santiago Pereira Campos and by Daniel Flores and Ettore Comi of Econ One Research; Exhibits R-008 to R-080 and Legal Authorities RL-024 to RL-119.
39. On 9 February 2017, Claimant filed a further communication informing the Tribunal that Mr. Herbón hearing before the Uruguayan Criminal Court was now scheduled for 15 February 2017 and reiterating its request for provisional measures. On 14 February 2017,

⁸ Resp. Letter (13 December 2016) at. 1.

Respondent filed observations in response to this communication, confirming again the above-mentioned guarantee. These communications are further described at Section III *infra*.

III. SUMMARY OF THE PARTIES' POSITIONS

40. The Parties' respective positions in connection with the present Application are briefly outlined below. The Tribunal notes, however, that in deciding this matter it has considered the full extent of the Parties' arguments in their written submissions. To the extent that arguments are not referred to expressly in the brief summary below, they should be deemed to be subsumed into the Tribunal's analysis.

A. Claimant's Position

41. Claimant contends that Uruguay has initiated criminal proceedings against two of Italba's witnesses (Mr. Gustavo Alberelli and Mr. Luis Herbón), based solely on documents and testimony submitted in this arbitration. According to Claimant, the proceedings concern the (false) allegation that certain documents presented with Claimant's Memorial are forgeries.⁹

42. Italba remarks that these witnesses are the target of the Investigation based on a high-ranking Government official's accusation that "the forged document was submitted *in this arbitration* for the purpose of defrauding *this Tribunal* and embarrassing Uruguay."¹⁰ According to Claimant, the Investigation "clearly arises out of and relates to conduct that is within the jurisdiction and competence of this Tribunal."¹¹

43. Claimant contends that these criminal proceedings "(a) thwart Italba's ability to proceed with this arbitration by incarcerating its principals and chilling assistance from relevant witnesses; (b) aggravate the *status quo*; and (c) usurp the functions of this Tribunal."¹² According to Italba, "Uruguay clearly hopes to litigate the authenticity of these

⁹ Cl. App. Prov. Meas., ¶¶ 4-5.

¹⁰ Cl. Reply Prov. Meas., ¶ 7(b).

¹¹ *Id.*, ¶ 7(b).

¹² Cl. App. Prov. Meas., ¶¶ 1 and 5.

documents in its home court, in the chilling context of a criminal prosecution, and present to this Tribunal the ‘findings of fact’ that court renders as a *fait accompli*.” The proceedings are, “[i]n essence, [...] an attempt by Uruguay to usurp the Tribunal’s fact-finding role in evaluating the evidence before it.”¹³

(1) On the Request for Provisional Measures

44. Claimant argues that it is entitled to provisional measures enjoining Respondent from continuing with the criminal prosecution of Mr. Alberelli and Mr. Herbón.¹⁴ It explains that “[it] does not seek to quash the criminal prosecution”, but rather “only a temporary stay of the prosecution until the end of the arbitration [...]”¹⁵

a. The Tribunal Has *Prima Facie* Jurisdiction to Grant Provisional Measures

45. Claimant argues that the Tribunal has *prima facie* jurisdiction and can grant the relief requested.¹⁶ In particular, Italba posits that:
- “[T]here is no doctrine of jurisdictional restraint with respect to applications or provisional measures, and tribunals have granted requests for such measures even where they have yet to decide on jurisdictional objections raised by respondents.”¹⁷
 - In any event, the Memorial and accompanying evidence have already showed that the Tribunal has *prima facie* jurisdiction “including because Italba is a U.S. national and the owner of its Uruguayan subsidiary, Trigosul.”¹⁸
46. According to Claimant, Article 47 of the ICSID Convention and Rule 39(1) of the Arbitration Rules “specifically authorize ICSID tribunals to order provisional measures to preserve the rights of the parties.”¹⁹

¹³ *Id.*, ¶ 5.

¹⁴ *Id.*, § III (A)

¹⁵ Cl. Reply Prov. Meas., ¶ 8.

¹⁶ *Id.*, ¶ 36.

¹⁷ *Id.*, ¶ 35.

¹⁸ *Id.*, ¶ 35 (citing Claimant’s Memorial, ¶¶ 90, 93 n. 196).

¹⁹ Cl. App. Prov. Meas., ¶ 19.

b. The Requirements for the Granting of Provisional Measures are Satisfied

47. Claimant notes that it is “widely accepted” that a petitioner seeking provisional measures must show that “(a) it holds rights deserving protection, (b) those rights are in urgent need of protection, (c) the requested provisional measures are necessary, and (d) the requested provisional measures are proportional.”²⁰ Italba contends that all four requirements are satisfied in the present case.

48. *Protected Rights.* Italba argues that its rights to the procedural integrity of the arbitral process, preservation of the *status quo* and non-aggravation of the dispute deserve protection.²¹ Claimant maintains that the criminal prosecution against its witnesses threatens and upsets those rights.²² In particular, Italba argues that:

- As the criminal proceedings against Mr. Alberelli and Mr. Herbón are based solely on Claimant’s filings in this arbitration, it would undermine the integrity of this arbitral proceeding, were the criminal investigation to be allowed to continue and to take place concurrently with this arbitration.²³
- The criminal investigation will “irremediably disrupt the arbitral process”, because it will divert Claimant’s time, effort and resources from this arbitration whilst it deals with the criminal proceedings; and it will have a chilling effect on Italba’s witnesses.²⁴

49. *Urgency.* Claimant contends that the measures are urgent by definition when the procedural integrity of the arbitration is threatened or when, as it alleges is the case here, a State has taken, or is threatening to take, measures aggravating the dispute.²⁵ In particular, Claimant argues that there is an urgent need for provisional relief in this case, as the criminal proceedings have already begun, and they will likely continue and be completed before a final award is rendered in this case.²⁶

²⁰ Cl. App. Prov. Meas., ¶ 21.

²¹ *Id.*, ¶¶ 22-27.

²² *Id.*, ¶¶ 28-31.

²³ *Id.*, ¶ 29.

²⁴ *Id.*, ¶ 30.

²⁵ *Id.*, ¶ 32.

²⁶ *Id.*, ¶ 33.

