

**INTERNATIONAL CENTRE FOR SETTLEMENT OF
INVESTMENT DISPUTES**

ITALBA CORPORATION,

Claimant,

v.

THE ORIENTAL REPUBLIC OF URUGUAY,

Respondent.

ICSID Case No. ARB/16/9

**CLAIMANT'S REPLY IN FURTHER SUPPORT OF
ITS APPLICATION FOR PROVISIONAL MEASURES
AND TEMPORARY RELIEF**

November 24, 2016

HUGHES HUBBARD & REED LLP

One Battery Park Plaza
New York, NY 10004
United States of America

TABLE OF CONTENTS

| | Page |
|---|-------------|
| I. INTRODUCTION | 1 |
| II. PROVISIONAL MEASURES ARE NECESSARY TO PRESERVE THE <i>STATUS QUO</i> IN THE ARBITRATION AND PREVENT IRREPARABLE HARM TO ITALBA. | 5 |
| A. The Indictment And Imprisonment Of Italba’s Key Witnesses Would Severely Impair Italba’s Right To Prepare And Present Its Case In This Arbitration. | 5 |
| B. There Is An Urgent Need For Provisional Relief To Prevent The Indictment And Incarceration Of One Of Italba’s Key Witnesses. | 10 |
| C. A Suspension Of The Criminal Proceedings Is Proportionate..... | 10 |
| D. Tribunals Have Ordered Provisional Relief In The Circumstances Present Here..... | 12 |
| E. Although A Finding of Bad Faith Is Not Required For Provisional Measures, There Is Evidence That Uruguay’s Criminal Prosecution of Italba’s Key Witnesses Is Politically Motivated And/Or Influenced..... | 15 |
| III. THIS TRIBUNAL HAS <i>PRIMA FACIE</i> JURISDICTION TO GRANT PROVISIONAL MEASURES. | 17 |

TABLE OF AUTHORITIES

| | Page(s) |
|---|----------------|
| Cases | |
| <i>Burlington Resources Inc. v. Republic of Ecuador</i> , ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente’s Request for Provisional Measures (June 29, 2009) | 11 |
| <i>Caratube International Oil Company LLP v. Republic of Kazakhstan</i> , ICSID Case No. ARB/08/12, Decision Regarding Claimant’s Application for Provisional Measures (July 31, 2009) | 13, 14 |
| <i>Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia</i> , Procedural Order No. 14 on Provisional Measures, ICSID Case No. ARB/12/14 and 12/40 (Dec. 22, 2014) | 11, 12 |
| <i>Convial Callao S.A. y CCI - Compañía de Concesiones de Infraestructura S.A. v. República del Perú</i> , ICSID Case No. ARB/10/2, Decisión Sobre Solicitud De Medidas Provisionales (Feb. 22, 2011) | 12 |
| <i>Hydro S.r.l. and others v. Republic of Albania</i> , ICSID Case No. ARB/15/28, Order on Provisional Measures (Mar. 3, 2016) | 11, 12, 15, 17 |
| <i>Lao Holdings N.V. v. The Lao People’s Democratic Republic</i> , ICSID Case No. ARB(AF)/12/6, Ruling on Motion to Amend the Provisional Measures Order (May 30, 2014) | 11, 12 |
| <i>Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)</i> , ICSID Case No. ARB/08/6, Decision on Provisional Measures (May 8, 2009) | 11 |
| <i>Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia</i> , ICSID Case No. ARB/06/2, Decision on Provisional Measures (Feb. 26, 2010) .. | 10, 11, 12, 17 |
| <i>Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. and The Argentine Republic</i> , Decision on Provisional Measures, ICSID Case No. ARB/09/1 (Apr. 8, 2016) | 13 |
| <i>Tokios Tokelés v. Ukraine</i> , ICSID Case No. ARB/02/18, Order No. 3 (Jan. 18, 2005) | 13 |
| Statutes and Rules | |
| Uruguay Criminal Procedural Code, Article 112 | 6 |
| Uruguay Criminal Procedural Code, Article 113 | 6 |
| Uruguay Criminal Procedural Code, Article 126 | 6, 7 |

TABLE OF AUTHORITIES

(Continued)

| | Page(s) |
|---|----------------|
| Uruguay Criminal Procedural Code, Article 69 | 7 |
| Miscellaneous | |
| <i>Citación del Ministerio Del Interior Dirección General De Información E Inteligencia Policial División Operativa (Oct. 21, 2016)</i> | 6 |
| Diego Camano Viera, <i>Prisión Preventiva y Estandádares Internacionales</i> , in Raúl Ronzoni (ed.), <i>Reforma al Sistema Penal y Carcelario en Uruguay</i> , 2008 | 8 |
| <i>Informe de Actuación y Evaluación del Sistema Penitenciario Nacional</i> , 2013 | 8 |
| <i>Report on the Use of Pretrial Detention in the Americas</i> , OEA/Ser.L/V/II. Doc. 46/13 (Dec. 30, 2013) | 8 |
| Richard M. Aborn y Ashley D. Cannon, <i>Prisiones: encerrados sin sentencia</i> , <i>Américas Quarterly</i> , Edición de invierno de 2013..... | 8 |
| United Nations, Special Rapporteur on Torture and other Cruel, <i>Inhuman or Degrading Treatment or Punishment</i> , <i>Report of the Mission to Uruguay</i> , A/HRC/13/39/Add.2, adopted on Dec. 21, 2009 | 8 |

