

**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 APPLICATION FOR
PROVISIONAL MEASURES AND TEMPORARY RELIEF**

November 10, 2016

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1. Italba Corporation (*Italba*) submits this urgent Application for Provisional Measures and Temporary Relief (*Application*) pursuant to Article 47 of the Convention on Settlement of Investment Disputes (the *ICSID Convention*) and Rule 39(1) of the Rules of Procedure for Arbitration Proceedings (the *ICSID Rules*) to enjoin criminal proceedings that the Oriental Republic of Uruguay (*Uruguay*) initiated against Italba's key witnesses solely on the basis of documents and testimony that Italba submitted in this arbitration. These proceedings threaten to: (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. Because the risk of such harm is imminent, an immediate and temporary order restraining Uruguay from proceeding with the criminal prosecutions detailed below is necessary until the Tribunal renders a decision on this Application.

I. INTRODUCTION

2. Following Uruguay's decision to refuse to comply with the final judgment of its highest administrative court reinstating the telecommunications license of Italba's Uruguayan subsidiary, Trigosul, S.A. (*Trigosul*), and instead to transfer that license to Trigosul's competitor, Italba initiated ICSID proceedings against Uruguay. In these proceedings, Italba asserts, among other things, that Uruguay unlawfully expropriated Italba's investments in Uruguay and failed to accord Italba fair and equitable treatment in breach of the Treaty Between the United States of America and The Oriental Republic of Uruguay Concerning the Encouragement And Reciprocal Protection of Investment (the *Treaty*).

3. Italba submitted a Memorial in support of its claims on September 16, 2016, together with supporting documentation including witness statements from Gustavo Alberelli, Italba's President and Chief Executive Officer, and Luis Herbon, Trigosul's Legal

Representative.¹ The Memorial and witness statements each referenced a contract between Trigosul and Dr. Fernando Garcia, a radiologist who owned several radiology clinics in Uruguay and who contracted with Trigosul for the provision of data transmission services.² Uruguay is in the process of preparing its response to the Memorial, which is due on January 14, 2017. A hearing on the merits of this case is scheduled to be completed in the fall of 2017.

4. Nevertheless, on October 24, 2016, Mr. Herbon received a summons to appear before a Uruguayan criminal court at the end of that week, with a direction to bring counsel with him, indicating that he was the target of a criminal investigation. Mr. Herbon did not receive any further information at that time. Ultimately, Uruguayan counsel for Mr. Herbon obtained a copy of his file in connection with the criminal investigation and learned that Uruguay had initiated a criminal proceeding against Mr. Herbon and Dr. Alberelli — both of Italba’s key witnesses in this arbitration — *solely on the basis of documents that Italba submitted with its Memorial*, alleging that the documents Italba presented to this Tribunal evidencing a contract between Trigosul and Dr. Fernando Garcia were forgeries. Because Mr. Herbon had business obligations that required him to be out of the country on the scheduled date of the hearing, his appearance at the hearing was postponed until December 1, 2016. Dr. Alberelli has not yet received a summons because he has not been in Uruguay recently.

5. The allegations against Mr. Herbon and Dr. Alberelli are false, and Italba looks forward to the opportunity to prove the authenticity of the evidence it submitted in this arbitration at the hearing on the merits of this arbitration. Uruguay’s initiation of criminal

1 On October 7, 2016, in accordance with Procedural Order No. 1, Italba submitted translations of its Memorial and accompanying documents.

2 Claimant’s Memorial submitted on September 16, 2016 (*Cl. Mem.*) ¶¶ 55-56; Witness Statement of Gustavo Alberelli on Behalf of Claimant (Sept. 16, 2016) (*Alberelli Witness Stmt.*) ¶¶ 63-64; Witness Statement of Luis Herbon on Behalf of Claimant (Sept. 16, 2016) (*Herbon Witness Stmt.*) ¶¶ 33.

proceedings against Italba’s witnesses, however, threatens to undermine the integrity of this arbitration and radically alter the *status quo* in place as of the time it was filed by dramatically impeding Italba’s ability to present its case in this arbitration. At the same time, the criminal investigation also threatens to usurp the functions of this Tribunal. Uruguay clearly hopes to litigate the authenticity of these 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*. In essence, the criminal proceedings are an attempt by Uruguay to usurp the Tribunal’s fact-finding role in evaluating the evidence before it. The Tribunal should not allow this result.

6. In its response to Italba’s letter notifying the Tribunal of this situation, Uruguay states that the criminal process is, in essence, “out of its hands” — the wheels of justice have been set in motion by a complaint from a private citizen, and there is nothing the government can do to bring them to a halt. Nothing could be further from the truth. *First*, as this Tribunal is well aware, Uruguay’s obligations under the Treaty and the ICSID Convention apply equally to its judiciary.³ *Second*, the irony of Uruguay’s sudden respect for the independence of its judiciary in a case that is based on the Uruguayan executive’s admitted refusal to abide by a final and non-appealable ruling of its judiciary is unmistakable.