50. During the briefing process, Claimant emphasized that Mr. Herbón was scheduled to appear before the criminal court on 1 December 2016. It noted that there was a “significant risk” that at such time, or shortly thereafter, he might be indicted, arrested and put in pre-trial detention, thereby destroying Italba’s access to one of its key witnesses and compromising its ability to present its case.²⁷ Italba argues that “pre-trial detention is the *norm* for individuals charged with fraud.”²⁸
51. In Claimant’s Reply, Italba also took issue with Respondent’s contention that there was no imminent harm to Claimant resulting from Mr. Herbón’s 1 December 2016 hearing, because he could choose not to attend and the hearing would then be adjourned.²⁹ Claimant referred to the serious consequences that might follow if Mr. Herbón failed to appear, including a court order for detention on his return to Uruguay, or a court request for Interpol assistance to arrest him. Italba further remarked that “if the judiciary in Uruguay is indeed as ‘independent’ as Uruguay professes, Uruguay cannot guarantee that Mr. Herbón would not suffer such consequences.”³⁰
52. *Necessity.* Italba notes that the measures requested must be necessary to avoid harm or prejudice to the petitioner.³¹ Observing that tribunals have differed on the degree of harm required, some requiring “substantial harm” and others requiring “irreparable harm” (*i.e.* harm not reparable by an award of damages), Claimant argues that both standards would be met in the present case.³²
53. According to Claimant, the testimony of Mr. Alberelli and Mr. Herbón is of “paramount importance.” The criminal prosecution of either would cause irreparable harm as it would obstruct Italba’s access to these witnesses and their documents, thereby hindering

²⁷ *Id.*, ¶ 33. *See also*, Cl. Reply Prov. Meas., ¶¶ 14, 19 and Cl. Letter (9 February 2017) at 2 (informing the Tribunal that Mr. Herbón’s hearing before the Uruguayan Criminal Court was now scheduled for 15 February 2017 and adding that “Counsel to Mr. Herbon has confirmed that if Mr. Herbón appears at the hearing, as he is required to do, he will likely be indicted and imprisoned pending a criminal trial.”)

²⁸ Cl. Reply Prov. Meas., ¶ 14. *See also, id.*, ¶ 7(c).

²⁹ Cl. Reply Prov. Meas., ¶ 13.

³⁰ Cl. Reply Prov. Meas., ¶ 13.

³¹ Cl. App. Prov. Meas., ¶ 34.

³² *Id.*, ¶ 35.

its ability to present its case.³³ Italba argues that Mr. Alberelli is unable to return to Uruguay for fear of incarceration and cannot access his documents, while Mr. Herbón's documents would not be accessible if he was incarcerated pending trial.³⁴

54. Italba has emphasized that, contrary to Uruguay's contention, Mr. Herbón and Mr. Alberelli are not simply "witnesses" in the Investigation, but rather the "targets" of the Investigation.³⁵ As such, Claimant argues, they "stand a very real risk of being indicted and imprisoned while they await trial."³⁶
55. Claimant states that (i) the criminal file indicates that Mr. Herbón and Mr. Alberelli are "summoned to appear before the court as '*indagados*'; that is persons placed under investigation"; (ii) Mr. Herbón's summons recommends that he appear with counsel, a direction only present when the individual is the subject of the Investigation; (iii) the file contains a letter from the Secretary of the Presidency to the State Prosecutor indicating the former's belief that Mr. Herbón committed a criminal offense; (iv) Respondent's 8 November 2016 letter itself indicates that the Investigation was initiated, because the Secretary of the Presidency had reason to believe that Mr. Herbón and Mr. Alberelli might have committed forgery or fraud; and, (v) after Mr. Herbón had to reschedule his first appearance before the criminal court, that court issued an order deeming him a flight risk and requiring the police to escort him to the hearing.³⁷
56. For Claimant, Respondent's promise (cited in para. 25 above) that this Investigation will not prevent Mr. Herbón or Mr. Alberelli from participating in this arbitration is "empty".³⁸ In Italba's view:

"Uruguay cannot guarantee that Mr. Herbon will not be indicted or imprisoned while he awaits trial. Nor can it guarantee that, if Mr. Herbon is placed in pre-trial detention, he will maintain the ability to place and receive calls at will, travel to his home or office to

³³ *Id.*, ¶ 36.

³⁴ *Id.* ¶ 36. *See also*, Cl. Reply Prov. Meas., ¶¶ 15-16.

³⁵ Cl. Reply Prov. Meas., ¶¶ 11-12.

³⁶ *Id.*, ¶ 12.

³⁷ *Id.*, ¶ 11.

³⁸ *Id.*, ¶ 15.

collect relevant documents, or travel in and out of the country at his discretion for meetings or hearings.”³⁹

57. Claimant reiterated this position in its communication of 5 December 2016. More specifically, Claimant argued that:

“Uruguay’s vague promise that it will ‘honor its commitment to respect Claimant’s rights in this arbitration’ in the event that Uruguay’s criminal investigation of the Garcia contract is allowed to continue is, on its face, inadequate and incapable of guaranteeing that Italba: (a) will have sufficient access to its key witnesses, Gustavo Alberelli and Luis Herbón ; or (b) will be able to gather evidence in Uruguay and elsewhere to prepare and present its case — including having access to other witnesses whose willingness to openly cooperate with Italba has evaporated since the advent of this investigation for fear of similar reprisals.”⁴⁰

58. Claimant argues that Uruguay’s “guarantee” is “effectively worthless” because Uruguay:

- “[...] has no control over the State Prosecutor in the case —and, therefore, the prosecutor may seek an indictment irrespective of Uruguay’s ‘guarantee;’”⁴¹
- “[...] has no control over the judge in this case, who could order Italba’s witnesses to stand trial and, at the same time, incarcerate them pending that trial;”⁴² and “should the Uruguayan courts decide to imprison Mr. Herbón or Dr. Alberelli pending trial — as is the usual practice in Uruguay — there is no action that the executive could take to overturn that decision [...]”⁴³
- “[...] has no control over the rules in its penitentiary system, which could significantly impede the ability of counsel to speak with and take instructions from its client and main witnesses”⁴⁴; and “there is no action that the executive could

³⁹ *Id.*, ¶ 15. *See also, Id.* ¶ 7(c).

