

# Kluwer Arbitration Blog

## Uruguay Holds Firm in Two New Awards

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Within the same week last March, two awards were rendered in cases against the Oriental Republic of Uruguay (*Uruguay*). **One** concerned an investment dispute with Italba Corporation (*Italba*), a company incorporated in Florida, over wireless spectrum services and the allocation of radio frequencies, and was Uruguay's second case before an ICSID tribunal (the first being against *Philip Morris*). With this victory, the Southern nation remains undefeated in ICSID proceedings. The **other** involved a commercial dispute with Conecta S.A. (*Conecta*), a local gas distribution subsidiary of Brazil's Petrobras.

### **ICSID Tribunal denies jurisdiction, finding that investor failed to prove ownership or control over local company**

In 2016, Italba filed a request for arbitration against Uruguay under the United States-Uruguay BIT (the *Treaty*). The Tribunal was composed of President Rodrigo Oreamuno (appointed by agreement of the parties) and arbitrators John Beechey and Professor Zachary Douglas, respectively appointed by Italba and Uruguay.

The dispute arose in relation to the revocation of an authorization for the provision of dedicated wireless digital lines for the transmission of data services and the release of certain frequencies, which had been granted to Gustavo Alberelli and transferred to a local company, Trigosal S.A. (*Trigosal*). Alberelli is an Italian citizen and US resident who is a shareholder of Italba, as well as its president and chief executive financial officer. In the arbitration, Italba claimed to be the shareholder of Trigosal.

Italba claimed that Uruguay had breached its obligations under the Treaty not to expropriate US investments, and to accord US investors and their investments fair and equitable treatment, full protection and security and no less favorable treatment than that accorded to other investors and investments in like circumstances. Italba claimed compensation in the amount of US\$ 61.1 million, plus interest.

During the arbitration, Italba filed an application for provisional measures and temporary relief, requesting the Tribunal to enjoin a criminal investigation that Uruguay had initiated against Italba's witnesses, Gustavo Alberelli and Luis Herbón (Trigosal's legal representative and former director), for alleged forgery in falsifying the signature of certain documents submitted in the arbitration. The arbitrators rejected the application holding that they lacked the power to order the

cessation of the investigation and that Italba had failed to prove that its witnesses' participation in the arbitration had been affected by the criminal investigation.

Italba also questioned the independence of Uruguay's expert, Professor Xavier de Mello, for being a partner in a law firm representing Uruguay in another arbitration (coincidentally, the one commenced by Conecta) and accordingly requested that the Tribunal disregard his report and testimony. In rejecting the request, the Tribunal reasoned that the expert's firm was based on a model known as "economic interest group" that operated similarly to English barristers chambers, which could not be "equated as a law firm in which the members are in partnership and share profits". The arbitrators found that Italba had not proven that Professor de Mello had obtained an economic benefit from Uruguay, either directly or otherwise, that would affect his independence. Additionally, they noted that Art 5(2)(a) and (c) of the **IBA Rules** is "very specific" and "refers to the expert's present or past relationship with any of the Parties and other actors in the proceeding" (*i.e.*, does not require disclosure of the "present or past relationship with the Parties of all members of his/her law firm").

The Tribunal noted that the Treaty afforded protection to investors who owned or controlled an investment in Uruguay. However, it found that none of the documents produced by Italba evidenced that it was either a shareholder of, or held the control over, Trigoslul.

The record only included one share certificate endorsed in favor of Italba. However, the Tribunal held that to transfer a share certificate under local law, "it is imperative to endorse it, hand it over to the acquirer, notify the company in writing **and record** the endorsement in the company's stock ledger". Since the tribunal found there was no such record in Trigoslul's books, it concluded that the endorsement was not perfected and therefore Italba could not claim to be its "lawful holder". The Tribunal also rejected Italba's proposition that Trigoslul's officers failed to keep formalities in order because they were not attorneys.

Additionally, and despite considering that the endorsement should be resolved in accordance with Uruguayan law, the Tribunal analyzed Italba's proposition that it should instead be assessed under the laws of Florida, where Alberelli had purportedly made the endorsement. However, the Tribunal concluded that Italba had failed to prove that it was the shareholder of Trigoslul under Florida law.

