



School of International Arbitration

IACL
International Arbitration Case Law

School of International Arbitration, Queen Mary, University of London

International Arbitration Case Law

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Award Name and Date: Italba Corporation v Oriental Republic of Uruguay, ICSID Case No. ARB/16/9 - *Decision on Claimant's Application for Provisional Measures And Temporary Relief* – 15 February 2017

Case report by: Cristina Viteri** **Editor:** Diego Luis Alonso Massa***

Summary:

The ICSID Tribunal rejected the Application for Provisional Measures and Temporary Relief filed by Claimant to enjoin the criminal prosecution initiated in Uruguay against two of its witnesses, for the alleged forgery of documents submitted in the proceeding, to obtain temporary relief and to preserve the *status quo* until the resolution of the Application.

According to the Tribunal, there was no evidence of risk of an irreparable harm to Claimant's rights, as a result of the criminal prosecution. In the Tribunal's view, arbitration does not confer a "blanket of immunity" to the investor's principals and witnesses, and the State's sovereign right to investigate and prosecute criminal actions could be enjoined only under exceptional circumstances. The Tribunal accepted the guarantee provided by Respondent to respect Claimant's rights to prepare and present the remainder of the case in arbitration proceedings.

Main issues: Provisional measures (Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules);

Members of the Tribunal: Mr. John Beechey (Appointed by Claimant); Professor Zachary Douglas (appointed by Respondent); Mr. Rodrigo Oremano, (President)

Claimant's Counsel: Mr. Alexander Yanos; Ms. Fara Tabatabai; Mr. Pavlos Petrovas; Mr. Andreas Baum; Ms. Rebeca Mosquera (Hughes Hubbard & Reed (New York) LLP)

Respondent's Counsel: Dr. Miguel Toma (Secretario de la Presidencia de Uruguay Secretaria de Presidencia); Dr. Nicolás Cendoya (Director Unidad Reguladora de Servicios de Comunicaciones de Uruguay (URSEC)); Mr. Rodolfo Nin Novoa (Ministro de Relaciones Exteriores de Uruguay); Mr. Paul S. Reichler; Ms. Clara Brillembourg; Ms. Patricia Cruz Trabanino; Ms. Melinda Kuritzky; Mr. Ofilio Mayorga; Mr. José Rebolledo (Foley Hoag (Washington D.C.) LLP).

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Digest:

1. Facts of the Case

This case was submitted to ICSID, pursuant to the Treaty Between the United States of America and the Oriental Republic of Uruguay, Concerning the Encouragement and Reciprocal Protection of Investment. (¶ 1). The dispute concerns Italba Corporation (“Claimant”), a company incorporated under the laws of the State of Florida, United States of America, and the Oriental Republic of Uruguay (“Respondent”). (¶ 2,3).

Shortly after Claimant filed its Memorial on the Merits, one of its witnesses - Mr. Herbón - received a notice to appear before a criminal court in Montevideo, Uruguay, in connection with an Investigation associated to his and another witness` testimony - Mr. Alberelli - in the arbitration. Claimant argued that Uruguay initiated such investigation, based solely on documents and a testimony submitted with Claimant’s Memorial that were allegedly not authentic. Claimant’s contention was that the investigation represented an “abuse of the filings”, “an attempt to harass and intimidate” its witnesses, to “thwart its ability to proceed with the arbitration”. (¶ 16, 41-42).

Respondent rejected those allegations and explained that there was “overwhelming evidence” to believe that the witnesses might have committed the crime of forgery while falsifying the signature of an individual in two of the submitted exhibits. Respondent asserted that the Office of the President had the duty to report to the authorities the commitment of a “serious criminal offense”, and defended the independence of its judiciary from the rest of the Government’s branches. In addition, Respondent argued that it could not be precluded from its sovereign right of “evaluating in good faith” evidence relevant to the commission of a crime. (¶ 17, 76).

In its Response to Claimant’s Application, Respondent stated, *inter alia*, that it was “prepared to guarantee” that the investigation would not prevent either Dr. Alberelli or Mr. Herbón from participating in the preparation or presentation of the remainder of Claimant’s case. (¶ 25). However, Claimant argued that Respondent’s “guarantee” was a “vague promise”, “inadequate” and “effectively worthless.” (¶ 32).

Mr. Hebron’s hearing was scheduled for 1 December 2016, but he refused to appear in court since the Tribunal had not yet ruled on Claimant’s application. The hearing date was rescheduled for 15 February 2017. During this time, Respondent assured that the guarantee was still valid. (¶ 36, 39).

2. Procedural Background

On 16 February 2016, Claimant filed a Request for Arbitration against Uruguay. (¶ 6). On 16 September 2016, Claimant filed a Memorial on the Merits, together with witness statements by Mr. Gustavo Alberelli and Mr. Luis Herbón. (¶ 14).

On 31 October 2016, Claimant informed the Tribunal that Mr. Herbón had received a notice to appear before a criminal court in Montevideo, Uruguay, in connection with the investigation associated with his and Mr. Alberelli's testimony in the arbitration. Claimant argued that the investigation represented an "abuse of the filings in this arbitration and an attempt to harass and intimidate". (¶ 16).