7. Uruguay concludes its response to Italba’s letter hoping to goad Italba into litigating the authenticity of the relevant documents now, in Uruguay, and, perhaps at the same

3 *International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts*, adopted in 2001 (CL-072) at Article 4(1) (“The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.”) (available at http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf).

time, before this Tribunal.⁴ Neither suggestion is appropriate. A hearing on the merits is scheduled for the fall of 2017. At that time, in context, all issues will be before this Tribunal. No other forum should review this matter beforehand, and it would be highly inappropriate for this Tribunal to consider this single issue, in isolation, in advance of the hearing on the merits.

8. Under the circumstances, with a hearing and indictment of Italba's key witnesses imminent and the likelihood that Uruguay will incarcerate those witnesses pending trial, urgent provisional measures enjoining the criminal prosecution until the end of this arbitration are necessary to protect Italba's rights and the integrity of the arbitral process, preservation of the *status quo*, and non-aggravation of this dispute. This Tribunal has jurisdiction to order injunctive relief, as other ICSID tribunals have done before in circumstances less extreme, in order to preserve Italba's ability to present its case and to prevent Uruguay from using its power of criminal prosecution as a tactic to usurp the function of the Tribunal in this arbitration.

9. Furthermore, to prevent imminent harm to its rights in this case, Italba respectfully requests that the Tribunal issue temporary relief with immediate effect, ordering Uruguay to suspend all actions in connection with the criminal proceedings against Mr. Herbon and Dr. Alberelli and refrain from taking any further measures that could alter the *status quo*, aggravate the dispute, or otherwise affect Italba's rights in this arbitration, pending the Tribunal's determination of this Application.

4 Uruguay's letter oddly misquotes Italba's letter, changing the sentence "Italba will be happy, when the time comes, to submit numerous documents clearly proving the authenticity of the documents in question" to a quotation of a non-existent sentence beginning "I will be happy . . ." Letter from Uruguay to Tribunal (Nov. 8, 2016) (C-137) at p. 6. Whatever the intention behind this misquotation — which is not accidental given that it is included in a paragraph beginning with the phrase "Claimant's counsel has written" — we hope that Uruguay will not continue with this unfortunate approach going forward.

II. FACTUAL BACKGROUND

10. Italba submitted a detailed description of the factual background of this arbitration in its Memorial. In this Section, Italba will only highlight recent developments relevant to the Tribunal's decision on provisional measures.

11. Following the submission of Claimant's Memorial, the Office of the President of Uruguay contacted Dr. Fernando Garcia — a radiologist and former business partner of Trigosl with whom Trigosl had contracted to provide data transmission services⁵ — to “inquire” about two documents that Italba had submitted as exhibits to its Memorial: (a) an October 4, 2010 letter from Dr. Garcia to Dr. Alberelli in which Dr. Garcia expressed an interest in using Trigosl's frequencies to transmit data to and from his radiology clinics;⁶ and (b) a Data Transmission and Equipment Loan Agreement between Trigosl and Dr. Garcia dated December 1, 2010.⁷ On October 12, 2016, Dr. Garcia spoke with the Office of the President and subsequently, on October 17, 2016, submitted a written declaration disclaiming the authenticity of those two documents. In his written declaration, Dr. Garcia stated that he did not recognize the signatures, contents, or individuals (including Dr. Alberelli and Mr. Herbon) referenced in these documents.⁸

12. On the basis of Dr. Garcia's declaration, Ms. Mariana Errazquin, an attorney acting on behalf of the Presidency of the Uruguayan Republic, filed a criminal complaint with

5 Cl. Mem. ¶¶ 55-56.

6 Criminal File assigned to El Juzgado Letrado de Primera Instancia (Oct. 19, 2016) (*Criminal File*) (C-138) at 36; see Letter from F. Garcia to G. Alberelli (Oct. 4, 2010) (C-056).

7 Criminal File (C-138) at 36; Data Transmission and Equipment Loan Agreement (Dec. 1, 2010) (C-057); see also Letter from Uruguay to the Tribunal (Nov. 8, 2016) (C-137) at 2.

8 Criminal File (C-138) at 30-32, 36.

the State Attorney General’s office on October 19, 2016.⁹ The complaint requested the immediate commencement of criminal proceedings against Mr. Herbon and Dr. Alberelli.¹⁰ In support of the complaint, Ms. Errazquin submitted Dr. Garcia’s written declaration as well as portions of Italba’s Memorial and the witness statements submitted with the Memorial, and alleged that Italba had forged documents to bolster its ICSID claim against Uruguay.¹¹ Specifically, the criminal complaint stated that there is a “strong presumption of forgery of documents that were created for the spurious purpose of causing serious economic and reputational damage to the State of Uruguay.”¹²

13. The same day, the State Attorney General requested, on the basis of Ms. Errazquin’s criminal complaint, that the Criminal Court of First Instance (*Juzgado Letrado de Primera Instancia en lo Penal de 3er Turno*) (**Criminal Court**) begin an investigation of the facts pertaining to the allegedly falsified documents.¹³

14. In addition to an investigation into the allegedly forged documents, the State Attorney General requested an investigation of Dr. Alberelli’s allegation that Alicia Fernandez, a former interim director of the Unidad Reguladora de Servicios de Comunicaciones (**URSEC**) had requested a bribe in order to “expedite” the issuance of Trigoslul’s license to use its frequencies.¹⁴ The State Attorney General urged the Criminal Court to immediately initiate the investigation by

9 *Id.* at 40.