⁴⁰ Cl. Letter (5 December 2016) at 1.

⁴¹ *Id.*, at 2-3 (“Uruguay *cannot do anything* to prevent the arrest and imprisonment of Italba’s key witnesses because both the Uruguayan courts and the State Prosecutor are independent from Uruguay’s executive branch and thus not subject to their control.”) *See also*, Cl. Letter (9 February 2017) at 3 (stating that “Although the Uruguayan government has given assurances that it would not interfere with Italba’s efforts to gather evidence and documentation in this arbitration, it has also admitted that it has no ability to control the actions of the independent prosecutors or the judiciary.”)

⁴² *Id.*, at 2.

⁴³ *Id.*, at 3.

⁴⁴ *Id.*, at 2.

take to [...] provide special privileges” to Mr. Herbón and Mr. Alberelli should the courts decide to imprison them pending trial.⁴⁵

59. Italba also maintains that, despite the Tribunal’s request of 25 November 2016, Uruguay has not referred to “a single concrete action” that it would take to prevent Mr. Alberelli’s and Mr. Herbón’s arrest or pre-trial detention on their return to Uruguay.⁴⁶
60. In Claimant’s view, “only this Tribunal, with its ability to bind all elements of the Uruguayan State — and not only its executive branch — can effectively protect Italba from the deleterious effects of this investigation [...].”⁴⁷
61. Lastly, Italba contends that access to other witnesses has been ‘chilled’ by this criminal prosecution.⁴⁸ Italba claims that when Mr. Alberelli approached other individuals, who might be potential witnesses for this arbitration, none was willing to become involved; and that, according to Mr. Alberelli, one (unnamed) individual expressed fears of Government retaliation or incarceration.⁴⁹ Claimant goes on to state that it “understand[s] that the Office of the Presidency has been in touch with this witness in an attempt to persuade him not to testify on Italba’s behalf.”⁵⁰
62. *Proportionality.* In Italba’s view, the measures requested are proportionate, because they would minimize Italba’s harm, while preserving Respondent’s sovereign right to prosecute crime in its territory.⁵¹ Italba argues that the measures are “proportionately less

⁴⁵ *Id.*, at 3.

⁴⁶ *Id.*, at 2.

⁴⁷ *Id.*, at 2.

⁴⁸ Cl. App. Prov. Meas., ¶ 36. *See also*, Cl. Reply Prov. Meas., ¶ 17.

⁴⁹ Cl. Reply Prov. Meas., ¶ 17. *See also*, Cl. Letter (9 February 2017) at 2.

⁵⁰ Cl. Reply Prov. Meas., ¶ 17. *See also*, Cl. Letter (5 December 2016) at 4 (arguing that “Italba has also submitted evidence that the same office of the Presidency has been contacting Italba’s potential witnesses to harass and threaten them so that they will not give testimony for Italba in this arbitration”); and Cl. Letter (13 December 2016) at 2 (referring to “Uruguay’s attempts to influence or coerce potential witnesses in this arbitration into refusing to provide testimony for Italba” and arguing that “[a]s a result of Uruguay’s egregious conduct, certain witnesses with information that could be helpful to Italba have either refused to speak with Dr. Alberelli or indicated that they could not support Italba openly in this arbitration because of the fear that Uruguay would retaliate against them for doing so.”)

⁵¹ Cl. App. Prov. Meas., ¶ 38.

prejudicial to Uruguay than the serious harm that Italba would suffer if one of its key witnesses were indicted and imprisoned.”⁵²

63. Claimant contends that a stay of the criminal proceedings for a few months would not cause serious prejudice to Respondent. “[A]ny harm to Uruguay resulting from such a stay would merely involve a delay in the prosecution of an alleged crime from six years ago, which Uruguay could have investigated as early as 2011.”⁵³ The criminal prosecution would only be suspended, not dropped, and it could be resumed once the arbitration ended.⁵⁴ Thus, a stay would not infringe upon Respondent’s sovereign right to conduct criminal investigations.⁵⁵
64. By contrast, Claimant argues, failure to suspend the proceedings could lead to intimidation or incarceration of witnesses, prejudicing Claimant’s ability to present its case.⁵⁶ A stay would “shield” Italba from irreparable harm by providing it unfettered access to testimony and documentary evidence of its principals and other witnesses, thereby allowing it properly to present its case.⁵⁷
65. Claimant further remarks that, while Respondent has invoked its sovereign right to prosecute crimes in its territory, the criminal offense in the investigations at issue is an alleged fraud “not on Uruguay, but on the Tribunal, because the allegedly forged documents were submitted to the Tribunal”,⁵⁸ which is a matter for the Tribunal to decide.
66. *Bad Faith*. Italba denies that a finding of State’s bad faith is needed for the imposition of provisional measures.⁵⁹

⁵² Cl. Reply Prov. Meas., ¶ 20.

⁵³ *Id.*, ¶ 20. *See also*, Cl. Letter (9 February 2017) at 3.

⁵⁴ Cl. App. Prov. Meas., ¶ 40.

⁵⁵ Cl. Reply Prov. Meas., ¶ 20.

⁵⁶ Cl. App. Prov. Meas., ¶ 39. *See also*, Cl. Reply Prov. Meas., ¶ 20.

⁵⁷ Cl. App. Prov. Meas., ¶ 39.

⁵⁸ Cl. Reply Prov. Meas., ¶ 24.

⁵⁹ *Id.*, ¶ 30.