1. Italba Corporation (*Italba*) hereby submits its Reply in further support of its Application for Provisional Measures and Temporary Relief dated November 10, 2016 (the *Application*), and in response to the Response of the Oriental Republic of Uruguay (*Uruguay*) to the Application dated November 21, 2016 (the *Opposition*). The provisional measures Italba requests are needed on an urgent basis to suspend the criminal prosecution of Italba's principals and to allow Italba to pursue its claims in this arbitration following Uruguay's unlawful expropriation of Italba's investments in Uruguay.

I. INTRODUCTION

2. On October 24, 2016, Luis Herbon, one of Italba's key witnesses and a Uruguayan national, received a summons directing him to appear in Uruguayan criminal court, with counsel, to answer questions from the public prosecutor. Mr. Herbon was unable to attend the hearing on the date set forth in the summons, October 28, 2016, because he had pre-existing plans to travel outside of Uruguay for business. The hearing was therefore rescheduled for December 1, 2016. In order to reschedule the hearing, Mr. Herbon retained counsel in Montevideo who provided him with information concerning the ongoing criminal investigation to which the summons related. Mr. Herbon has shared that information with Italba because the investigation also concerns Dr. Gustavo Alberelli, Italba's President and CEO, and arises out of and relates to this arbitration.

3. Because the summons directed Mr. Herbon to appear in court with counsel, Italba immediately understood that he was not simply wanted for questioning, as Uruguay now claims, but was the target of a criminal investigation. Furthermore, it is impossible to rule out the likelihood, notwithstanding Uruguay's claims to the contrary, that Mr. Herbon would be subject to indictment and pre-trial detention in Uruguay after he gives testimony on December 1. Pre-trial detention is the norm in Uruguay in cases, like this one, where the allegation is fraud. If, as Uruguay now consistently argues, its judiciary is independent, there

is no way that the Uruguayan executive can guarantee that Mr. Herbon will not be subject to pre-trial detention, which could last as long as two years, if he travels to Montevideo and gives testimony on December 1.

4. The incarceration of one of its key witnesses would devastate Italba's ability to prosecute this arbitration and respond to the allegations anticipated in Uruguay's Counter-Memorial, due to be received on January 16, 2017. As a result, Italba asked Uruguay to suspend the criminal proceedings until the close of this arbitration. When it refused, Italba asked this Tribunal to issue an order of provisional measures, directing Uruguay to suspend the criminal proceedings until after the conclusion of this arbitration. Such an order would be necessary to maintain the *status quo* in this arbitration and prevent irreparable harm to Italba.

5. In response, Uruguay has argued that provisional measures are unwarranted for three reasons: (a) Dr. Alberelli and Mr. Herbon are wanted only for questioning and are not the targets of a criminal prosecution — a representation that is flatly contradicted by the summons sent to Mr. Herbon, the decree of the criminal court, and the documentation Uruguay's Secretary of the Presidency submitted to the state prosecutor; (b) even if Dr. Alberelli and Mr. Herbon do end up being the target of a criminal prosecution, Uruguay can guarantee that it will not affect their ability to prepare for and participate in the arbitration — an empty promise flatly contradicted by Uruguay's prior representation that its judiciary is independent and cannot be controlled by the executive branch; and (c) this tribunal should not enjoin this criminal prosecution because it was brought in good faith, even though none of the cases the parties cite require a showing of bad faith to support an order of provisional measures. Uruguay also alleges that Italba has not established jurisdiction in this arbitration and, therefore, is not entitled to seek provisional measures — but Italba has made a *prima*

facie showing of jurisdiction, which was sufficiently clear to persuade Uruguay to elect not to seek bifurcation of this arbitration.

6. As detailed below, Uruguay's claims concerning the nature of the criminal investigation are incorrect. Moreover, facts obtained from the criminal court after Italba submitted its original request for provisional measures to this Tribunal have only underscored the urgent need for provisional relief because (a) the criminal investigation relating to Dr. Alberelli and Mr. Herbon bears all of the hallmarks of a political prosecution; and (b) the Uruguayan government has been involved in an effort to cajole and intimidate witnesses with any knowledge of this arbitration not to submit statements on Italba's behalf.

