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SECTION: TREATIES AND AGREEMENTS

INTRODUCTORY NOTE TO THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF URUGUAY CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT, BY LAURA SVAT AND GERALDINE FISCHER n1

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TEXT:

[*265] On October 25, 2004, when the United States and the Republic of Uruguay signed a bilateral investment treaty (BIT), officials of both governments hailed it as a symbol of their countries' strong ties and mutual commitment to greater economic integration. Indeed, the United States and Uruguay have worked determinedly since 2002 to strengthen their bilateral trade relationship, and they concluded the BIT negotiations with notable speed. n2 As a result of progress made by the United States-Uruguay Joint Commission on Trade and Investment, the two countries announced their intention to negotiate the BIT in November 2003, began formal negotiations in May 2004, and jointly announced the conclusion of negotiations four months later, on September 7, 2004.

n2 In order to enter into force, legislative action on the part of both governments is also required. The United States Senate must provide its advice and consent to ratification by two-thirds vote (U.S. Const. art. II, § 2, cl. 2) and both chambers of Uruguay's General Assembly must approve the treaty by an absolute majority (Constitucion § 5, ch. 1, art. 85(7) (Uru.)).

The treaty is also symbolic of Uruguay's desire to improve its investment climate and achieve greater economic growth.

At the September ceremony marking the conclusion of negotiations, Uruguayan Minister of Economy and Finance, Isaac Alfie, noted that Uruguay must not miss the opportunity to promote foreign investment, which is essential to its growth. n3 Once known as the Switzerland of Latin America, Uruguay experienced severe economic and financial difficulties during the 1999-2002 period. Uruguay's economy suffered as a result of lower demand for its exports and increased pressure on its financial system due primarily to external factors, including Brazil's currency devaluation and an economic crisis in neighboring Argentina. In mid-2002, Argentine depositors made a run on Uruguayan banks to withdraw dollar deposits. The banks did not have sufficient reserves to meet the withdrawal demand, and Uruguay's Central Bank lacked the foreign exchange reserves to control the crisis, which contributed as well to difficulty managing Uruguay's sovereign debt. n4

n3 El Pais Digital, "Concluye tratado bilateral de inversiones," Sept. 7, 2004, available at <http://www.elpais.com.uy/04/09/07/ultmo_109915.asp>.
n4 See Bureau of W. Hemisphere Affairs, U.S. Dep't of State, Background Note: Uruguay (Mar. 2005), available at <http://www.state.gov/r/pa/ei/bgn/2091.htm>.

Uruguay, however, took decisive steps to confront these problems in order to improve its economic performance and spur growth. Among other things, Uruguay borrowed $ 1.5 billion from the United States under a short-term bridge loan as an interim measure until funds from the IMF, World Bank, and Inter-American Development Bank could be transferred to alleviate the financial crisis. n5 In 2003, Uruguay was also able to avoid defaulting on $ 11 billion dollars of sovereign debt by offering a debt swap (exchanging old debt instruments for newer ones with longer amortization periods and collective action clauses n6). n7 Since the crisis, Uruguay has taken steps to improve its bank supervision and regulation, and it has strengthened its fiscal health by reducing government expenditures and fortifying tax administration. n8

n5 Press Release, John B. Taylor, The U.S. Commitment to Uruguay and Latin America Remarks at the Embassy of Uruguay on Receipt the "Medal of the Oriental Republic of Uruguay" (Feb. 14, 2005), available at <http://www.ustreas.gov/press/releases/js2250.htm>.
n6 A collective action clause in a debt instrument enables a designated supermajority of the debt instrument's creditors to broker a debt structuring deal with the debtor to modify the bond's payment terms, and prevents minority holders from blocking the restructuring.
n7 Alan Beattie, Uruguay Provides Test Case for Merits of Voluntary Debt Exchange, Fin. Times, Apr. 23, 2003, at 3.
n8 Taylor, supra, note 5.

The U.S.-Uruguay BIT is also expected to contribute to Uruguay's overall economic progress. The purpose of a BIT is to protect and encourage investment by investors of one country in the territory of the other country. BITs can also mitigate the risks associated with investing abroad by providing investors with significant investment protections and access to binding international arbitration. By stimulating investment, BITs help promote exports, economic development, and greater economic integration between the two countries.