67. Notwithstanding the above, Italba states that in light of Uruguay’s repeated assertions that the Investigation is conducted in good faith and without any hint of impropriety, Claimant feels compelled to note that “there *is* evidence that Uruguay’s criminal investigation [...] is politically motivated or, at the very least, tainted by the significant role that the Office of the President, through the Secretary of the Presidency [...] played in the process.”⁶⁰
68. Italba claims that the timing of the Investigation is “extremely suspicious”, as the documents at issue have been known to Uruguay for five years.⁶¹ According to Claimant, they were submitted by Italba’s subsidiary in court proceedings against the Uruguayan government, and no action was taken then.⁶² For Claimant, this fact “both underscores the political nature of the current prosecution and undermines any sense of urgency in respect of that prosecution.”⁶³
69. Claimant also remarks that Respondent has admitted that the Investigation was prompted by inquiries made with Dr. Fernando García by the Secretary of the Presidency, who subsequently wrote to the state prosecutor stating his belief that Mr. Alberelli and Mr. Herbón may have committed criminal offenses.⁶⁴ Italba claims not only that “it is highly unusual for officials in the Office of the President to be actively involved in initiating and gathering information to be used in criminal prosecutions or to be in direct communication with the state prosecutor about those prosecutions”, but also that the Investigation is *per se* tainted due to “the coercive effect of a high-ranking official contacting a witness directly to solicit information for use in a criminal prosecution.”⁶⁵
70. Lastly, Claimant alleges that the Secretary of the Presidency “has been actively involved in efforts to stop witnesses from supporting Italba and has caused such witnesses to fear

⁶⁰ *Id.*, ¶¶ 6, 7 (a), and 31.

⁶¹ *Id.*, ¶ 32.

⁶² *Id.*, ¶ 7(e).

⁶³ *Id.*, ¶ 7(e).

⁶⁴ *Id.*, ¶ 33.

⁶⁵ *Id.*, ¶ 33.

for their ability to freely operate in Uruguay without adverse legal consequences if they do not agree to his demands.”⁶⁶

c. The Request

71. On the basis of the above, Claimant requests:

“[...] an order by the Tribunal recommending that Uruguay:

(a) Take all appropriate measures to end or, alternatively, suspend the criminal proceedings until this Tribunal issues a final award in this arbitration;

(b) Refrain from initiating any other criminal proceedings directly related to the present arbitration, or engaging in any other course of action, which may jeopardize the procedural integrity of this arbitration;

(c) Refrain from taking any further measure of intimidation against Dr. Gustavo Alberelli, Mr. Luis Herbón or any other director, shareholder, representative or employee connected to, or affiliated with, Trigosul and to refrain from engaging in any conduct that may aggravate the dispute between the parties and/or alter the *status quo* that existed prior to the initiation of the criminal investigation launched on October 21, 2016 or any local proceedings related, directly or indirectly, to the subject-matter of this arbitration, including any further steps which might undermine Italba’s ability to substantiate its claims, threaten the procedural integrity of the arbitral process, aggravate or exacerbate the dispute between the parties, or directly or indirectly affect the legal or physical integrity of Italba’s directors, shareholders, representatives or employees.”⁶⁷

(2) On the Request for Temporary Relief

72. In its Application, Claimant argued that the circumstances at issue require “an *immediate* intervention by this Tribunal in order to preserve the *status quo* in this arbitration and

⁶⁶ *Id.*, ¶ 7(d). *See also*, Cl. Letter (5 December 2016) at 4.

⁶⁷ Cl. App. Prov. Meas., ¶ 45. *See also*, Cl. Letter (5 December 2016) at 4 (requesting “[...] an order enjoining Uruguay from continuing that criminal prosecution until the conclusion of this arbitration or taking any other measures that may impair Italba’s ability to present its case, including by intimidating Italba’s potential witnesses.”) and Cl. Letter (13 December 2016) at 2 (reiterating “request for provisional measures to suspend the criminal prosecution against Mr. Herbon and Dr. Alberelli and to enjoin Uruguay from taking any measures that may impair its ability to present its case, including by intimidating Italba’s potential witnesses.”)

prevent Italba from suffering imminent irreparable harm while the Application is pending.”⁶⁸ In particular, Claimant requested that “promptly upon receipt” of the Application, the Tribunal:

“[...] issue temporary relief with immediate effect, ordering Uruguay to suspend its criminal prosecution of Dr. Alberelli and Mr. Herbón and enjoining Uruguay from taking any measure that could alter the *status quo*, aggravate the parties’ dispute in this arbitration, or affect the rights that are the subject of this application until such time as this Tribunal has rendered its decision regarding the provisional measures requested by Italba.”⁶⁹

73. According to Claimant, ICSID tribunals have “routinely ordered” such temporary relief to prevent actions that could alter the *status quo*, aggravate the dispute or affect a tribunal’s ability to address the issues arising in a pending application for provisional measures.⁷⁰
74. Claimant justified this request noting that, as Mr. Herbón was required to appear in a criminal court on 1 December 2016, both Claimant and Mr. Herbón would suffer serious and irreparable harm if Respondent was allowed to continue with the Investigation while the briefing on this Application was completed and the Tribunal deliberated: Mr. Herbón “will be subject to indictment, arrest and pre-trial detention”, and Italba’s access to a key witness and documents will be severely impaired.⁷¹

B. Respondent’s Position

75. Respondent requests the Tribunal to dismiss the application for Provisional Measures and the request for a temporary order, and to issue an order for costs and attorney’s fees against Claimant.⁷²

⁶⁸ Cl. App. Prov. Meas., ¶ 42.

⁶⁹ *Id.*, ¶¶ 9 and 44.

⁷⁰ *Id.*, ¶ 42.

⁷¹ Cl. App. Prov. Meas., ¶ 43. As noted above, on 13 December 2016, Claimant reported that Mr. Herbón’s counsel had been able to reschedule the hearing date until February 2017, but argued that he and Mr. Alberelli were still “unable to return to Uruguay to gather evidence and conduct business without the threat of pretrial incarceration.” Cl. Letter (13 December 2016) at 2.

⁷² Resp. Res. Prov. Meas., ¶ 75.

(1) On the Request for Provisional Measures

76. Respondent contends that Claimant’s application invites 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.”⁷³ Respondent opposes this “extraordinary step”, observing that:

- (i) 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 [...]”⁷⁴
- (ii) It is “indisputable” that Mr. Alberelli and Mr. Herbón are “material witnesses in regard to the commission of these criminal offenses [...]”⁷⁵
- (iii) “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 proceeding, or to hamper Claimant in the presentation of its case [...]”⁷⁶ The Secretary of the Presidency’s actions in connection with the investigation were taken “in fulfillment of his official duties and his obligations under Uruguayan law” as the “Uruguayan Penal Code imposes strict obligations on all public officials to report unlawful activity that comes to their attention.”⁷⁷ The facts demonstrate that there is “good reason” to conduct the criminal investigation in question, and that it was “entirely reasonable” to have cited Mr. Alberelli and Mr. Herbón to “solicit their testimony” on how the allegedly forged signature came to appear in the documents.⁷⁸ Mr. Alberelli is the addressee of the letter and Mr. Herbón signed the contract, in which the alleged forged signature appears.⁷⁹ There are no pending allegations against Mr. Herbón or Mr. Alberelli, and “they have been cited by the Criminal Court as witnesses [...]”⁸⁰

⁷³ *Id.*, ¶ 1.