On 8 November 2016, Respondent replied to Claimant's communication and denied that the purpose of the Investigation was to attack the Claimant's witnesses in the arbitration. (¶ 17).

On 10 November 2016, Claimant filed an Application for Provisional Measures and Temporary Relief, pursuant to Article 47 of the ICSID Convention and Rule 39(1) of the Arbitration Rules. Claimant's Application sought, *inter alia*, to enjoin the criminal prosecution in Uruguay of Mr. Alberelli and Mr. Herbón pending the resolution of the arbitration. In addition, Claimant requested temporary relief to preserve the *status quo* while Claimant's Application was pending, noting that Mr. Herbón was scheduled to appear for a hearing on 1 December 2016. (¶ 18).

On 21 November 2016, Respondent submitted its Response to the aforementioned Application. Uruguay stated that it was "prepared to guarantee that its investigation into the circumstances of the apparently forged signatures and fraudulent documents, regardless of its course, will not prevent either Dr. Alberelli or Mr. Herbón from participating in the preparation or presentation of the remainder of Claimant's case." (¶ 25).

On 24 November 2016, Claimant submitted its Reply in Further Support of its Application for Provisional Measures and Temporary Relief. (¶ 27).

On 25 November 2016, the President of the Tribunal requested Respondent to confirm, no later than 28 November 2016, that regardless of the course of the investigation, the witnesses would not be prevented from participating in the preparation or presentation of the remainder of Claimant's case. Additionally, Respondent was requested to communicate the concrete steps that it would take to provide certainty to the witnesses that they would not be detained in the criminal investigation or in any other proceeding that Respondent could initiate. Due to the urgency, the Tribunal decided to communicate directly with the Parties. (¶ 28).

On 28 November 2016, Respondent re-assured the abovementioned guarantee. (¶ 30).

On 30 November 2016, the Tribunal invited Claimant to confirm, on or before Monday, 5 December 2016, whether or not it accepted the guarantees. (¶ 31). On 5 December 2016, Claimant replied asserting that the Respondent's "guarantee" was a "vague promise", "inadequate" and "effectively worthless." (¶ 32).

On 9 December 2016, the President of the Tribunal invited the Parties to provide an update on whether Mr. Herbón had appeared [on 1 December 2016] before the Uruguayan Criminal Court. (¶ 34).

On 13 December 2016, Respondent informed the Tribunal that “Mr. Herbón did not appear in court and added that the guarantee remained in place.” (¶ 35). On that same day, Claimant reported that Mr. Herbón’s counsel had successfully rescheduled his hearing date. (¶ 36).

On 30 January 2017, Respondent filed a Counter-Memorial on the Merits and Memorial on Jurisdiction, together with witness statements (¶ 38).

On 9 February 2017, Claimant filed a further communication informing the Tribunal that Mr. Herbón’s hearing was scheduled for 15 February 2017 and reiterated its request for provisional measures. On 14 February 2017, Respondent filed observations in response to this communication, confirming again the above-mentioned guarantee. (¶ 39).

3. Analysis

Prior to analyze Claimant’s Application of Provisional Measures, the Tribunal addressed the issue of *prima facie* jurisdiction. On this regard, since Respondent agreed that its jurisdictional objection be determined at the same time as its defenses on the merits, the Tribunal considered that Respondent had accepted that its members were vested with the necessary adjudicative powers to conduct the proceeding, including the power to recommend provisional measures according to Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules (¶ 111, 113-114)

Accordingly, the Tribunal proceeded to observe whether the application for provisional measures satisfied the requirements to be adjudicated, as established in Rule 39 (1) of the ICSID Arbitration Rules. (¶ 110)

Regarding Claimant’s request for Uruguay to end or suspend the investigation as it threatened 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”, the Tribunal considered that there was not substantive and compelling evidence of a serious risk of irreparable harm to Claimant’s rights, as a result of the criminal investigation, or any threat to the integrity of the arbitration proceedings. (¶ 117)

In addition, the Tribunal asserted that it was in no way bound by any finding made by the Uruguayan courts, as accepted by Respondent. The Tribunal considered not to be empowered to order the cessation of a criminal investigation, since Uruguay had the sovereign right and duty to investigate alleged criminal actions, as established by the Tribunals in *Churchill v. Indonesia*, *SGS v. Pakistan*, *Hamster v. Ghana* and *Teinver v. Argentina*. In the Tribunal’s view, arbitration does not confer a “blanket of immunity” to the investor’s principals and witnesses, and a Sovereign’s right to conduct an investigation could not be enjoined when there is no evidence of bad faith by the authorities (¶ 116,118).

In the Tribunal’s perspective, it had to accept Respondent’s commitment made in good faith, to respect Claimant’s rights in the arbitration, including its right to gather evidence. (¶ 120)

4. Decision

The Arbitral Tribunal unanimously rejected the Application for Provisional Measures and Temporary Relief filed by Italba Corporation. However, the Tribunal reminded the parties of their duty to act in good faith during the proceeding and to refrain from taking any action that could affect the integrity of the arbitration.