The text of the U.S.-Uruguay BIT is largely based on the 2004 U.S. Model BIT. n9 In addition to core investment principles--such as non-discrimination; free transfers relating to investments; prompt, adequate and effective compensation in the case of expropriation; and binding international arbitration of investment disputes--the U.S.-Uruguay BIT includes provisions that reflect the investment negotiating objectives in the Bipartisan Trade Promotion Act of 2002 (TPA). As a result, the treaty is similar in many respects to the investment chapters of the free trade agreements the United States has concluded in recent years with Latin American and other partners. For example, the treaty includes annexes covering topics such as customary international law, expropriation, and an appellate mechanism. In addition, provisions on investor-State dispute settlement address other TPA objectives such as deterring frivolous claims, ensuring transparency, and providing for amicus participation.

n9 U.S. Model Bilateral Investment Treaty, available at <http://www.state.gov/e/eb/rls/othr/38602.htm> and

<http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html>. For a summary of the U.S. Model BIT's substantive obligations, see Geraldine Fischer, Reviving the U.S. Bilateral Investment Treaty Program, The Int'l Lawyer (forthcoming 2005).

The U.S.-Uruguay BIT also includes provisions that address Uruguay's interest in ensuring financial stability. For example, Article 20 addresses financial services and sets forth two defenses on which a respondent might rely: one for prudential measures, including measures taken to ensure the stability of the financial system, and another for measures taken in pursuit of monetary or exchange rate policies. The prudential exception derives from the **[*266]** World Trade Organization General Agreement on Trade in Services and is a well-recognized defense for measures that a Party might take for "prudential reasons," such as "for the protection of investors, depositors, policy holders, or persons to whom a fiduciary duty is owed by a financial services supplier, or to ensure the integrity and stability of the financial system." The second defense covers non-discriminatory measures of general application taken by a central bank or monetary authority in pursuit of monetary and related credit policies or exchange rate policies. n10

n10 This defense, however, does not derogate from the obligations in Article 7 (Transfers) or Article 8 (Performance Requirements).

Article 20 also provides for special procedures that apply where a respondent Party invokes either of these defenses. For example, in an investor-State dispute, the respondent may trigger a process that suspends the arbitration while the competent financial authorities of both Parties attempt in good faith to make a joint determination as to whether the respondent's defense is valid. If they do make a joint determination within a specific time period, it is binding on the investor-State tribunal. If they do not agree, the tribunal decides whether the defense applies.

Annex F also addresses financial services matters. It begins by clarifying the application of the National Treatment and Most-Favored-Nation Treatment obligations in cases where measures of a Party relating to financial institutions are challenged. It explains that, in evaluating the treatment accorded to investors and covered investments in such cases, the relevant comparison that should be made is with respect to domestic or third-country financial institutions or investments in financial institutions, as the case may be. It also provides that investor-State arbitration is not available for National and Most-Favored-Nation Treatment claims concerning a measure of a Party relating to a financial institution in its territory that is authorized to do business and regulated or supervised as a financial institution under domestic law. Finally, the Annex clarifies that the BIT does not prevent a Party from taking measures relating to financial institutions that are necessary to secure compliance with laws or regulations that are not inconsistent with the BIT, such as measures relating to the prevention of deceptive and fraudulent practices.

Another reflection of Uruguay's concern for fiscal stability is contained in Annex G to the agreement, entitled "Sovereign Debt Restructuring." It provides Uruguay a safe haven from binding investor-State arbitration for claims (other than national and most-favored-nation treatment claims) that a negotiated restructuring of a sovereign debt instrument amounts to a breach of a BIT obligation. Only certain restructurings, however, qualify for the safe haven: those that are effected through (i) a change of key payment terms of the debt instrument, in accordance with its terms (a collective action clause), or (ii) a debt exchange or other process wherein a certain threshold percentage of debt holders consent to the exchange or process. n11

n11 In any given case, the threshold is determined by the actual percentage required to modify the key payment terms of a single series of bonds in Uruguay's most recent (prior to the measures complained of) widely-distributed issue of external sovereign bonds, provided the bonds are also governed by New York law and permit such modification by holders of less than 100 percent of the aggregate principal of the outstanding debt. See U.S.-Uruguay BIT, Annex G, para. 2(b).

In the words of Under Secretary of State Alan P. Larson, the U.S.-Uruguay BIT "will complement and reinforce the significant economic reforms already undertaken by Uruguay and provide greater confidence to U.S. and Uruguayan investors." n12 Following is the text of the Treaty Between the United States of America and the Republic of Uruguay

Concerning the Encouragement and Reciprocal Protection of Investment signed on October 25, 2004.

n12 Press Release, United States, Uruguay Conclude Bilateral Investment Treaty (Sept. 7, 2004), available at <http://www.ustr.gov/Document_Library/Press_Releases/2004/September/United_States,_Uruguay_Conclude_Bilateral_Investm