⁷⁴ *Id.*, ¶¶ 3 and 15.

⁷⁵ *Id.*, ¶ 3.

⁷⁶ *Id.*, ¶¶ 3 and 19.

⁷⁷ Resp. Res. Prov. Meas. ¶ 13 (third bullet) and n. 15. Respondent explains that Article 177 of the Criminal Code “requires any official who becomes aware of the possible commission of a criminal offense to report the circumstances to the appropriate law enforcement authorities”, adding that “[a]n official’s failure to report such circumstances is itself a criminal offense, punishable by three to eighteen months’ imprisonment.” *Id.*, n. 15. *See also*, Resp. Letter (8 November 2016) at 2.

⁷⁸ Resp. Res. Prov. Meas., ¶¶ 17-18.

⁷⁹ *Id.*, ¶ 21.

⁸⁰ *Id.*, ¶ 21.

77. Respondent has emphasized that international organizations have recognized Uruguay as a “mature democracy with solid public institutions and a stable political system” with an independent judiciary.⁸¹ It has also observed that its Constitution provides for “the complete separation and independence of the different branches of Government, including the Executive and Judicial branches.”⁸²

78. In Respondent’s view, Claimant has failed to show that the Investigation will interfere with its procedural or other rights, since Claimant has already presented its case in the Memorial dated 16 September 2016.⁸³ Uruguay further stated that it:

“[...] 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.”⁸⁴

79. The above was confirmed in Uruguay’s letter of 28 November 2016.⁸⁵ In particular, the letter states that:

“[...] Uruguay will honor its commitment to respect Claimant’s rights in this arbitration, including its rights to have Mr. Herbón and Dr. Alberelli gather evidence in Uruguay to present to this Tribunal, help prepare Claimant’s written pleadings, and assist Claimant in the preparation of its case.

Uruguay will also respect Claimant’s right to call witnesses to give oral testimony, in person, at the hearings tentatively set to be held in November 2017. Thus, Uruguay will not take any action that will impede the witnesses, Mr. Herbón and Dr. Alberelli, from

⁸¹ *Id.*, ¶ 4. *See also*, Resp. Letter (8 November 2016) at 1.

⁸² Resp. Letter (8 November 2016) at 1.

⁸³ Resp. Res. Prov. Meas., ¶ 5.

⁸⁴ *Id.*, ¶ 6.

⁸⁵ Resp. Letter (28 November 2016), at 2.

attending the scheduled hearings and freely offering their testimony.”⁸⁶

“[...] Uruguay will take the necessary and proper measures so that Mr. Herbón and Dr. Alberelli can attend the hearings scheduled by the Tribunal without any restriction. Similarly, Uruguay will also adopt the necessary and proper measures to enable Mr. Herbón and Dr. Alberelli to collect all the evidence in Uruguay that may be necessary for submission to this Tribunal.”⁸⁷

80. In that letter, Uruguay also remarked that it was making these commitments:

“[...] notwithstanding that (1) it has not been established that the Tribunal has *prima facie* jurisdiction in these proceedings, and (2) as a consequence, the Tribunal is without authority to recommend provisional measures, let alone measures that would diminish Uruguay’s sovereign right to investigate crimes or enforce its penal laws in its own territory.”⁸⁸

81. It added, however, that:

“At the same time, in the interest of full transparency, Uruguay trusts that the Tribunal will appreciate that Uruguay’s judiciary is independent, as part of its democratic and republican government system. At the present time, there is no formal accusation against Mr. Herbón or Dr. Alberelli. They were summoned by the competent authorities of the criminal justice system in order to provide information on the matter under investigation. Whatever transpires as a result of this criminal investigation is within the exclusive competence of the judicial authorities of Uruguay.”⁸⁹

82. Uruguay further argues that “[...] its guarantee is entitled to the same status and respect that international courts and tribunals consistently give to similar undertakings by sovereign States.”⁹⁰

83. By letter of 14 February 2017, Uruguay reiterated the guarantee previously made to the Tribunal, stating that:

⁸⁶ *Id.*, at 3.

⁸⁷ *Id.*, at 4.

⁸⁸ *Id.*, at 2.

⁸⁹ *Id.*, at 4.

⁹⁰ Resp. Letter (13 December 2016) at 2 (citing ICJ case law).

“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.”⁹¹

84. Uruguay also takes the view that, there is “no reason to believe” that Mr. Herbón or Mr. Alberelli will refrain from providing further support to Claimant, as they are both interested parties. Further, for Respondent, there are no basis to conclude that other persons would be “chilled” from cooperating, as Claimant has not identified any other potential witnesses.⁹²
85. Respondent adds that the alleged “impact” of the Investigation in the preparation of Claimant’s case is undermined by the fact that the documents at issue in that Investigation are only of “marginal” importance to the question of damages in this arbitration. According to Respondent, they have no bearing on questions of jurisdiction or merits.⁹³
86. Uruguay also takes issue with Claimant’s assertion that Uruguay’s Investigation will usurp the Tribunal’s fact finding role in assessing the evidence. Accepting that the Tribunal has “the exclusive competence to evaluate the evidence [...] for the purpose of ruling on all claims and defences presented in these arbitral proceedings”,⁹⁴ Respondent states that a finding by a Uruguayan court that the signatures were forgeries would not be binding on this Tribunal.⁹⁵
87. Similarly, Uruguay questions the notion that Respondent should not be allowed to conduct a criminal investigation based on documents it received as part of this arbitration. For Respondent, a claimant in an ICSID proceeding “does not automatically enjoy immunity from the application of the host State’s criminal law.”⁹⁶

⁹¹ Resp. Letter (14 February 2017) at 3.