10 *Id.*

11 *Id.* at 1-29, 34-37.

12 *Id.* at 36.

13 Criminal Complaint submitted with the Fiscalía General De La Nación (Oct. 19, 2016) (**Criminal Complaint**) (C-139) at 1-2.

14 *Id.* at 1; *see also* Cl. Mem. ¶¶ 35-36.

calling Dr. Garcia and Ms. Fernandez as “witnesses” and by placing Dr. Alberelli and Mr. Herbon under investigation for forgery and fraud.¹⁵

15. On October 21, 2016, the Criminal Court issued an order requiring Dr. Garcia, Ms. Fernandez, Dr. Alberelli, and Mr. Herbon to appear for a hearing before the court in Montevideo on October 28, 2016.¹⁶ The court order also required the presence of an expert in handwriting analysis for the examination of the signatures in the documents under scrutiny.¹⁷

16. The Uruguayan Ministry of Interior, Department of Police Information and Intelligence (*Ministerio Del Interior Dirección General De Información E Inteligencia Policial División Operativa*) served on Mr. Herbon a summons ordering him to appear before the Criminal Court on October 28, 2016.¹⁸ The summons directed that Mr. Herbon should attend the hearing with a lawyer, signifying that Mr. Herbon was a target of the investigation.¹⁹ The summons did not contain any additional information. Dr. Alberelli was not served with a summons to appear because he was out of the country.

17. On October 28, 2016, Uruguayan counsel appeared on behalf of Mr. Herbon and requested the postponement of Mr. Herbon’s appearance at the hearing by 30 days because Mr. Herbon had business obligations that required him to be out of the country on the scheduled hearing date. The Criminal Court granted the request, postponing Mr. Herbon’s appearance at the hearing until December 1, 2016.

15 Criminal Complaint (C-139) at 1-2.

16 *Id.* at 3.

17 *Id.*

18 *Citación del Ministerio Del Interior Dirección General De Información E Inteligencia Policial División Operativa* (Oct. 21, 2016) (C-140).

19 *Id.*

18. Some of the cited witnesses, including Dr. Garcia, appeared at a hearing on November 1, 2016. During that hearing, Dr. Garcia admitted that, contrary to his written declaration, in fact he *did* know the individual who acted as an intermediary between Trigosl and himself with respect to the negotiation of the agreement Italba submitted with its Memorial.²⁰

III. ITALBA IS ENTITLED TO PROVISIONAL MEASURES ENJOINING URUGUAY FROM CONTINUING ITS CRIMINAL PROSECUTION OF DR. ALBERELLI AND MR. HERBON.

A. This Tribunal Has Jurisdiction To Grant Provisional Measures.

19. Both the ICSID Convention and the ICSID Rules specifically authorize ICSID tribunals to order provisional measures to preserve the rights of the parties. Specifically, Article 47 of the ICSID Convention provides that “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.”²¹ Similarly, Rule 39(1) of the ICSID Rules provides: “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.”²²

20 Testimony of Dr. Fernando Garcia Before The Uruguayan Criminal Court (Nov. 1, 2016) (**C-141**) at 4.

21 ICSID Convention, Regulations and Rules, ICSID/15 (Apr. 2006) (**CL-001**) at 24, Convention on the Settlement of Investment Disputes between States and Nationals of Other States (entered into force on October 14, 1966) at Article 47.

22 ICSID Convention, Regulations and Rules, ICSID/15 (Apr. 2006) (**CL-001**) at 118, *Rules of Procedure for Arbitration Proceedings* (as amended and effective April 10, 2006) at Rule 39(1). The drafting history of the ICSID Convention also indicates that provisional measures were intended to preserve the rights of the parties, including maintaining the *status quo* and avoiding the aggravation of the dispute. *See, e.g.*, Extract from Christoph H. Schreuer, *The ICSID Convention: A Commentary* (2001) (**CL-086**) at 773 (“The Comment to the Preliminary Draft explained that the provisional measures were designed to preserve the *status quo* between the parties pending the tribunal’s final decision on the merits . . . The Chairman thought that the purpose of the provisional measures must be as far as possible to preserve the *status quo* at the time when the provisional measures were requested . . . Other proposals referred to an obligation of the parties to refrain from taking any steps that would aggravate or extend the dispute and a provisional protection of the rights of the parties on the merits.”) Furthermore, in the first edition of the ICSID Arbitration Rules, ICSID provided notes for the interpretation of the rules. Note A to Arbitration Rule 39 referred explicitly to non-aggravation of the dispute, as the fundamental principle behind the “preservation of rights” language of the ICSID Convention and

20. In accordance with this authority, tribunals have granted requests for provisional measures, even where they have yet to decide jurisdictional objections interposed by respondents.²³

The Tribunal therefore has jurisdiction to order provisional measures in this arbitration.

B. Italba’s Request Satisfies The Requirements For The Granting Of Provisional Measures.

21. Though Article 47 of the ICSID Convention does not list specific criteria for the issuance of provisional measures, it is widely accepted that a petitioner 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.²⁴ Italba’s request for provisional measures satisfies each of these requirements.