7. In particular, to date, Italba has learned the following about the investigation:

- a) **The criminal investigation has a political dimension:** The investigation was initiated by Dr. Miguel Angel Toma, the Secretary of the Presidency of Uruguay. Dr. Toma is apparently involved in the defense of Uruguay in this arbitration, as a representative of the President, and has been actively involved in the recruitment of witnesses for Uruguay. It was Dr. Toma who called Dr. Fernando Garcia directly to question him about the authenticity of documents that Italba submitted with its Memorial. Dr. Toma then sent a letter to the state prosecutor containing information he had obtained in the context of his investigation in relation to the arbitration and expressed an opinion, from the office of the Secretary of the President, that he believed Dr. Alberelli and Mr. Herbon had engaged in criminal activity — namely, the submission of forged documents in this arbitration for the purpose of embarrassing Uruguay and defrauding this Tribunal. That letter to the prosecutor, expressing the opinion of the President's office on the nature of the conduct at issue, constitutes a *per se* effort to politicize the investigation and influence the prosecution. In addition, the prosecutor took the extraordinary step of asking the court that the case be investigated with the direct and personal cooperation of the National Director of Intelligence.
- b) **The criminal investigation, as it relates to Mr. Herbon, alleges criminal conduct in this arbitration:** The information Dr. Toma provided to the prosecutor concerned a claim by Dr. Garcia that a contract submitted in this arbitration did not bear his signature. *Neither Dr. Garcia nor any other witness questioned to date has alleged that either Dr. Alberelli or Mr. Herbon forged Dr. Garcia's signature.* However, contrary to Uruguay's representations, Dr. Alberelli and Mr. Herbon are not wanted purely for

questioning concerning the possible source of the allegedly forged signature, but are being treated as criminal targets of the investigation based on Dr. Toma's accusation that the forged document was submitted *in this arbitration* for the purpose of defrauding *this Tribunal* and embarrassing Uruguay. Thus, Uruguay's investigation clearly arises out of and relates to conduct that is within the jurisdiction and competence of this Tribunal.

- c) **If Mr. Herbon appears in court on December 1, 2016, it is impossible for Uruguay to guarantee that he will not be placed in custody until trial, thereby making it impossible for him to participate properly in the preparation of Italba's case in this arbitration:** Under Uruguayan criminal law, where a suspect has been accused of fraud, pre-trial detention is the norm. Although it is possible that the judge in this case would not order pre-trial detention, that decision would be solely within the discretion of the court. Uruguay has repeatedly stated that it has no power to control the actions of its allegedly independent judiciary. Therefore, without an order of provisional measures, there is a significant possibility that Mr. Herbon will be unavailable to Italba except in the most cumbersome and unhelpful circumstances, and Uruguay will disclaim responsibility for the situation because it was due to the decisions of an independent judiciary.
- d) **Dr. Toma has been actively involved in efforts to stop witnesses from supporting Italba and has caused such witnesses to fear for their ability to freely operate in Uruguay without adverse legal consequences if they do not agree to his demands:** As set forth in the attached witness statement from Dr. Alberelli, Dr. Toma has contacted individuals and advised them that it would not be in their best interest to submit testimony in support of Italba in this arbitration. Italba cannot reveal the identity of any such individuals at this time; however, the information that Italba has received belies Uruguay's repeated assertions in its Opposition that there is no bad faith element to the criminal investigation at issue here.
- e) **The criminal prosecution initiated by Uruguay is not urgent because the documents in question were submitted to Uruguay in court proceedings dating back to 2011, without any action having been taken:** In opposing the request for a stay of the criminal proceedings currently underway, Uruguay stresses the urgent nature of its obligation to investigate criminal conduct. However, Uruguay fails to mention that, in 2011, Trigosul S.A. (*Trigosul*), Italba's subsidiary, submitted in court proceedings against the Uruguayan government the same documents that are now the subject of the criminal investigation. Tellingly, Uruguay took no action in this regard until the dispute ripened into an arbitration under the Treaty Between the United States of America and The Oriental Republic of Uruguay Concerning the Encouragement And Reciprocal Protection of Investment (the *Treaty*). This fact both underscores the political nature of the current prosecution and undermines any sense of urgency in respect of that prosecution.

8. Italba does not seek to quash the criminal prosecution initiated by Uruguay. Italba seeks only a temporary stay of the prosecution until the end of the arbitration because the continuation of the prosecution at this time threatens to destroy Italba's ability to prepare and present its case in this arbitration and would fundamentally undermine the ability of this Tribunal to hear Italba's claims. A hearing date has already been set in this arbitration, and it is likely that an award will be rendered soon thereafter. Granting Italba's request will not harm Uruguay's ability to eventually investigate the crimes it alleges may have been committed, but would preserve Italba's right to prosecute its claims under the Treaty. As a result, the request should be granted.

II. PROVISIONAL MEASURES ARE NECESSARY TO PRESERVE THE *STATUS QUO* IN THE ARBITRATION AND PREVENT IRREPARABLE HARM TO ITALBA.

9. Uruguay agrees that provisional measures are warranted where (a) a State action would irreparably impair a claimant's rights, (b) provisional measures are urgently required to prevent such impairment, and (c) those measures are proportionate.¹ Italba's request for provisional measures satisfies each of those requirements.