⁹² Resp. Res. Prov. Meas., ¶ 28.

⁹³ *Id.*, ¶¶ 29-31.

⁹⁴ *Id.*, ¶ 24.

⁹⁵ *Id.*, ¶ 24.

⁹⁶ *Id.*, ¶ 25.

88. Recognizing that a State may not abuse its sovereign right to enforce criminal laws “[...] by exercising them in bad faith, including for the purpose of obtaining unfair advantage in an arbitration”, Uruguay argues that no such bad faith is present here.⁹⁷
89. In response to Claimant’s allegations that the Secretary of the Presidency has been engaged in a campaign to intimidate witnesses, in its communication of 6 December 2016, Respondent stated:

“Uruguay represents to the Tribunal, categorically and unequivocally, that it has made, and will make, no effort to dissuade any witnesses from cooperating with or testifying on behalf of Claimant. Uruguay has done no more than its due diligence in inquiring of particular individuals in Uruguay whether the actions or comments attributed to them by Dr. Alberelli or Mr. Herbon in their Declarations are as described therein. That is how Uruguay discovered that Dr. Garcia had no communications with either Dr. Alberelli or Mr. Herbon, contradicting what they said in their Declarations, and that his signatures on the documents submitted by them are forgeries.

Uruguay has since discovered that Claimant has also falsely reported on its communications with other persons and entities in Uruguay, including Canal 7 and DirecTV. Uruguay has received letters from authorized representatives of these companies, which it will submit with its Counter Memorial on 16 January, denying the truthfulness of the representations made about them in the Declarations of Dr. Alberelli and Mr. Herbon. It appears from Uruguay's due diligence that Claimant has engaged in a pattern of false representations about its contacts and business dealings in Uruguay. This may be the reason it is falsely accusing Uruguay of witness intimidation — to discourage Uruguay from exercising its right to ascertain the veracity of the representations Claimant has made in these proceedings.”⁹⁸

⁹⁷ *Id.*, ¶ 27.

⁹⁸ Resp. Email (6 December 2016). Claimant responded also on 6 December 2016, arguing that this submission was an attempt to “distract the Tribunal from the matter at hand.” Italba went on to state that “it would not be at all surprising if the new allegations in Uruguay’s letter portend a widened criminal investigation in Uruguay — the goal of which is either to force this entire dispute into the Uruguayan criminal courts or, at the very least, to cripple Italba's ability to respond in this arbitration with live witnesses to any of Uruguay's forthcoming arguments.” Claimant also argued “that Uruguay's desperate effort to use unsupported and baseless allegations in order to avoid an order of provisional measures only highlights why this arbitration became necessary in the first place: Uruguay will stop at nothing to block Italba from enjoying the fruits of its investments in Uruguay.”

a. Lack of *Prima Facie* Jurisdiction

90. Respondent contends that the Claimant’s Application must be rejected because Claimant has not established the Tribunal’s *prima facie* jurisdiction.⁹⁹ For Uruguay, “[b]efore 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.”¹⁰⁰ According to Respondent, the contrary argument is incorrect as a matter of law.¹⁰¹
91. Uruguay maintains that to exercise jurisdiction the Tribunal must find that Claimant is an investor protected by the Treaty, and more particularly, that it had an investment in Uruguay at the relevant time.¹⁰² In Respondent’s view, although the claims are based on alleged actions against a Uruguayan company (Trigosul, S.A.) purportedly owned by Italba, Claimant has provided no evidence that it owns Trigosul S.A.¹⁰³
92. In Respondent’s view “[u]nless and until Claimant comes forward with proof of 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.”¹⁰⁴

b. The Requirements for the Granting of Provisional Measures are Not Met

93. In Uruguay’s view, there is a “high threshold” for the recommendation of provisional measures, namely “[...] 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.”¹⁰⁵
94. According to Respondent, tribunals have “uniformly” recognized that provisional measures are an “extraordinary remedy” subject to a “high bar”, which is “particularly

⁹⁹ Resp. Res. Prov. Meas., ¶ 12.

¹⁰⁰ *Id.*, ¶ 70.

¹⁰¹ See Resp. Letter (28 November 2016) at 2-3.

¹⁰² Resp. Res. Prov. Meas., ¶ 70.

¹⁰³ *Id.*, ¶¶ 12, 71-73. See also, Resp. Letter (28 November 2016) at 2-3 and Resp. Letter (14 February 2017) at 1-2.

¹⁰⁴ Resp. Res. Prov. Meas., ¶ 74. See also, Resp. Letter (28 November 2016) at 3.

¹⁰⁵ Resp. Res. Prov. Meas., ¶¶ 11 and 34-37.

high” when the requested measures would interfere with the sovereign right to investigate criminal offenses in its territory.¹⁰⁶

95. Uruguay argues that tribunals have “routinely” rejected applications similar to the one at issue here “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.”¹⁰⁷ Respondent contends that the cases in which the applications have been granted, on which Claimant relies, are based on findings of a State’s “bad faith” in the initiation or conduct of the investigation.¹⁰⁸
96. For Respondent, Claimant has failed to meet this high threshold. In short, in Uruguay’s view: (i) Claimant has no right to insulate witnesses from good faith criminal investigations in Uruguay; (ii) even if such right existed, there is no imminent threat requiring urgent relief; and (iii) the relief sought is not proportionate.¹⁰⁹
97. *The Allegedly Impaired Right*. Uruguay contends that Claimant has failed to demonstrate that it has a right threatened with irreparable impairment.¹¹⁰ While Claimant has a right freely to present its case before the Tribunal, such right does not include immunity for its witnesses from Uruguay’s good faith exercise of its sovereign right to conduct a criminal investigation.¹¹¹
98. According to Respondent, Claimant’s rights are not impaired by the mere fact of calling witnesses for questioning in a criminal investigation in Uruguay’s territory.¹¹² The Investigation does not infringe on the exclusivity of the arbitral proceeding, nor does it undermine the Tribunal’s jurisdiction. Respondent points out that the matter being investigated (forgery of signatures and falsification of documents) is very different from the subject matter of the arbitration (alleged treaty violations arising out of the revocation

¹⁰⁶ *Id.*, ¶ 38.