1. Italba’s Rights To Procedural Integrity Of The Arbitral Process, Preservation Of The *Status Quo*, And Non-Aggravation Of The Dispute Deserve Protection.

22. International law recognizes that provisional measures are appropriate to protect the procedural integrity of the arbitration, the right to preservation of the *status quo* as it existed

Arbitration Rules, explaining that Article 47 of the ICSID Convention “is based on the principle that once a dispute is submitted to arbitration the parties should not take steps that might aggravate or extend their dispute or prejudice the execution of the award.” *Rules of Procedure for Arbitration Proceedings (Arbitration Rules)* January 1968, 1 ICSID Reports (1993) (CL-087) at 47. The tribunal in *City Oriente v. Ecuador* confirmed that preservation of the *status quo* and non-aggravation of the dispute are legitimate rights to be protected by provisional measures. *City Oriente Ltd v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador) [I]*, ICSID Case No. ARB/06/21, Decision on Provisional Measures (Nov. 19, 2007) (CL-088) at ¶ 55 (“it is the Tribunal’s view that Article 47 of the Convention provides authorization for the passing of provisional measures prohibiting any action that affects the disputed rights, aggravates the dispute, frustrates the effectiveness of the award or entails having either party take justice into their own hand”).

23 See, e.g., *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), ¶ 3.7 (“It is not in issue that an ICSID tribunal may recommend provisional measures even where it is yet to decide the question of its jurisdiction”); *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), ¶¶ 105, 108-12 (exercising power to order provisional measures because tribunal had *prima facie* basis for jurisdiction).

24 See, e.g., *Hydro v. Albania*, Order on Provisional Measures (CL-089) at ¶ 3.20; *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), ¶ 50; *Quiborax v. Bolivia*, Decision on Provisional Measures (CL-090) at ¶ 113; *City Oriente v. Ecuador and Petroecuador [I]*, Decision on Provisional Measures (CL-088) at ¶ 54.

when the arbitration began, and the right to proceed through arbitration without either party aggravating the dispute.²⁵ Accordingly, “[i]t is now settled in both treaty and international commercial arbitration that an arbitral tribunal is entitled to direct the parties not to take any step that might (1) harm or prejudice the integrity of the proceedings, or (2) aggravate or exacerbate the dispute.”²⁶

23. Thus, for example, in *Hydro v. Albania*, to protect the procedural integrity of the arbitration until the issuance of a final award, the tribunal issued an order enjoining criminal proceedings that Albania initiated after the claimants filed an ICSID arbitration.²⁷ The tribunal noted that the claimants’ possible incarceration in Albania as a result of the criminal proceedings “would prevent them from effectively managing their businesses, and fully participating in this

25 See, e.g., *Quiborax v. Bolivia*, Decision on Provisional Measures (CL-090) at ¶¶ 139-48 (finding that Bolivia had impaired the procedural integrity of the arbitral tribunal by unduly pressuring the claimant’s witnesses); *Hydro v. Albania*, Order on Provisional Measures (CL-089) at ¶¶ 3.18-3.20 (finding that Albania had impaired the procedural integrity of the arbitral tribunal by threatening to incarcerate the claimant’s witnesses); *Lao Holdings v. Laos*, Ruling on Motion to Amend the Provisional Measures Order (CL-091) at ¶¶ 31, 42 (directing the respondent state not to take steps that would aggravate the parties’ dispute); *City Oriente v. Ecuador and Petroecuador [I]*, Decision on Provisional Measures (CL-088) at ¶ 66 (enjoining the pursuit of procedures or inquiries against the claimants in order to preserve the *status quo*). ICSID tribunals have repeatedly affirmed the existence of these rights. Thus, the *City Oriente* tribunal endorsed a broad interpretation of the scope of the *status quo* that must be preserved while procedures are pending: “City Oriente has a right that the *status quo ante* be maintained for as long as these arbitration proceedings are pending . . . and it also has a right that Petroecuador and Ecuador refrain from adopting any unilateral compulsory or coercive measure impairing contractual balance. In the meantime, given that there is a right that the *status quo ante* be maintained, Article 47 of the Convention provides authorization to the Arbitral Tribunal to order any Provisional Measures required for the protection of such right.” *City Oriente Ltd v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/06/21, Decision on Revocation of Provisional Measures (May 13, 2008) (CL-092) at ¶¶ 58-59. The *Tokios Tokelés* tribunal similarly recognized that “[a] provisional measure may also be granted to protect a party from actions of the other party that threaten to aggravate the dispute or prejudice the rendering or implementation of an eventual decision or award.” *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Order No. 3 (Jan. 18, 2005) (CL-093) at ¶ 7. In *Pey Casado*, the tribunal found that its task was to prevent aggravation of the existing tension between the parties. *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Provisional Measures Requested by the Parties (Sept. 25, 2001) (CL-094) at ¶¶ 74-77.

26 *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case ARB/05/22, Procedural Order No. 3 (Sept. 29, 2006) (CL-095) at ¶ 135.