A. The Indictment And Imprisonment Of Italba's Key Witnesses Would Severely Impair Italba's Right To Prepare And Present Its Case In This Arbitration.

10. In its Opposition, Uruguay generously concedes that Italba "has a right to freely present its case before this Tribunal," but argues that criminal prosecution of Italba's key witnesses in this arbitration would not impair that right because "a respondent State does not

1. Response of the Oriental Republic of Uruguay to the Claimant's Application, dated November 21, 2016 (*Opposition*) at ¶¶ 35-37.

impair the rights of a claimant investor by the mere fact of calling its witnesses . . . for questioning as part of a criminal investigation of offenses committed in its own territory.”²

11. Uruguay’s statement that Mr. Herbon and Dr. Alberelli are being called solely as witnesses in the criminal investigation misrepresents the nature of that investigation. Mr. Herbon and Dr. Alberelli are not simply *witnesses* in a criminal investigation — they are the *targets* of that investigation. Mr. Herbon’s criminal file³ contains a decree dated October 21, 2016 from the Uruguayan criminal court indicating that Dr. Alberelli and Mr. Herbon are summoned to appear before the court as “*indagados*,” that is, persons placed under investigation.⁴ The summons that Mr. Herbon received⁵ also indicates as much: it recommends that Mr. Herbon appear with counsel, a direction that appears only in the summonses of individuals who are the subject of a criminal investigation.⁶ Mr. Herbon’s criminal file further contains a letter from the Secretary of the Presidency of Uruguay, Dr. Miguel Angel Toma, to the State Prosecutor, indicating Dr. Toma’s belief that Mr. Herbon committed criminal offenses.⁷ Uruguay’s letter to this Tribunal on November 8, 2016 likewise indicates that Dr. Toma initiated the criminal investigation against Mr. Herbon and

2. *Id.* at ¶¶ 41, 43.

3. Mr. Herbon disclosed the contents of his criminal file to Italba for the purpose of coordinating his defense in the criminal proceeding with Italba’s prosecution of its claims in this arbitration.

4. Criminal Complaint submitted with the Fiscalía General De La Nación (Oct. 19, 2016) (C-139) at 3 (“Cítese para igual día y hora *en calidad de indagados*, asistidos por Defensor y bajo apercibimiento de conducción por la fuerza pública a Alicia FERNANDEZ, a Luis HERBON y a Gustavo ALBERELLI”) (emphasis added).

5. Because Dr. Alberelli resides in the United States and has not recently been in Uruguay to receive his summons, he has yet to be served with a summons to appear in connection with the criminal investigation.

6. *Citación del Ministerio Del Interior Dirección General De Información E Inteligencia Policial División Operativa* (Oct. 21, 2016) (C-140). Under Articles 112, 113, and 126 of the Uruguayan Code of Criminal Procedure, a person placed under investigation (*indagado*) is required to make a declaration to the court in the presence and with the assistance of legal counsel (C-143).

7. Opposition at ¶ 13.

Dr. Alberelli because he “had reason to believe that [they] might have committed the crime of forgery or fraud.”⁸ Following the rescheduling of Mr. Herbon’s hearing in the criminal investigation, the Uruguayan criminal court issued an order deeming Mr. Herbon a flight risk and requiring that the police escort him to his criminal hearing.

12. It is therefore clear that Mr. Herbon and Dr. Alberelli are the subjects of Uruguay’s criminal investigation. As such, they do not face the mere prospect of having to testify in criminal court — they stand a very real risk of being indicted and imprisoned while they await trial.

13. The urgency of Italba’s request for provisional measures and temporary relief stems from the fact that Mr. Herbon’s criminal hearing is scheduled for December 1, 2016, only a few days away. Uruguay suggests that there will be no imminent harm to Italba as a result of that hearing because Mr. Herbon could simply choose not to go and instead “remain out of the country,” such that the hearing would “necessarily be further adjourned.”⁹ That suggestion is disingenuous at best. The truth is that Mr. Herbon could face serious consequences if he does not appear at his hearing. For example, the Uruguayan criminal court could enter an order that Mr. Herbon be detained immediately upon his return to Uruguay and kept in detention until he stands trial.¹⁰ The court could also request the assistance of Interpol in arresting Mr. Herbon and returning him to Uruguay. If the judiciary in Uruguay is indeed

8. Letter from Uruguay to the Tribunal (Nov. 8, 2016) (C-137) at 3.

9. Opposition at ¶ 13.

10. Uruguay Code of Criminal Procedure, Arts. 69 & 126 (C-143).

as “independent” as Uruguay professes,¹¹ Uruguay cannot guarantee that Mr. Herbon would not suffer such consequences.