¹⁰⁷ *Id.*, ¶¶ 7 and 8-10.

¹⁰⁸ *Id.*, ¶¶ 9, 39, and 52.

¹⁰⁹ *Id.*, ¶ 11.

¹¹⁰ *Id.*, ¶ 55.

¹¹¹ *Id.*, ¶¶ 41-42.

¹¹² *Id.*, ¶ 43.

of Trigosul’s frequencies in 2011 and alleged failure to comply with a 2014 judgment of the *Tribunal Contencioso Administrativo*).¹¹³

99. *Urgency and Proportionality.* In Respondent’s view, absent any threat of irreparable harm, there is no urgent need for protection, and any provisional measures would be disproportionate.¹¹⁴
100. In addition, Respondent contends that there is no urgency because (i) Mr. Alberelli has not even been served with summons as he lives in the the United States; and (ii) although Mr. Herbón has been summoned to appear before the criminal court on 1 December, that fact alone does not deprive Claimant of any of its rights in this arbitration.¹¹⁵
101. By letter of 14 February 2017, referring to the new date for Mr. Herbón’s hearing, noted that “Mr. Herbón, acting through Uruguayan counsel, has successfully rescheduled his hearing on previous occasions. Claimant has provided no reason to believe this time will be any different.”¹¹⁶
102. In Respondent’s view, there is no proportionality. The measures requested are “extreme” and “grossly disproportionate” as the remedy sought would cause greater harm to Uruguay’s indisputable sovereign right to conduct criminal investigations for serious offenses in its territory.¹¹⁷

(2) On the Request for Temporary Relief

103. In Respondent’s Response of 21 November 2016, Uruguay argued that this request was “entirely unjustified”.¹¹⁸ Uruguay observed that it was based on the assumption that the Tribunal would not be able to rule on the Claimant’s Application for Provisional Measures before 1 December 2016, when Mr. Herbón had been summoned to appear. In

¹¹³ *Id.*, ¶ 45.

¹¹⁴ *Id.*, ¶ 56.

¹¹⁵ *Id.*, ¶ 57.

¹¹⁶ Resp. Letter (14 February 2017) at 2.

¹¹⁷ *Id.*, ¶ 58.

¹¹⁸ *Id.*, ¶ 63.

addition, Respondent contended, the request also failed for the same reasons adduced with respect to the Application for Provisional Measures.¹¹⁹

104. Uruguay distinguished the cases on which temporary orders have been issued, observing that in those cases the orders were issued to prevent the State from committing alleged treaty violations, including unlawful expropriation, during the pendency of the arbitration.¹²⁰ By contrast, in this case the only “imminent” event was the appearance of Mr. Herbón before the Criminal Court on 1 December 2016.¹²¹
105. In its 21 November 2016 submission, Respondent went on to argue that there was no need for the temporary order as Mr. Herbón could remain outside of Uruguay until the Tribunal ruled on the Application for Provisional Measures, if he did not wish to testify on 1 December 2016.¹²²
106. Finally, Uruguay took the view that the Claimant’s Application and the Respondent’s Response provided enough elements for the Tribunal to rule on Claimant’s Application before 1 December 2016 (even without a second round of pleadings). It noted, however, that even if this were not possible, the alternatives of Mr. Herbón (a) appearing to testify or (b) remaining outside of Uruguay until the Tribunal ruled on Claimant’s Application were “far less onerous than the extreme measure of ordering Uruguay to refrain from exercising its sovereign rights.”¹²³

IV. THE TRIBUNAL’S ANALYSIS

107. In order to arrive at this decision, the Tribunal reviewed and considered all the arguments of the Parties and the documents submitted by them in this phase of the proceeding. The fact that the Tribunal does not specifically mention a given argument or reasoning does not mean that it has not considered it. In their submissions, the Parties produced and

¹¹⁹ *Id.*, ¶¶ 61-63.

¹²⁰ *Id.*, ¶ 64.

¹²¹ Resp. Res. Prov. Meas., ¶ 65. As already noted, on 13 December 2016, Respondent informed the Tribunal that Mr. Herbón had not appeared in court on 1 December. Resp. Letter (13 December 2016) at 1.

¹²² Resp. Res. Prov. Meas., ¶ 66.

¹²³ *Id.*, ¶ 67.

cited numerous awards and decisions dealing with matters that they consider relevant to these provisional measures. The Tribunal has considered these documents carefully and may take into account the reasoning and findings of these and other tribunals. However, in coming to a decision on the matter of provisional measures and temporary relief requested by Italba, the Tribunal must perform, and in fact has performed, an independent analysis of the ICSID Convention, the Arbitration Rules, and the particular facts of this case.

A. Legal Framework

108. For the decision on provisional measures, Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules particularly are applicable.

109. Article 47 of the ICSID Convention provides the following:

“Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.”

Rule 39 of the ICSID Arbitration Rules reads as follows:

“(1) At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.

(2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).

(3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.

(4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.

(5) If a party makes a request pursuant to paragraph (1) before the constitution of the Tribunal, the Secretary-General shall, on the application of either party, fix time limits for the parties to present observations on the request, so that the

request and observations may be considered by the Tribunal promptly upon its constitution.

(6) Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests.”

110. Pursuant to Rule 39 (1) of the ICSID Arbitration Rules, the application for provisional measures must include three matters: the rights to be preserved; the measures requested and the circumstances that require such measures.

B. Jurisdiction

111. Before it can recommend provisional measures, the Tribunal must be satisfied that it has *prima facie* jurisdiction over the parties and the dispute submitted to it.
112. In the present case, the Respondent in its Counter-Memorial has raised a jurisdictional objection in relation to the standing of the Claimant to advance a claim in respect of Uruguay’s actions towards the Uruguayan company, Trigosul S.A., which are alleged to be in violation of the BIT.¹²⁴ According to the Respondent, the Claimant has not furnished evidence that it owns Trigosul S.A. and hence cannot prove, even on a *prima facie* basis, that it has an investment in Uruguay for the purposes of the BIT.
113. The Respondent has not requested that its aforementioned jurisdictional objection be dealt with in a preliminary phase of this arbitration in accordance with Article 41 of the ICSID Convention. The Respondent has instead agreed that its jurisdictional objection should be determined at the same time as its defences on the merits, in a final award.
114. In these circumstances, the Tribunal considers that the Respondent has accepted that the Tribunal is vested with the necessary adjudicative powers to conduct this arbitration. Those powers include the power to recommend provisional measures where appropriate, in accordance with Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules. In reaching this conclusion, the Tribunal in no way prejudices the

¹²⁴ *Id.*, ¶¶ 70-74.; Resp. Letter (28 November 2016) at 2 and 3.

merits of the Respondent’s jurisdictional objection, which will be determined by the Tribunal in accordance with the procedure agreed to by the parties.