27 *Hydro v. Albania*, Order on Provisional Measures (CL-089) at ¶¶ 3.18-3.20.

arbitration,” which was “a grave concern to the procedural integrity of the proceeding.”²⁸

Moreover, this was not a case where the claimants were charged with a crime “unrelated to the factual circumstances of the dispute being arbitrated, such as murder;” rather, the alleged offenses in that case were related to claimants’ investments in Albania.²⁹

24. The tribunal’s decision in *Quiborax v. Bolivia* is even more pertinent to the circumstances in this case. There, Bolivia instituted criminal proceedings for forgery and fraud against several persons related to the arbitration based on submissions made in the claimants’ Request for Arbitration.³⁰ The claimants subsequently sought injunctive relief. While the tribunal recognized the State’s sovereign prerogative to prosecute crimes in its territory, it nonetheless held that the suspension of the criminal proceedings was warranted to preserve the procedural integrity of the arbitration:

What is clear to the Tribunal is that there is a direct relationship between the criminal proceedings and this ICSID arbitration that may merit the preservation of Claimants’ rights in the ICSID proceeding. . . .

The Tribunal considers that the criminal proceedings may indeed be impairing Claimants’ right to present their case, in particular with respect to their access to documentary evidence and witnesses.³¹

25. In particular, the tribunal noted that the criminal proceedings could have the effect of inhibiting the testimony of witnesses:

Even if no undue pressure is exercised on potential witnesses, the very nature of these criminal proceedings is bound to reduce their willingness to cooperate in the ICSID proceeding. Given that the

28 *Id.*

29 *Id.* at ¶ 3.19.

30 *Quiborax v. Bolivia*, Decision on Provisional Measures (CL-090) at ¶¶ 29-32.

31 *Id.* at ¶¶ 123, 142; *see generally* ¶¶ 139-48 (finding that Bolivia had violated the claimants’ right to the procedural integrity of the arbitration).

existence of this ICSID arbitration has been characterized within the criminal proceedings as a harm to Bolivia, it is unlikely that the persons charged will feel free to participate as witnesses in this arbitration.

Regardless of whether the criminal proceedings have a legitimate basis or not . . . , the direct relationship between the criminal proceedings and this ICSID arbitration is preventing Claimants from accessing witnesses that could be essential to their case.³²

26. The tribunal concluded that the criminal proceedings could impair the claimants’ right to present their case and access documentary evidence and witnesses, which would frustrate their right to have their claims “fairly considered and decided by the arbitral tribunal.”³³ Accordingly, the tribunal ordered Bolivia to desist from the criminal proceedings and to refrain from engaging in any other course of action that would jeopardize the procedural integrity of the arbitration.³⁴

27. The tribunal in *Lao Holdings N.V. v. The Lao People’s Democratic Republic* reached the same conclusion, ultimately enjoining a criminal investigation from running parallel to the investment arbitration because there was “a strong linkage” between the two proceedings, with the former threatening the procedural integrity of the latter.³⁵

28. Here, the criminal prosecution of Italba’s witnesses threatens the procedural integrity of the arbitral process, upsets the *status quo* in place at the initiation of the arbitration, and aggravates the parties’ dispute.

32 *Id.* at ¶¶ 146, 163.

33 *Id.* at ¶ 148 (internal quotes and citation omitted).

34 *Id.* at p. 46.

35 *Lao Holdings v. Laos*, Ruling on Motion to Amend the Provisional Measures Order (CL-091) at ¶¶ 31, 37, 39 (“[A]llowing at this stage the Laotian police and prosecutors to pursue criminal proceedings, depose witnesses and collect documentation would aggravate the dispute in the prohibited sense of harming the integrity of the arbitral process”).

29. *First*, there is no question that Uruguay commenced criminal proceedings against Dr. Alberelli and Mr. Herbon based solely on Italba’s filings in this arbitration. Indeed, the criminal court file expressly confirms that fact.³⁶ As a result, allowing the criminal prosecution — which concerns the same facts and same witnesses as Italba’s claims in this arbitration — to take place concurrently with this arbitration would undermine the integrity of the arbitral process.

30. *Second*, the criminal investigation targeting Italba’s witnesses will irremediably disrupt the arbitral process because it will significantly divert Italba’s time, effort, and resources from preparing and presenting its case before the Tribunal to having to deal with the pressures of court hearings, police interviews, and the threat of incarceration. Perhaps most critically, a concurrent criminal investigation will have a chilling effect on Italba’s witnesses. As the *Quiborax* tribunal noted, the very nature of criminal proceedings is bound to reduce the willingness of Italba’s witnesses to cooperate in the ICSID proceeding and may result in Italba’s key witnesses being unwilling to testify truthfully in this arbitration.³⁷ Already, potential witnesses that Italba may need in connection with its Reply Memorial have been reluctant to communicate with Italba, likely as a result of the criminal proceedings underway.