The Tribunal also rejected Italba's argument that ownership could be established by a theory of economic reality. The Tribunal noted that this theory is used for situations different than the transfer of shares (*i.e.*, fraud or violation of public order), and concluded that applying it here would be futile as there was no evidence that Italba participated in shareholders meetings, shared profits or losses with the company, or oversaw its management. Italba also argued that ownership could be proven by showing capital contributions to the company, but the arbitrators found no evidence of such contributions from Italba.

Ultimately, the Tribunal concluded that Italba had not proven its ownership of Trigoslul, and that it appeared from the evidence submitted that Alberelli and his family were the only shareholders.

The arbitrators then analyzed whether Italba had control of Trigoslul, noting that the exercise of control is case-specific. Italba argued that it exercised control by making business decisions, capital contributions, funding operations and representing to third parties that it was the owner of Trigoslul. Nevertheless, the Tribunal found no evidence to support these assertions and therefore held that Italba did not have control over Trigoslul.

Since Uruguay's first jurisdictional objection was upheld, the Tribunal considered it unnecessary to rule on the remaining objections. It found that the parties agree that the "loser pays" principle should guide the allocation of costs, and ordered Italba to pay Uruguay all costs.

In accordance with the Treaty's transparency provisions and following the parties' agreement, documents for the case can be found [online](#). Those include a submission from the US government on questions of interpretation of the Treaty.

### **ICC tribunal holds that Uruguay has an obligation to renegotiate the terms of a gas distribution agreement, but finds that the State had not breached such obligation**

In 2017, Conecta commenced a commercial arbitration seated in Buenos Aires against Uruguay under the [Rules of the International Chamber of Commerce \(ICC\)](#), on the basis of the arbitration clause included in the public works' concession agreement executed by the parties in 1999 for the project, construction and exploitation of gas distribution systems outside of Montevideo (the *Concession*).

The Tribunal was composed of arbitrators Antonio Hierro and Dr. Diego P. Fernández Arroyo, appointed by Conecta and Uruguay, respectively, and President Yves Derains (appointed by agreement of the party-appointed arbitrators). The [award](#) was rendered on 18 March 2019, and made public as agreed by the parties.

The parties did not contest that in 2004, Argentina, Uruguay's supplier of natural gas, adopted measures that limited and restricted the export of natural gas and the use of Argentina's transportation system. Conecta claimed that the Argentine measures triggered its right to restore the initial financial-economic balance of the Concession, but as such balance had not been restored, the State breached its obligations and Conecta had the right to terminate the Concession and receive compensation in the amount of US\$ 57.07 million.

The Tribunal recognized that the measures severely affected the financial-economic balance of the Concession, which had been executed on the basis of an abundant and competitive gas supply from Argentina. The Tribunal also recognized that the Concession included an obligation to renegotiate in good faith with the purpose of restoring its financial-economic balance due to severe and unforeseen circumstances, and that Conecta has the right to request a renegotiation of the terms of the Concession.

However, the Tribunal decided that the obligation to renegotiate does not imply an obligation to reach an agreement and concluded that Uruguay had not breached such obligation, as it had agreed to prior amendments to the Concession and had been involved in the project of a regasification plant aimed at solving the supply problem (despite the fact that such project was aborted in the end).

Other subsidiary claims made by Conecta and counter-claims made by Uruguay regarding to alleged contractual breaches incurred by Conecta were rejected by the Tribunal, which ordered each party to pay its own costs.

## More to come

While Uruguay withstood these closely timed claims, the country's track record will soon be tested; Uruguay is facing (i) another commercial dispute brought by [Montevideo Gas](#), also a subsidiary of Petrobras, over a similar contract as the one agreed with Conecta and (ii) an investment arbitration for more than US\$ 3.5 billion commenced by three UK investors over an iron ore project ([PCA Case No 2018-04](#)).

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This entry was posted on Friday, May 3rd, 2019 at 12:05 pm and is filed under [ICC](#), [ICSID](#), [Italba](#), [Uruguay](#)

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