

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Italba Corporation

v.

Oriental Republic of Uruguay

(ICSID Case No. ARB/16/9)

PROCEDURAL ORDER NO. 4
Decision on Respondent's Document Production Request

Members of the Tribunal

Mr. John Beechey, Arbitrator
Prof. Zachary Douglas, Q.C., Arbitrator
Mr. Rodrigo Oreamuno, President of the Tribunal

Assistant to the President of the Tribunal

Ms. María José Rojas

Secretary of the Tribunal

Ms. Marisa Planells-Valero

May 31, 2017

I. PROCEDURAL BACKGROUND

1. Pursuant to Section 16.5 of Procedural Order No. 1, on March 29, 2017, Uruguay submitted a Redfern Schedule replying to the Claimant's responses and objections to Uruguay's Document Production Request.
2. On April 11, 2017, the Tribunal invited the Parties to try to reach an agreement about the following:
 - “1. Requests No. 64 and 65 of Uruguay's Document Request.
 2. The Confidentiality Agreement proposed by Uruguay, and on the basis of this agreement, as to Requests No. 1, 4, 5, 6, 8, 9, 12, 13, 14, 16, 17, 19, 20, 38, 40, 41, 42, 43, 44, 45, 46, 48, 50, 52, 56, 57, 58, 60, 62, and 66 of Uruguay's Document Request.”
3. On April 18, 2017, the Parties, *inter alia*, informed the Tribunal that they had been unable to reach a confidentiality agreement.
4. On April 24, 2017, the Tribunal noted that, in view of the Parties' communications of April 18, 2017, Uruguay's Document Requests No. 21, 47, 64 and 65 had been satisfied and urged the Parties:
 - “... to try to agree on a confidentiality agreement (not necessarily the one proposed by the Respondent), and (ii) should they are able to agree on such confidentiality agreement, to try to agree on Uruguay's Documents Requests No. 1, 4, 5, 6, 8, 9, 12, 13, 14, 16, 17, 19, 20, 38, 40, 41, 42, 43, 44, 45, 46, 48, 50, 52, 56, 57, 58, 60, 62, and 66. The Parties are invited to inform the Tribunal by May 1, 2017 of the agreement reached or of their respective positions if they are unable to reach agreement.”
5. On May 3, 2017, the Parties informed the Tribunal that they had been unable to reach a confidentiality agreement, proposed their own confidentiality texts, and requested the Tribunal to consider the Parties' respective positions and reach a decision on an appropriate confidentiality agreement. The Parties noted, however, that they had been able to reach an

agreement with regards to the definitions of “Confidential Information”¹ and “Authorized Persons.”² Such definitions are included in this Procedural Order.

II. THE PARTIES’ POSITIONS

6. Italba proposed that all documents produced in this arbitration be treated as confidential and that they may only be used for purposes of this arbitration.³

7. Italba also affirmed that:

“In addition, because Italba is a closely held corporation consisting solely of Gustavo Alberelli and his wife, the usual concerns about confidentiality of private documents are particularly salient here. Documents that Italba produces in this arbitration are necessarily personal to Dr. Alberelli and his wife. As a result, their dissemination to third parties or use for purposes unrelated to this arbitration carries a higher risk of disclosure of personal or private information, including information concerning the couple’s finances or the relationship between husband and wife.”⁴

8. Uruguay stated that: “It is, to say the least, not typical in Investor-State disputes for all documents to be given confidential treatment.”⁵ Respondent also said “Moreover, just as Uruguay entered into a binding commitment under the Uruguay-U.S.A. BIT to subject itself to international arbitration, it also made a corresponding commitment to the United States and [to] Uruguay’s own public to preserve transparency in these proceedings. Article 29 calls for greater transparency in arbitrations resulting from this Treaty, including making documents available to the public and open hearings.”⁶

9. In addition, Uruguay stated: “The Uruguayan Penal Code imposes strict obligations on public officials to report unlawful activity that comes to their attention. Uruguay’s officials cannot agree to ignore these obligations. However, they can and will agree to treat confidential documents as such in all other respects.”⁷

¹ “Confidential” information in Uruguay’s proposed confidentiality agreement and “Highly Confidential” information in Italba’s proposed confidentiality agreement; see Italba’s May 3, 2017 letter, pages 1-2; Uruguay’s May 3, 2017 letter, page 2.