31. If Uruguay wishes to question the authenticity of Italba’s documents, it is free to do so in due course through a robust hearing and the submission of testimony and documentary

36 *See* Criminal File (**C-138**) at 1-29 (in its criminal complaint, Uruguay submitted portions of the Memorial filed by Italba on September 16, 2016, portions of Luis Herbon’s Witness Statement referring to the Radiology Clinic of Dr. Fernando Garcia, the October 4, 2010 letter from Dr. Garcia to Dr. Alberelli (**C-056**), and the December 1, 2010 Data Transmission and Equipment Loan Agreement (**C-057**)); *see also id.* at 34-35 (alleging that in connection with the filing of its ICSID arbitration, Italba submitted documents that do not appear to be authentic); *id.* at 37 (directly referring to the ICSID arbitration against Uruguay); Criminal Complaint (**C-139**) at 1-2 (referring to facts alleged in Claimant’s Memorial); *id.* at 5-12 (referring to the December 1, 2010 Data Transmission and Equipment Loan Agreement (**C-057**) and to Claimant’s exhibits submitted with its Memorial).

37 *See supra*, ¶ 26.

evidence before this Tribunal.³⁸ Uruguay will have the opportunity to cross-examine Dr. Alberelli and Mr. Herbon at the hearing on the merits of this arbitration, as will the Tribunal, and Uruguay may call its own witnesses to testify about the authenticity of the documents that Italba submitted. Uruguay may not usurp the arbitral process by attacking Italba’s witnesses and the authenticity of their documents now — in a process conducted in Uruguay and totally divorced from this arbitration — solely on the basis of documents and testimony submitted in this arbitration.

2. The Provisional Measures Are Urgently Required.

32. Typically, injunctive relief meets the “urgency” test when there is an “imminent danger of irreparable harm before a decision is made on the merits.”³⁹ However, in cases where the procedural integrity of the arbitration is threatened, measures to protect a party’s procedural rights are urgent *by definition*. As stated in *Quiborax v. Bolivia*:

[If] measures are intended to protect the procedural integrity of the arbitration, in particular with respect to access to or integrity of the evidence, they are urgent by definition. Indeed the question of whether a Party has the opportunity to present its case or rely on

38 Indeed, the Tribunal has already ruled that it will examine the authenticity of objectionable documents during the course of the arbitration. *See* Procedural Order No. 1 (July 29, 2016), ¶ 18.5.6.

39 *Quiborax v. Bolivia*, Decision on Provisional Measures (CL-090) at ¶¶ 149-50 (citing the ICJ decision of *Passage through the Great Belt (Finland v. Denmark)*, Provisional Measures, Order of 29 July 1991, ICJ Reports 1991, p. 17, ¶ 23 (“[w]hereas the power of the Court to indicate provisional measures will be exercised only if there is urgency in the sense that there is a real risk that action prejudicial to the rights of either party might be taken before the Court has given its final decision”)); *see also Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case ARB/05/22, Procedural Order No. 1 (Mar. 31, 2006) (CL-096) at ¶ 76 (“the degree of ‘urgency’ which is required depends on the circumstances, including the requested provisional measures, and may be satisfied where a party can prove that there is a need to obtain the requested measures at a certain point in the procedure before the issuance of an award”). Similarly, the *City Oriente v. Ecuador* decision explained that, though the Convention and the ICSID Rules did not make express reference to the urgency requirement, “it seems evident that provisional measures are only appropriate if it is impossible to wait for a specific issue to be settled at the merits stage.” *City Oriente v. Ecuador and Petroecuador [I]*, Decision on Provisional Measures (CL-088) at ¶ 67.

the integrity of specific evidence is essential to (and therefore cannot await) the rendering of an award on the merits.⁴⁰

The urgency criterion is also satisfied by definition when a State has taken, or is threatening to take, measures aggravating the parties' dispute.⁴¹

33. In this case, there is an urgent need for provisional relief. Uruguay has already initiated criminal proceedings against Dr. Alberelli and Mr. Herbon. If this Tribunal does not grant the provisional measures Italba requests, Uruguay will continue and likely complete its criminal prosecution of Italba's witnesses before a final award is issued in this arbitration. Mr. Herbon is currently scheduled to appear at his hearing on December 1, 2016, a date only three weeks away. There is a significant risk that, at that hearing or shortly thereafter, Mr. Herbon could be indicted, arrested, and put in pre-trial detention, which would destroy Italba's ability to access its key witnesses and thereby severely compromise Italba's ability to present its case.

3. The Provisional Measures Are Necessary.

34. To support an order for injunctive relief, the provisional measures requested by the petitioner must be necessary to avoid harm or prejudice to the petitioner.⁴² The "necessity"

40 *Quiborax v. Bolivia*, Decision on Provisional Measures (CL-090) at ¶ 153; *see also City Oriente v. Ecuador Petroecuador [I]*, Decision on Provisional Measures (CL-088) at ¶ 69 ("In the Tribunal's opinion, the passing of the provisional measures is indeed urgent, precisely to keep the enforced collection or termination proceedings from being started, as this operates as a pressuring mechanism, aggravates and extends the dispute and, by itself, impairs the rights which Claimant seeks to protect through this arbitration. Furthermore, where, as is the case here, the issue is to protect the jurisdictional powers of the tribunal and the integrity of the arbitration and the final award, then the urgency requirement is met by the very own nature of the issue"); *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), ¶ 74 ("when the measures are intended to protect against the aggravation of the dispute during the proceedings, the urgency requirement is fulfilled by definition").

