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Follow-up: An Analysis of the U.S.-Uruguay Bilateral Investment Treaty, the New Model's First Application

BY MARK KANTOR

The U.S. government has released the text of the U.S.-Uruguay Bilateral Investment Treaty that was executed on Oct. 25, 2004. It is available at www.state.gov/e/eb/tpp/2004/index.htm.

The U.S.-Uruguay "BIT" is the first fully negotiated U.S. investment treaty since the release, in February 2004, of the draft revised Model U.S. BIT. A discussion of the draft model focusing on its substantial international arbitration provisions appeared recently in a two-part *Alternatives* article. See Part I at 22 *Alternatives* 171 (November 2004), and Part II at 22 *Alternatives* 186 (December 2004).

The U.S.-Uruguay BIT reflects comments received by the U.S. government on the February draft revised Model U.S. BIT, and, of course, the results of negotiations with the Uruguayan government. Consequently, the new agreement can be considered in part as an updating of the February draft.

The U.S.-Uruguay BIT contains a number of changes from the February draft Model U.S. BIT. A great number of those changes are technical corrections rather than substantive modifications. But some of the changes are quite substantive. Here are a few of those key changes:

1. The draft Model U.S. BIT limited the definition of "investment agreement" in Article 1 solely to an agreement "that takes effect on or after the date of entry into force of this Treaty." In the U.S.-Uruguay BIT, that limit has been deleted. As a result, breaches by a national authority of an investment agreement between a foreign investor and that national authority will be covered by investor-state arbitration under Articles 24.1(a)(i)(c) and 24.1(b)(i)(c), the new BIT's "umbrella" clauses, even if the particular agreement was entered into before the BIT.

2. The definition of "investment agreement" also has been modified to make clear that it covers agreements with a national authority relating to the supply of services, such as power, water, and telecoms, and agreements to undertake infrastructure projects that are not for the government's predominant use and benefit. Therefore, breaches of such agreements by the national authority are covered by investor-state arbitration under the umbrella clauses at Article 24.1(a)(i)(c) and 24.1(b)(i)(c).

INTERNATIONAL ADR

3. In addition, under Article 24.1 of the U.S.-Uruguay BIT, investor-state arbitration with respect to breaches of "investment agreements" with a national authority is available "only if the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement." That language, which is not found in the draft Model U.S. BIT, limits the scope of claims against the "national authority" with respect to the investment agreement in question.

4. "Nationality" references in the definitions of "investor of a Party" and "investor of a non-Party," and elsewhere in the draft Model U.S. BIT have been replaced in the U.S.-Uruguay BIT with references to "citizen" and "citizenship." These changes can have significant consequences for jurisdiction under the investor-state arbitration provisions, as the tests for nationality and citizenship are often quite different.

5. A new Section 3 has now been added to Article 13, addressing investment and labor, and providing:

> Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to labor concerns.

The addition of this Section 3 in Article 13 now brings that article into conformity with Article 12, Investment and the Environment. It remains the case, however, that breach of neither article is covered by investor-state arbitration.

6. The monetary crises in numerous countries since 1997 have resulted in a number of claims under BITs for breach-of-treaty obligations, including the many Argentine cases. A new provision has been added in Article 20 of the U.S.-Uruguay BIT, Financial Services, that affects claims of a breach of the BIT due to fiscal or monetary measures. New Section 2(a) provides:

> Nothing in this Treaty applies to non-discriminatory measures of general application taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies. This paragraph shall not affect a Party's obligations under Article 7 or Article 8.

Articles 7 and 8 of the BIT, which are excluded from the operation of this clause by the last sentence, relate to "Transfers" and "Performance Requirements." By virtue of excluding the provisions of Article 7 of the U.S.-Uruguay BIT requiring free transferability and convertibility for U.S. dollar payments outside Uruguay, it appears that this new language would not prevent a U.S. investor from bringing a

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claim against Uruguay based on a foreign exchange moratorium in violation of Article 7.

The exclusion in the last sentence, however, does not refer to Article 5, Minimum Standards of Treatment, or Article 6, Expropriation and Compensation, of the U.S.-Uruguay BIT. It therefore appears that a nondiscriminatory measure of general application taken by the government in pursuit of monetary and related credit policies or exchange rate policies will not of itself result in a successful claim for breach of minimum standards of treatment under customary international law (such as "fair and equitable treatment") nor a successful claim for expropriation.

Moreover, a footnote in the U.S.-Uruguay BIT not found in the draft Model U.S. BIT, footnote 16, offers further explanation of the phrase "measures of general application taken in pursuit of monetary and related credit policies or exchange rate policies," as used in Article 20.2(a). That footnote states:

> For greater certainty, measures of general application taken in pursuit of monetary and related credit policies or exchange rate policies do not include measures that expressly nullify or amend contractual provisions that specify the currency of denomination or the rate of exchange of currencies.

In light of that footnote, it appears that "Pesofication" measures similar to those enacted in Argentina would not be protected against a claim by a foreign investor under the U.S.-Uruguay BIT.

7. The financial services provisions of Article 20 contain provisions for state-state involvement in investor-state arbitrations when the respondent state asserts a defense to the investor's claims based on "prudential" regulation by financial authorities. The U.S.-Uruguay BIT makes a number of procedural changes to the process, including requirements as to the financial expertise of the arbitrators and a definition of "prudential reasons."

8. The scope and coverage of Article 21, addressing taxation measures, has been substantially modified in a number of respects. In particular, the "National Treatment" and "Most-Favored-Nation" provisions of Articles 3 and 4 of the BIT now apply to a number of tax measures.