² “Authorized Person” in Uruguay’s proposed confidentiality agreement and “Representatives” in Italba’s proposed confidentiality agreement and; see Italba’s May 3, 2017 letter, pages 1-2; Uruguay’s May 3, 2017 letter, page 2.

³ Italba’s May 3, 2017 letter, page 2.

⁴ Italba’s May 3, 2017 letter, page 3.

⁵ Uruguay’s May 3, 2017 letter; page 2.

⁶ Uruguay’s May 3, 2017 letter; page 2.

⁷ Uruguay’s May 3, 2017 letter; page 3.

III. INTRODUCTION

10. The Tribunal is aware that a company may wish to preserve the confidentiality of certain commercial, technical or other types of information. It also is aware of the need to consider certain personal information as confidential, in order not to harm the owners of this type of information.
11. However, in the Tribunal's view, Article 29 of the Uruguay-U.S.A. BIT, which governs the transparency of arbitration proceedings, defines which documents might be made public, including those listed in Article 29(1) of said BIT.⁸ For that reason, the Tribunal may not order that all the documents filed in these proceedings be considered as confidential or of limited access.
12. Therefore, only those documents that the Tribunal so orders, whether in the Redfern Schedule or in any future procedural order, shall be treated as confidential.

IV. DEFINITIONS

13. "Confidential Information" means any information, document, or material not in the public domain, and any information derived therefrom, designated by a Producing Party as confidential in accordance with this Order, on the grounds that it is:
 - a. so proprietary or competitively sensitive that its public disclosure is likely to cause competitive injury, or material financial loss or gain, to a Party or a third party to which it relates;
 - b. otherwise protected from disclosure under the applicable domestic law of the disputing State party or the laws governing the entity in question; or
 - c. financial, commercial, scientific or technical information supplied by third parties that has been consistently treated as confidential by those third parties, as indicated by the existence of a confidentiality or non-disclosure agreement applicable to such information.
14. "Authorized Persons" means:
 - a. the Tribunal, the Assistant to the President of the Tribunal, the Secretary of the Tribunal and other ICSID staff assigned to the present arbitration;

⁸ Article 29(1) of the Uruguay-US BIT, states as follows: "Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Party and make them available to the public: (a) the notice of intent; (b) the notice of arbitration; (c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 28(2) and (3) and Article 33; (d) minutes or transcripts of hearings of the tribunal, where available; and (e) orders, awards, and decisions of the tribunal."

- b. each Receiving Party's legal counsel and staff for the time being retained for the purpose of representing the Receiving Party in this Arbitration (i.e., for Italba, Hughes Hubbard & Reed LLP,⁹ and for Uruguay, Foley Hoag LLP);
 - c. experts and witnesses retained to assist the Receiving Party in connection with this Arbitration;
 - d. the following employees and officers of Uruguay, who are actively engaged in the defense of this arbitration: Dr. Carlos Gianelli, Mr. Rodolfo Nin Novoa and Dr. Miguel Toma, and the following supporting individuals: Esc. Silvana Sena, Dra. Verónica Duarte, Dra. María Inés Da Rosa, Dra. Sara Ilha, Dra. Marianela Bruno.
 - e. any individuals listed as either a sender, author or recipient of the Confidential Document, provided that any such individual executes an undertaking in the form of **Annex A** annexed hereto, prior to the receipt of the Confidential Information;
 - f. other categories of personnel, which the Tribunal has agreed, after consultation with the Parties, to treat as Authorized Personnel (any individuals falling within the scope of this subparagraph shall execute an undertaking in the form of **Annex A**, annexed hereto).
15. "Producing Party" means a Party to this arbitration or any third party producing documents or any information contained therein in connection with this Arbitration.
16. "Receiving Party" means a Party to this arbitration, including such Party's Authorized Persons, to whom a Producing Party produced documents or any information contained therein in connection with this Arbitration.