14. Mr. Herbon’s other option — to attend his hearing on December 1 as scheduled — also carries a significant risk. Following that hearing, Mr. Herbon could face immediate indictment and pre-trial detention. Indeed, pre-trial detention is the *norm* for individuals charged with fraud.¹²

15. Uruguay’s Opposition fails even to mention the substantial risk that Mr. Herbon will be imprisoned following his hearing on December 1. In light of that risk, Uruguay’s promise that “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”

11. Opposition at ¶ 4.

12. *See id.* at ¶¶ 3, 13, 16 n.19, 17. While Uruguay’s Opposition touts its reputation as a country with an independent judiciary and rule of law, it conveniently fails to mention its abysmal record with pre-trial detention. In Uruguay, pre-trial detention is “a general rule rather than an exception.” Diego Camano Viera, *Prisión Preventiva y Estandádares Internacionales*, in Raúl Ronzoni (ed.), *Reforma al Sistema Penal y Carcelario en Uruguay*, 2008 (C-144) at 127. In December 2013, the Inter-American Commission on Human Rights found that 65% of Uruguay’s detainees were pre-trial detainees, due to the “deep-rooted culture among justice operators of favoring the use of pretrial detention.” *Report on the Use of Pretrial Detention in the Americas*, OEA/Ser.L/V/II. Doc. 46/13 (Dec. 30, 2013) (C-145) at ¶ 71; *see also* Richard M. Aborn and Ashley D. Cannon, *Prisons: In Jail, But Not Sentenced*, *Americas Quarterly*, Winter Edition (C-146) (available at <http://www.americasquarterly.org/content/prisiones-encerrados-sin-sentencia>) (Uruguay is the sixth Latin American nation in pretrial incarcerations) (last visited Nov. 21, 2016); *see also* United Nations, Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *Report of the Mission to Uruguay*, A/HRC/13/39/Add.2, adopted on Dec. 21, 2009 (C-147) at ¶ 80. It is normal practice for detainees to remain in pre-trial detention from indictment through trial and until the end of any sentence they receive. Diego Camano Viera, *Prisión Preventiva y Estandádares Internacionales*, in Raúl Ronzoni (ed.), *Reforma al Sistema Penal y Carcelario en Uruguay*, 2008 (C-144) at 127 (“Even though pretrial detention has been interpreted by national courts as obligatory only for crimes carrying a sentence of more than two years, the imposition of pretrial detention is at the judge’s discretion. In addition, the law does not provide for a maximum period of pretrial detention, but only refers to a ‘reasonable time,’ meaning in practice that detainees may remain in pretrial detention until they complete the sentence foreseen in the legislation for the crime of which they are accused.”). Uruguay itself has recognized that pretrial incarceration is used excessively in its legal system and “constitutes a premature, illegitimate and unjustifiable application of the punishment from any point of view.” *Comisionado Parlamentario, Informe de Actuación y Evaluación del Sistema Penitenciario Nacional*, 2013 (C-148) at 4 (“La generalizada prevención con prisión configura un adelanto de la pena, ilegítimo e injustificable desde cualquier punto de vista.”). The Uruguay National Institute for Human Rights has called the percentage of people preemptively incarcerated in Uruguay “alarming.” United Nations, Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *Report of the Mission to Uruguay*, A/HRC/13/39/Add.2, adopted on December 21, 2009. (C-147) at ¶ 79.

is empty.¹³ 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 collect relevant documents, or travel in and out of the country at his discretion for meetings or hearings. As a result, Italba's ability to access one of its key witnesses and the documents of that witness would be severely impaired, which would have a serious detrimental effect on Italba's ability to prepare and present its case in this arbitration.

16. In addition, given the significant risk of indictment and imprisonment that Dr. Alberelli would face if he were to return to Uruguay and appear before the criminal court, Dr. Alberelli cannot travel to Uruguay while the criminal proceedings are pending. That means, of course, that Dr. Alberelli cannot obtain any relevant documents that remain in Uruguay or meet with any potential witnesses in Uruguay.

17. Finally, the criminal proceedings in Uruguay have already resulted in the "chilling" of potential witnesses who might have testified in the arbitration. In particular, Dr. Alberelli attempted to reach out to several witnesses in relation to this matter and the arbitration.¹⁴ None of the witnesses he contacted were willing to become involved in this arbitration. In addition, one witness expressed to Dr. Alberelli that he is not willing to participate in the arbitration proceedings because he is afraid that the government will retaliate against him — or even put him in jail — if he supports Italba's claims.¹⁵ We understand that

13. Opposition ¶ 54.

14. Witness Statement of Gustavo Alberelli in Support of Application (Nov. 24, 2016) (*Alberelli Witness Stmt. For Application*) ¶ 4.

15. *Id.* at ¶ 5.

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.¹⁶

18. Accordingly, the notion in Uruguay's Opposition that the criminal prosecution of Italba's key witnesses will not affect its ability to prepare and present its case in this arbitration is simply untrue. Italba has already suffered and will continue to suffer serious prejudice if the Tribunal allows the criminal proceedings to continue.

B. There Is An Urgent Need For Provisional Relief To Prevent The Indictment And Incarceration Of One Of Italba's Key Witnesses.