41 *Burlington v. Ecuador*, Procedural Order No. 1 on Burlington Oriente's Request for Provisional Measures (CL-097) at ¶ 74 ("Indeed, when the measures are intended to protect against the aggravation of the dispute during the proceedings, the urgency requirement is fulfilled by definition").

42 *See, e.g., Hydro v. Albania*, Order on Provisional Measures (CL-089) at ¶¶ 3.31-3.36; *Lao Holdings v. Laos*, Ruling on Motion to Amend the Provisional Measures Order (CL-091) at ¶ 50; *Quiborax v. Bolivia*, Decision on Provisional Measures (CL-090) at ¶¶ 154-57.

requirement implies an assessment of the risk of harm that the requested measures are intended to eliminate or attenuate.⁴³

35. Tribunals have differed in their interpretation of the degree of “harm” that is required to grant provisional measures, with some tribunals requiring a showing of “substantial harm” and others a showing of “irreparable harm,” defined as “harm that cannot be repaired by an award of damages.”⁴⁴ The harm that Italba would suffer if this Tribunal does not grant its request for provisional measures satisfies either standard.

36. As Italba’s two key witnesses who are intimately familiar with the facts underlying this arbitration, the testimony of Dr. Alberelli and Mr. Herbon is of paramount importance for Italba. As a result, allowing Uruguay’s criminal prosecution to proceed would cause irremediable harm to Italba because it would obstruct access to its witnesses and their documents, thereby hindering Italba’s ability to present its case. Dr. Alberelli cannot return to Uruguay at present for fear of incarceration in connection with Uruguay’s improper criminal proceeding against him and cannot, therefore, access his documents in Uruguay or gather further evidence. Italba will also lose access to documents in Mr. Herbon’s possession in the likely event that he is incarcerated pending trial. At the same time, the spectre of a criminal prosecution has already chilled Italba’s access to other witnesses, based in Uruguay, with knowledge of facts relevant to this dispute.

37. In the recent case of *Hydro v. Albania*, in which Albania threatened the arrest, extradition, and incarceration of two critical witnesses of the claimants in that case, the tribunal

43 *Quiborax v. Bolivia*, Decision on Provisional Measures (CL-090) at ¶ 113.

44 *See Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Order on Interim Measures (Sept. 2, 2008) (CL-098), ¶¶ 68-69 (requiring a showing of “substantial harm”); *but see Quiborax v. Bolivia*, Decision on Provisional Measures (CL-090) at ¶¶ 155-56 (requiring a showing of “irreparable harm”); *see also Hydro v. Albania*, Order on Provisional Measures (CL-089) at ¶ 3.31 (same).

found that “the Claimants’ ability to effectively participate in the arbitration, *by definition, cannot be adequately remedied by damages.*”⁴⁵ In *Quiborax*, the tribunal reached the same conclusion, holding that “any harm caused to the integrity of the ICSID proceedings, particularly with respect to a party’s access to evidence or the integrity of the evidence produced could not be remedied by an award of damages.”⁴⁶ This case is the same: if Uruguay’s criminal prosecution were allowed to continue, the ensuing prejudice to Italba would be irreparable. The provisional measures that Italba requests are therefore necessary.

4. The Provisional Measures Are Proportional.

38. Besides being necessary and urgent, the provisional measures in this case would also be proportional because they would minimize the harm caused to Italba while preserving Uruguay’s sovereign right to prosecute crime in its territory.⁴⁷ A stay of criminal proceedings is warranted where a deferral of criminal investigations or proceedings by a few months does not seriously prejudice the respondent State.⁴⁸

39. On one hand, a stay of the criminal proceedings would shield Italba from the irreparable harm described above because it would provide Italba with unfettered access to the testimony and documentary evidence of its principals and other witnesses, allowing it to adequately present its case. On the other hand, a failure to suspend the proceedings could lead to

45 *Hydro v. Albania*, Order on Provisional Measures (CL-089) at ¶ 3.34 (emphasis added).

46 *Quiborax v. Bolivia*, Decision on Provisional Measures (CL-090) at ¶ 157.

47 *Hydro v. Albania*, Order on Provisional Measures (CL-089) at ¶ 3.37 (defining proportionality in the context of provisional measures as a “balance [of] the harm caused to the Claimants by the criminal proceedings [sought to be enjoined] and the harm that would be caused to the Respondent if those proceedings were stayed”); *see also Quiborax v. Bolivia*, Decision on Provisional Measures (CL-090) at ¶ 158 (same).

48 *See Hydro v. Albania*, Order on Provisional Measures (CL-089) at ¶ 3.41 (stay of criminal proceedings did not affect State’s ability to prosecute crimes in the future); *see also Quiborax v. Bolivia*, Decision on Provisional Measures (CL-090) at ¶ 165 (same); *Lao Holdings v. Laos*, Ruling on Motion to Amend the Provisional Measures Order (CL-091) at ¶ 71 (deferral of police investigation by a few months did not seriously prejudice respondent).

intimidation or even incarceration of Italba's witnesses, who would fear retribution if they were to speak publicly in Italba's favor, which would undoubtedly affect Italba's ability to present its case.