9. A new Annex C has been added in the U.S.-Uruguay BIT. It contains a "fork in the road" provision prohibiting a U.S. investor, on its own behalf or on behalf of a Uruguayan enterprise, from using investor-state arbitration if that investor already has alleged a breach of any of Articles 3 through 10 of the BIT before a Uruguay court or administrative tribunal. There is no reciprocal provision with respect to Uruguayan investors.

This new fork-in-the-road provision is a supplement to, not a replacement for, the requirements of Article 24. The latter article requires the claimant investor, as a condition to pursuing investor-state arbitration under the BIT, to waive any right to initiate or continue before any administrative tribunal or court under the law of either party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute an actionable breach under the BIT.

Similar provisions are found in the North American Free Trade Agreement with respect to claims against Mexico and in the U.S.-Chile Free Trade Agreement with respect to claims against Chile, in each case because national law permits claims for breach of a treaty to be brought against that state in its local courts.

10. Set out on page 49 are (A) Document I, which is the text of an Annex G to the U.S.-Uruguay BIT directly addressing sovereign debt restructurings, and (B) Document II, the paragraphs from a Protocol appended to the BIT regarding (i) burden of proof for BIT claims and elements of a damage claim with respect to an attempt to establish an investment and (ii) confirmation that the "public welfare" list in Annex B of the BIT covering legitimate regulatory actions that would not (except in rare circumstances) be an indirect expropriation is not exhaustive.

The Uruguay investment treaty includes requirements on arbitrators' financial expertise.

The treaty prohibits U.S. investors from using arbitration in many circumstances if they are in a Uruguayan court.

Neither document has an analogue in the draft Model U.S. BIT. These new documents are of particular interest in connection with the impact of a BIT on sovereign debt restructurings, the continuing movement in these treaties to send clear instructions to the arbitrators to not expand customary practice, and the impact of BITs on "regulatory taking" theories. In situations involving restructured sovereign Uruguayan debt, Annex G prohibits a U.S. investor from bringing an investor-state arbitration claim under the BIT against Uruguay alleging that the negotiated restructuring breached the BIT's Minimum Standards, Expropriation, Transfer, Performance Requirements, Senior Management or Publication obligations, which are found in Articles 5–10.

Claims based on breach of National Treatment or Most-Favored-Nation Treatment obligations, however, remain available in investor-state arbitration under the BIT. Annex G, of course, does not address the ability to bring any such claims in national courts.

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Document I

ANNEX G
Sovereign Debt Restructuring

1. No claim that a restructuring of a debt instrument issued by Uruguay breaches an obligation under Articles 5 through 10 may be submitted to, or if already submitted continue in, arbitration under Section B, if the restructuring is a negotiated restructuring at the time of submission, or becomes a negotiated restructuring after such submission.

2.(a) For purposes of this Annex, "negotiated restructuring" means the restructuring or rescheduling of a debt instrument that has been effected through:

(i) a modification of the key payment terms of such debt instrument, as provided for under the terms of such debt instrument; or

(ii) a debt exchange or other process in which the holders of no less than the percentage of debt specified in subparagraph (b) have consented to such debt exchange or other process.

(b) The percentage referred to in subparagraph (a)(ii) shall be the percentage required to modify the key payment terms of a single series of bonds in the most recent widely-distributed issue of external sovereign bonds that:

(i) were issued by Uruguay prior to the alleged breach;

(ii) are governed by New York law; and

(iii) permit the modification of the key payment terms by holders of less than 100 percent of the aggregate principal amount of the debt outstanding.

3. Notwithstanding Article 26(1) and subject to paragraph 1 of this Annex, an investor of the United States may not submit a claim under Section B that a restructuring of debt issued by Uruguay breaches an obligation under Articles 5 through 10 unless 270 days have elapsed from the date of the events giving rise to the claim.

Document II

PROTOCOL

2. The Parties confirm their shared understanding that, consistent with general principles of law applicable to international arbitration, when a claimant submits a claim to arbitration under Section B, it has the burden of proving all elements of its claim, including the damages that it alleges were sustained by reason of, or arising out of, the alleged breach. Accordingly, the Parties further share the understanding that, where a claimant has met its burden of proving that the respondent has breached an obligation under Section A with respect to an attempt to make an investment, the only damages that may be awarded are those that the claimant has proven were sustained in the attempt to make the investment, provided that the claimant also proves that the breach was the proximate cause of those damages.

3. For greater certainty, the Parties confirm that the list of "legitimate public welfare objectives" in paragraph 4(b) of Annex B on Expropriation is not exhaustive.

More Options for Employment Mediation

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pay tax only based on the amount that he or she received each year.

Since the plaintiff's taxable income likely would be significantly more during the year that the settlement was reached, by spreading that out over a period of time, the tax rate also is reduced because the income is significantly less. The employee would realize about 45% of the settlement, or $45,000. The employee defers the income tax at a lower rate, while creating a secure stream of income that assists with other financial needs.

The considerations that would justify a structured settlement include whether the employee:

- Needs the cash up front or can afford to defer income.
- Might be interested in a retirement-type plan that can be set up at the time of the settlement.
- Has any other future needs, such as a college fund, mortgage or other long-term commitment that would benefit from a periodic payment plan.
- Has a "lottery ticket" mentality about the case.
- Has counsel that can craft a physical-injury component.
- Has long- and short-term goals that fit a structured settlement.
- Has workers' compensation. Since the landmark decision in *City of Moorpark v. Superior Court,* 18 Cal.4th 1143 (1998), many employees are concurrently filing workers' compensation claims while prosecuting discrimination actions. If the workers' compensation claim is still open at the time of the mediation, counsel should consider running a portion of the settlement funds through the Workers' Compensation Appeals Board.

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