V. ORDER

17. For the purpose of the information labeled as confidential, the Tribunal orders the following:
18. The parties shall make good faith efforts to ensure that they do not unnecessarily designate information as confidential under this Order.
19. Each Producing Party shall designate a document as "Confidential" by labeling the upper right corner of each page of every Confidential Document with the words "Confidential," written in red and bold.

⁹ Pursuant to ICSID Arbitration Rule 18(1) and Section 9.1. of Procedural Order No. 1, the law firm Ferrere will be included in the category of "Authorized Persons" following receipt by the Tribunal of a power of attorney from the Claimants authorizing this law firm to act as counsel of record for the Claimants in this case.


20. Each Producing Party producing Confidential Documents shall submit, along with each production of documents, a log listing the documents from that production designated as Confidential Documents as well as a brief description stating the reason for the designation.
21. Unless the designation of a document as Confidential is challenged within 10 days of the document's production and designation, such designation shall be final and permanent.
22. If a Party objects in writing to the other Party's designation of information as Confidential Information within 10 days after the information was submitted, the following procedures shall apply:
 - a. The Parties shall seek to reach agreement on the designation. If the Parties do not reach agreement, then, no later than 10 days after the submitting Party receives the written objection to the designation, the submitting Party may raise the issue in writing with the Tribunal. In the event the submitting Party elects not to raise the issue with the Tribunal, the information in question shall no longer be entitled to confidential treatment.
 - b. The objecting Party shall have 10 days to respond in writing to the submitting Party's presentation to the Tribunal.
 - c. As promptly as possible after the matter is referred to it, the Tribunal shall decide whether the information has been properly designated. While the matter is under consideration by the Tribunal, the information in question shall be entitled to confidential treatment.
23. If the Tribunal decides that the information was not properly designated as confidential, then the information shall not be treated as confidential. The submitting Party shall have the opportunity either to agree to withdraw the confidential information or resubmit the documents, as specified in Article 29 of the Uruguay-US BIT.
24. Material inadvertently produced without the designation of "Confidential" may be so designated subsequent to its production if the Producing Party provides replacement material bearing appropriate designations and notifies the Receiving Party within 7 days of the submission of the non-designated information.
25. The inadvertent production of any privileged or otherwise protected document or other material shall not be deemed a waiver or impairment of any claim of privilege or protection, including, but not limited to, the attorney-client privilege and the protection afforded to work-product materials, or the subject matter thereof. On receiving notice from the Producing Party that materials have been inadvertently produced pursuant to the terms in paragraph 24, the Receiving Party shall promptly return all such materials to the Producing Party and destroy all copies, extracts or summaries thereof. The return of any inadvertently produced documents is without prejudice to the right to challenge any claim of privilege.

Moreover, the inadvertent production of any such document shall not be deemed a waiver of any privilege.