40. Conversely, the harm to Uruguay is negligible. A stay of the criminal proceedings would not affect Uruguay's sovereign prerogative to police its territory because the criminal prosecution would only be delayed, not forgone. Once this arbitration comes to an end, Uruguay may resume criminal proceedings. As such, the burden that a stay would cause to Uruguay is proportionately much less than the irreversible prejudice that Italba would suffer should the criminal proceedings continue their course.

41. Importantly, no assurance or cooperation from Uruguay could *guarantee* that Dr. Alberelli and Mr. Herbon would be allowed to participate as witnesses in this arbitration — and nothing could guarantee that if they are indeed allowed to participate, they would testify candidly while a sword of Damocles is hanging over their heads, particularly given Uruguay's record of jailing foreign investors for extended periods of time without bringing formal charges.⁴⁹ At the same time, it is already possible that the harm created by the spectre of criminal proceedings, already introduced by Uruguay's measures, will chill other witnesses from coming forward even if Italba is granted the relief sought here. Accordingly, the Tribunal should grant provisional measures ordering the suspension of Uruguay's criminal proceedings against Dr. Alberelli and Mr. Herbon as the minimum step necessary to prevent further damage to Italba as a result of Uruguay's measures.

⁴⁹ See David Gelles and Charles Newbery, *An Airline Investment in Uruguay Becomes a Catch-22* (May 14, 2015) (C-142).

IV. ITALBA IS ENTITLED TO A TEMPORARY RELIEF TO PRESERVE THE *STATUS QUO* WHILE THIS APPLICATION IS PENDING.

42. The circumstances explained above necessitate an *immediate* intervention by this Tribunal in order to preserve the *status quo* in this arbitration and prevent Italba from suffering imminent irreparable harm while this Application is pending. Where such a risk exists, ICSID tribunals considering applications for provisional measures have routinely ordered temporary relief enjoining the parties from initiating or continuing any action that could alter the *status quo*, aggravate the parties' dispute, or affect the ability of the Tribunal to address the issues raised in the pending application for provisional measures.⁵⁰

43. Mr. Herbon's hearing in this criminal investigation is set for December 1, 2016, when he returns from business obligations abroad. By the time of that hearing or shortly thereafter, he will be subject to indictment, arrest, and pre-trial detention, which would severely impair Italba's access to one of its key witnesses, as well as access to key documents in his possession. If Uruguay is permitted to continue its criminal prosecution while the parties brief

⁵⁰ See, e.g., *Burlington v. Ecuador*, Procedural Order No. 1 on Burlington Oriente's Request for Provisional Measures (CL-097) at ¶¶ 18-25 (issuing a temporary order recommending that "the Respondents refrain from engaging in any conduct that aggravates the dispute between the Parties and/or alters the status quo until it decides on the Claimants' Request for Provisional Measures or it reconsiders the present recommendation, whichever is first," because Claimant's right to have its interests effectively protected by way of provisional measures was sufficient to demonstrate necessity in the circumstances); *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), ¶ 28 (issuing a temporary order requiring the parties "to refrain from initiating or continuing any action or adopting any measure which may, directly or indirectly, modify the *status quo* between the parties . . . until it has had an opportunity to further hear from the parties on the question of provisional measures."); *City Oriente v. Ecuador and Petroecuador [I]*, Decision On Provisional Measures (CL-088) at ¶ 19 (ordering the respondent to refrain from instituting or prosecuting any judicial action of any nature, pending a ruling on the provisional measures requested by the claimant); see also *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, UNCITRAL/PCA Case No. 2009-23, Fourth Interim Award On Interim Measures (Feb. 7, 2013) (CL-100), ¶ 55(c) (pending the resolution of the request for provisional measures, the tribunal reconfirmed its previous interim order recommending *inter alia* that the parties (a) maintain the *status quo* and not exacerbate the procedural and substantive disputes before this Tribunal; and (b) refrain from any conduct likely to impair or otherwise adversely affect, directly or indirectly, the ability of the Tribunal to address fairly any issue raised by the parties).

the provisional measures issues and the Tribunal deliberates, Italba and Mr. Herbon will suffer serious and irreparable harm.

44. Italba therefore respectfully requests that this Tribunal promptly upon receipt of this Application issue temporary relief with immediate effect, ordering Uruguay to suspend its criminal prosecution of Dr. Alberelli and Mr. Herbon 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.

V. REQUEST FOR INJUNCTIVE RELIEF

45. On the basis of the foregoing, Italba respectfully requests that the Tribunal preserve Italba's rights through the granting of provisional measures. Specifically, Italba 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 Herbon 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.

46. Furthermore, for the reasons explained in detail above, Italba respectfully requests that the Tribunal issue temporary relief with *immediate effect*, ordering Uruguay⁵¹ to suspend criminal proceedings against Dr. Alberelli and Mr. Herbon 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.

47. Italba expressly reserves the right to supplement and/or amend the aforementioned list of provisional measures applied for, which are both necessary and urgent for the preservation of its rights in this arbitration. This application is also without prejudice to Italba's right to seek, in due course, moral damages for Uruguay's acts and omissions.

51 "Uruguay" should be understood, pursuant to Article 4(1) of the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts, as any "State organ [of Uruguay] whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State." *International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts*, adopted in 2001 (CL-072) (available at http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf).

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