19. As demonstrated above, Mr. Herbon faces a serious risk of indictment and incarceration immediately following his hearing on December 1, and his incarceration while he awaits trial would severely impair Italba's ability to prosecute its claims in this arbitration. With December 1 only a week away, Italba urgently needs relief to ensure that its ability to access one of its key witnesses and his documents is not compromised.

C. A Suspension Of The Criminal Proceedings Is Proportionate.

20. Uruguay asserts that suspension of the criminal proceedings against Italba's witnesses would be "grossly disproportionate" to the harm that Italba would suffer if the criminal proceedings were allowed to continue.¹⁷ That is incorrect. A stay of the criminal proceedings would not infringe upon Uruguay's sovereign right to conduct criminal investigations — it would only defer continuation of the proceedings to a later date. Most importantly, any 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. Thus, suspension of the criminal proceedings would be

16. *Id.*

17. Opposition at ¶ 58.

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

21. The tribunal in *Quiborax v. Bolivia* reached the same conclusion, ultimately ordering a stay of criminal proceedings against the claimant because “a mere stay of the criminal proceedings would not affect Respondent’s sovereignty nor require conduct in violation of national law. . . . [and] the harm that such a stay would cause to Bolivia is proportionately less than the harm caused to Claimants if the criminal proceedings were to continue their course.”¹⁸

22. The tribunals in *Hydro v. Albania* and *Lao Holdings v. Lao People’s Democratic Republic* similarly concluded that the State’s sovereign right to conduct criminal investigations had to give way to the preservation of the claimant’s rights and *status quo* in the arbitration where, as here, the harm to the claimant would have resulted from the incarceration of the claimants’ key witnesses.¹⁹

18. *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures (Feb. 26, 2010), (CL-090), ¶ 164.

19. *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Order on Provisional Measures (Mar. 3, 2016) (CL-089), ¶¶ 3.40-3.41 (“The effect of the provisional measures proposed would affect the Respondent’s ability to proceed with the criminal prosecution in the immediate future. However a stay would not put an end to the criminal proceedings. They would be delayed but not terminated.”); *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 (May 30, 2014) (CL-091), ¶ 26 (“there are however a number of exceptional circumstances in this case which lead the Tribunal to depart from the general rule entitling a State to enforce on the national level its criminal laws. In particular, the Tribunal is satisfied on the evidence that 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, which, in the result, will undermine the integrity of the arbitral process.”); see also *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente’s Request for Provisional Measures (June 29, 2009) (CL-097) at ¶ 66 (“In making this finding, the Tribunal understands Ecuador’s arguments about its duties to enforce its municipal law and in particular Law 42. Yet, the ICSID Convention allows an ICSID tribunal to issue provisional measures under the conditions of Article 47. Hence, by ratifying the ICSID Convention, Ecuador has accepted that an ICSID tribunal may order measures on a provisional basis, even in a situation which may entail some interference with sovereign powers and enforcement duties.”); *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Provisional Measures (May 8, 2009) (CL-099), ¶ 50 (“While the enactment of a law

23. In its Opposition, Uruguay quotes a specific paragraph in *Churchill Mining v. Indonesia* to argue that the tribunal “had no difficulty determining” that the balance of harms favored the respondent.²⁰ However, the paragraph quoted by Uruguay is *not* the tribunal’s holding — it is the tribunal’s summary of the position of the *respondent*. In fact, nowhere in *Churchill* does the tribunal even discuss the balance of harms. Uruguay’s characterization of the holding in *Churchill* is therefore misleading.

24. Furthermore, while Uruguay repeatedly invokes its sovereign right to prosecute crimes in its territory, the criminal offense that is at the heart of the proceedings against Italba’s witnesses is alleged fraud — not on Uruguay, but on the Tribunal, because the allegedly forged documents were submitted to the Tribunal. Whether there has been a fraud *on the Tribunal* is clearly an issue for the Tribunal to decide.

D. Tribunals Have Ordered Provisional Relief In The Circumstances Present Here.

25. As set forth in Italba’s Application, in order to preserve the integrity of the arbitral process, tribunals will enjoin a State from pursuing criminal prosecution of a claimant’s key witnesses.²¹

26. The cases that Uruguay relies on in its Opposition are easily distinguishable from the facts here. In *Churchill Mining v. Indonesia*, the tribunal’s decision not to recommend provisional measures relied on the fact that the claimant’s key witness was merely

by a sovereign State, upheld as constitutional in that State, is a matter of importance, it cannot be conclusive or preclude the Tribunal from exercise of its power to grant provisional measures.”).

20 Opposition at ¶ 59 (citing *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, Procedural Order No. 14 on Provisional Measures, ICSID Case No. ARB/12/14 and 12/40 (Dec. 22, 2014) (RL-015), ¶ 59).