26. Pleadings containing Confidential Information shall be marked clearly on each page: “Contains Confidential Information.” The Confidential Information shall be identified with double brackets (“[[. . .]]”).
27. If a Party submits a document containing Confidential Information, the submission containing such information shall be made in accordance with the existing pleading deadlines specified by the Tribunal. A redacted version of the submission shall also be made, within 14 days thereafter, and will be marked with the designation “Confidential Information Redacted.”
28. Authorized Persons shall not disclose or make available Confidential Information in whole or in part to any third party, except with the express permission of the Tribunal.
29. Only Authorized Persons of a Receiving Party may have access to, possession, custody or control of, or view, the Confidential Documents produced by the Producing Party.
30. A Receiving Party’s Authorized Persons shall not use, reproduce, transform, or store Confidential Information of the Producing Party or transmit it in any form or by any means whatsoever, except as expressly permitted by this Order.
31. A Receiving Party’s Authorized Persons may only review Confidential Information as part of the Receiving Party’s preparation for this Arbitration. Authorized Persons may print, reproduce, or make a hard or digital copy of Confidential Information only in connection with the preparation of the Receiving Party’s submissions in this Arbitration. Save pursuant to an order of the Tribunal, any document containing Confidential Information that is used in this Arbitration shall not be disseminated to any person, agent, or party that is not an Authorized Person as defined in this Order.
32. Any document submitted to the Tribunal in this Arbitration shall include an index specifically identifying Confidential Information used or referenced within that document and the page or paragraph number at which such Confidential Information appears.
33. During the hearings in this Arbitration, if either Party submits Confidential Information to the Tribunal in its opening presentation or during the examination of a witness, all persons (other than the witness) in attendance at the hearings, who are not authorized to receive Confidential Information shall be excused from the hearing room.
34. In order to designate information as confidential information in the Award, a Party must, within five (5) days from the receipt of the Award, notify the other Party and the Tribunal of its intent to do so, and within fifteen (15) days of receipt of the Award, provide the other Party and the Tribunal with an electronic copy of the Award, with the information that it contends is confidential information appropriately identified and redacted. The Party’s

- Authorized Persons shall disclose only the redacted Award and shall use only the redacted Award for any court filings necessary in connection with this Arbitration. If any court requires an unredacted version of the Award to be filed in a legal proceeding related to this Arbitration, that unredacted version of the Award shall be filed under seal or pursuant to similar protective measures in the applicable jurisdiction.
35. At the conclusion of this Arbitration, the Receiving Party shall destroy the Confidential Documents received from a Producing Party.
 36. In the event that a Producing Party agrees to, or the Tribunal orders, an inspection of original versions or copies of any Confidential Documents, such inspection shall be conducted by the Receiving Party's Authorized Persons on a date and at a time and in a manner to be agreed upon by the Parties, or as ordered by the Tribunal.
 37. The Producing Party reserves all rights in the Confidential Information produced by it. No rights in respect of the Confidential Information produced by a Producing Party are granted to the Receiving Party, and no obligations are imposed on the Producing Party in respect of documents produced by it other than those expressly stated in this Order.
 38. No Party shall disclose, or permit any person to disclose, the existence or content of this Order, except as required by law or any governmental or regulatory authority, or any court or other authority of competent jurisdiction.
 39. No disputing party shall file any confidential information covered by the terms of this Order in any Court without first bringing this Order to the Court and seeking directions from the Court concerning the filing of such material in a manner that protects its confidentiality. A disputing party shall notify the other disputing party and any affected parties prior to requesting such direction from the Court.
 40. Nothing in this Order shall prohibit a Party from disclosing Confidential Information as required by and in conformity with domestic laws.
 41. Upon consultation with the parties and for good cause, the Tribunal may at any time amend this Order.

Signed on behalf of the Arbitral Tribunal



Mr. Rodrigo Oreamuno
President of the Tribunal
Date: May 31, 2017

ANNEX A

ITALBA CORPORATION

v.

ORIENTAL REPUBLIC OF URUGUAY

ICSID Case No. ARB/16/9

I, [name], [title], hereby undertakes that

(a) I have read the Confidentiality Order in the above captioned arbitration,

(b) I am a person encompassed by Paragraph 14 of the Order, and

(c) I will abide by all of the terms of the Order, including the obligation not to disclose or discuss Confidential Information with any individual other than the Authorized Persons defined in Paragraph 14 of the Order, and will utilize any Confidential Information solely in connection with the above captioned arbitration.

Signature

Date

Name (printed)

ANNEX B

ITALBA CORPORATION

v.

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REDFERN SCHEDULE