C. Merits

(1) Italba’s request for Uruguay to end or suspend the investigation

115. The Tribunal considers that Uruguay has the sovereign right and duty to investigate alleged criminal actions that have taken place in its territory, in accordance with the rules and procedures established under the laws of Uruguay. That right is recognised and protected by international law. As stated by the Tribunal in *Churchill v. Indonesia*:

“At the outset, the Tribunal stresses that the right, even the duty, to conduct criminal investigations and prosecutions is a prerogative of any sovereign State.”¹²⁵

116. The Tribunal does not have the power to order or recommend the cessation of a criminal investigation that is being conducted by the relevant organs of Uruguay in relation to an alleged criminal action on its territory. In the words of the Tribunal in *SGS v. Pakistan*: “[w]e cannot enjoin a State from conducting the ordinary processes of criminal, administrative and civil justice within its own territory.”¹²⁶ This conclusion was confirmed by the Tribunal in *Hamester v. Ghana* (“A state may obviously exercise its sovereign powers to investigate and prosecute criminal actions.”¹²⁷) and 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.”)¹²⁸ Besides the above, there is no evidence on the

¹²⁵ *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), ¶ 72.

¹²⁶ *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), ¶ 36.

¹²⁷ *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award (18 June 2010), ¶ 297.

¹²⁸ *Teinver S.A. et al v. the Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Provisional Measures (8 April 2016), ¶ 190.

record to support Claimant’s contention that the criminal investigation in the present case has been brought in bad faith by the Uruguan authorities.

117. Claimant maintains that the investigation will: “(a) thwart Italba’s ability to proceed with this arbitration by incarcerating its principals and chilling assistance from relevant witnesses; (b) aggravate the *status quo*; and (c) usurp the functions of this Tribunal.”¹²⁹ On the basis of its present understanding of the matter based upon the totality of the submissions that it has received, the Tribunal is not persuaded that there is, as yet, substantive and compelling evidence of a serious risk that Claimant’s rights will suffer irreparable harm as a result of the Investigation or that the integrity of these arbitration proceedings will be compromised.

118. Furthermore, the Tribunal is satisfied that its functions will not be usurped by the Investigation. Respondent has accepted, as it must, that the Tribunal is in no way bound by any finding ultimately made by the Uruguayan courts in relation to the authenticity or otherwise of the documents in question.¹³⁰ The Tribunal does not consider that the Investigation will “aggravate the *status quo*” in any relevant sense. As noted above, Uruguay has the right to investigate alleged criminal conduct in its territory. There can be no legitimate expectation on the part of Claimant that the prosecution of an ICSID arbitration against Uruguay confers a blanket immunity upon its principals and witnesses from a criminal investigation in Uruguay.

119. In relation to Claimant’s ability to present and prove its case in this arbitration, Respondent has given the following undertakings:

- a) Uruguay’s “investigation of the apparently forged signatures and fraudulent documents ... will not prevent either Dr. Alberelli or Mr. Herbón from participating in the preparation or presentation of the remainder of Claimant’s case.”;
- b) “Uruguay will honor its commitment to respect Claimant’s rights in this arbitration, including its rights to gather evidence in Uruguay to present to this Tribunal ...”; and

¹²⁹ Cl. App. Prov. Meas., ¶¶ 1 and 5.

¹³⁰ Resp. Res. Prov. Meas., ¶ 24.

c) "... Uruguay will not take any action that will impede the witnesses, Mr. Herbón and Dr. Alberelli, from attending the scheduled hearings and freely offering their testimony".

120. Claimant's application is based on the anticipated consequences of the investigation. It has filed no evidence that Dr. Alberelli's and Mr. Herbón's participation in this proceeding has been affected by such the investigation to date. Under the present circumstances, the Tribunal must accept that Uruguay's commitment to respect Claimant's rights in this arbitration has been made in good faith and will be adhered to.

121. For the above reasons, the Tribunal rejects Claimant's Application for Provisional Measures to end or to suspend the Investigation.

(2) Temporary Relief

122. It will be recalled that Mr. Herbón was summoned to appear on 1 December 2016 before the Criminal Court conducting the investigation. Claimant maintained that: "By the time of that hearing or shortly thereafter, he will be subject to indictment, arrest and pre-trial detention..."¹³¹

123. To avoid that possibility, on 10 November 2016, Claimant requested the Tribunal to "issue temporary relief with immediate effect, ordering Uruguay to suspend the Criminal prosecution of Dr. Alberelli and Mr. Herbón until such time as this Tribunal has rendered its decision regarding the provisional measures requested by Italba."¹³²

124. It was Respondent's position that: "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."¹³³

¹³¹ Cl. App. Prov. Meas., ¶ 43.

¹³² *Id.*, ¶ 44.

¹³³ Resp. Res. Prov. Meas., ¶ 66.

125. The Tribunal has now been fully briefed on the Claimant's Application for Provisional Measures and has decided to reject this Application. Accordingly, the Tribunal need not decide on the Claimant's request for temporary relief.

V. DECISION

126. For the above reasons, the Arbitral Tribunal unanimously decides the following:

- 1) The Application for Provisional Measures and Temporary Relief filed by Italba Corporation is rejected.
- 2) The Parties are reminded of their duty to act in good faith during this proceeding and to refrain from taking any action that could affect the integrity of the arbitration.
- 3) To reserve to the final award or decision the matter of the costs of the procedure related to Claimant's Application.

John Beechey CBE
Arbitrator
Date: February 15, 2017

Zachary Douglas, Q.C.
Arbitrator
Date: February 15, 2017

Rodrigo Oreamuno
President
Date: February 15, 2017