21 Application at ¶¶ 22-27 (discussing *Hydro v. Albania*, Order on Provisional Measures (CL-089) at ¶¶ 3.18-3.20; *Quiborax v. Bolivia*, Decision on Provisional Measures (CL-090) at ¶¶ 139-48; *Lao Holdings v. Laos*, Ruling On Motion To Amend The Provisional Measures Order (CL-091) at ¶¶ 31, 37, 39, 42); *see also Conival Callao S.A. y CCI - Compañía de Concesiones de Infraestructura S.A. v. República del Perú*, ICSID Case No. ARB/10/2, Decisión Sobre Solicitud De Medidas Provisionales (Feb. 22, 2011) (CL-101), p. 42.

a witness, and not a suspect, in the criminal investigations.²² Even so, the tribunal stated that its “assessment could change if . . . access to relevant evidence is effectively barred.”²³ Here, both of Italba’s key witnesses are targets of the criminal investigation, and Italba’s access to relevant evidence in Mr. Herbon’s possession would be barred in the likely event that Mr. Herbon is indicted and imprisoned following his December 1 hearing.

27. In two other cases that Uruguay cites, the tribunals rejected applications for provisional measures based on the significantly different procedural postures of those cases. In *Tokios Tokelés v. Ukraine*, the tribunal denied a request for provisional measures in part because the Ukrainian government had instituted criminal proceedings against the claimant nine months *prior to* the claimant’s initiation of arbitration proceedings. As a result, the claimant could not credibly claim that provisional measures were urgently needed or that they were necessary to preserve the *status quo* as of the time the claimant filed for arbitration.²⁴ *Teinver v. Argentina* presented a similarly “unusual” situation because the request for provisional measures came long after the completion of the merits phase of the arbitration, and the claimant therefore could not demonstrate impairment of its ability to prepare or present its case.²⁵ Unlike *Tokios Tokelés* and *Teinver*, Uruguay began criminal proceedings only a few weeks ago, at an early stage of this arbitration, and Italba immediately requested relief from this tribunal to prevent the irreparable harm to its ability to prepare its case that would result from the indictment and incarceration of one or both of its key witnesses.

22. *Churchill Mining v. Indonesia*, Procedural Order No. 14 on Provisional Measures (**RL-015**) at ¶ 78.

23. *Id.* at ¶ 75.

24. *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 3 (Jan. 18, 2005) (**CL-093**), ¶ 13.

25. *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. and The Argentine Republic*, Decision on Provisional Measures, ICSID Case No. ARB/09/1 (Apr. 8, 2016) (**RL-019**), ¶¶ 163, 191, 228.

28. Uruguay also relies on a misreading of the holding in *Caratube v. Kazakhstan* to suggest that, because Italba seeks only money damages, it has no right in need of protection in this case.²⁶ However, that holding was solely in reference to the impairment of the claimant’s *substantive* — not procedural — rights.²⁷ With respect to such substantive rights, the tribunal observed that further damages caused by “an abuse of the sovereign right of the State in breach of the BIT . . . may be claimed, examined and decided later . . . in the procedure on the merits.”²⁸ The fact that the claimant was seeking money damages and not specific performance was entirely irrelevant to the Tribunal’s finding as to the impairment of the claimant’s procedural rights — the rights that Italba is seeking provisional measures to protect.²⁹

29. As for the impairment of the claimant’s procedural rights, the respondent in *Caratube* had observed that there was no urgency in that case because the measures about which the claimant complained had been going on for months before the claimant made its application for relief.³⁰ In spite of this, the tribunal — after acknowledging assurances made by the respondent’s counsel that it would be “advising [their] clients very clearly to be acting in good faith with respect to this Arbitration”³¹ — found it necessary to “clearly put on record

26. Opposition at ¶ 46.

27. *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision Regarding Claimant’s Application for Provisional Measures (July 31, 2009) (**RL-009**), ¶ 139.

28. *Id.*

29. *Id.*

30. *Id.* at ¶ 62.

31. *Id.* at ¶¶ 115, 118.

the basic procedural duties of the Parties”³² and confirmed that the parties to an ICSID arbitration have “a duty to avoid any unnecessary aggravation of the dispute and harassment of the other party.”³³

E. Although A Finding of Bad Faith Is Not Required For Provisional Measures, There Is Evidence That Uruguay’s Criminal Prosecution of Italba’s Key Witnesses Is Politically Motivated And/Or Influenced.

30. In an attempt to distinguish cases in which tribunals have ordered provisional relief, Uruguay invents a new requirement for the imposition of provisional measures: a finding that the State acted in bad faith.³⁴ There is no such requirement in the case law. Rather, “the fundamental standards that are applicable to a request for provisional measures [are] that such measures are necessary to protect the applicant’s rights, are urgent and are proportionate.”³⁵ As Uruguay concedes elsewhere in its Opposition, the requirements for provisional measures do not include bad faith.³⁶

31. Notwithstanding that bad faith is not a requirement for the imposition of provisional measures, Uruguay’s repeated assertions in its Opposition that the criminal investigation is conducted in good faith without any hint of impropriety compels Italba to point out that there *is* evidence that Uruguay’s criminal investigation against Italba’s two key witnesses in this arbitration is politically motivated or, at the very least, tainted by the

32 *Id.* at ¶ 118.

33 *Id.* at ¶ 120. The *Caratube* tribunal also observed that “under international law no state may rely on its national law as a justification to breach its duties under public international law,” and that the “procedural duties stemming from the ICSID Convention and the reference thereto in the relevant BIT are such — procedural — obligations as part of international law.” *Id.* at ¶ 118.

34 Opposition at ¶¶ 39-40, 42, 45, 52.

35 *Hydro v. Albania*, Order on Provisional Measures (CL-089) at ¶ 3.11.

36 Opposition at ¶¶ 34-37.

significant role that the Office of the President, through the Secretary of the Presidency Dr. Toma, played in the process.

32. *First*, the timing of the investigation is extremely suspicious. Contrary to Uruguay's assertion that it "could not have commenced its investigation any earlier, because it had no knowledge of the existence of the apparently forged documents" until Italba submitted them with its Memorial,³⁷ Uruguay has known about these documents for five years: Italba's Uruguayan subsidiary, Trigosul, attached the allegedly forged Data Transmission and Equipment Loan Agreement as evidence to its October 24, 2011 and March 22, 2012 Petitions for Annulment before the Tribunal de lo Contencioso Administrativo (*TCA*), requesting that the TCA overturn resolutions of the Unidad Reguladora de Servicios de Comunicaciones (*URSEC*) and Uruguay's Ministry of Industry, Energy & Mining (*MIEM*) revoking Trigosul's license to provide wireless data services.³⁸ As the subjects of Trigosul's challenge before the TCA, URSEC and MIEM were actively involved in the TCA proceedings and received copies of all of the evidence. Thus, Uruguay was well aware of the existence of the documents that are now the subject of its criminal prosecution, but these allegations only arose after Italba initiated this more public ICSID arbitration.

33. *Second*, Uruguay admits that the criminal investigation began because, "[u]pon their review of Claimant's Memorial of 16 September 2016, officials in the Office of the President of Uruguay, including Dr. Miguel Angel Toma, Secretary of the Presidency, contacted Dr. Fernando Garcia . . . to inquire about two documents that allegedly bore his

37 *Id.* at ¶ 26 n.24.

38 Petition for Annulment (Oct. 28, 2011) (C-074) at 3; Petition for Annulment (Mar. 22, 2012) (C-075) at 3.

signature.”³⁹ Dr. Toma subsequently sent a letter to the state prosecutor stating his belief that Dr. Alberelli and Mr. Herbon may have committed criminal offenses.⁴⁰ In response, the prosecutor asked the court that the case be investigated with the direct and personal cooperation of the National Director of Intelligence. 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. Leaving aside the Office of the President’s apparent attempt to influence the state prosecutor, the coercive effect of a high-ranking official contacting a witness directly to solicit information for use in a criminal prosecution cannot be overlooked — it has *per se* tainted the investigation.

III. THIS TRIBUNAL HAS *PRIMA FACIE* JURISDICTION TO GRANT PROVISIONAL MEASURES.

34. Uruguay argues that this Tribunal lacks *prima facie* jurisdiction to order provisional measures because Italba has not offered evidence demonstrating that it owns Trigosl.⁴¹ This argument is meritless for two reasons.

35. *First*, there is no doctrine of jurisdictional restraint with respect to applications for provisional measures, and tribunals have granted requests for such measures even where they have yet to decide on jurisdictional objections raised by respondents.⁴² *Second*, in any event, Italba has already demonstrated in its Memorial, its witness statements, and in the evidence submitted therewith, that the Tribunal has *prima facie* jurisdiction over this

39. Letter from Uruguay to the Tribunal (Nov. 8, 2016) (C-137) at 2.

40. Opposition at ¶ 13.

41. *Id.* at ¶¶ 12, 70-74.

42. *See, e.g., Hydro v. Albania*, Order on Provisional Measures (CL-089) at ¶ 3.7; *Quiborax v. Bolivia*, Decision on Provisional Measures (CL-090) at ¶ 108.

arbitration, including because Italba is a U.S. national and the owner of its Uruguayan subsidiary, Trigosul.⁴³

36. Thus, the Tribunal has *prima facie* jurisdiction and can grant the relief Italba requests.

DATED: November 24, 2016

Respectfully submitted,

By: 

Alexander A. Yanos
Fara Tabatabai
Pavlos Petrovas
Andreas Baum
Rebeca Mosquera
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, NY 10004
Telephone: (212) 837-6000
Facsimile: (212) 422-4726

alex.yanos@hugheshubbard.com
fara.tabatabai@hugheshubbard.com
pavlos.petrovas@hugheshubbard.com
andreas.baum@hugheshubbard.com
rebeca.mosquera@hugheshubbard.com

43. See Claimant's Memorial ¶¶ 90, 93 n.196; see also generally Claimant's Memorial ¶¶ 85-103.