

**National Interest Analysis [2019] ATNIA 13**

**with attachment on consultation**

**Agreement between Australia and the Oriental Republic of Uruguay on the Promotion  
and Protection of Investments**

(Canberra, 5 April 2019)

**[2019] ATNIF 12**

## NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

### SUMMARY PAGE

#### **Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments**

(Canberra, 5 April 2019)

**[2019] ATNIA 13**

**[2019] ATNIF 12**

#### **Nature and timing of proposed treaty action**

1. The proposed treaty action is entry into force of the *Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments* (the 2019 Agreement), which was signed on 5 April 2019 in Canberra.
2. Article 17(1) provides that the 2019 Agreement will enter into force thirty days after the date of the latter notification through diplomatic channels by which either Party notifies the other Party that its domestic requirements for entry into force of the 2019 Agreement have been fulfilled.
3. Article 17(5) of the 2019 Agreement provides that the *Agreement between Australia and Uruguay on the Promotion and Protection of Investments* signed on 3 September 2001 at Punta del Este, which entered into force 12 December 2002 (the 2002 Agreement), will terminate upon entry into force of the 2019 Agreement.

#### **Overview and national interest summary**

4. The Australian Government recognises the importance of its role in expanding economic relations and technical cooperation between countries and promoting bilateral investment. The 2019 Agreement is an improvement on the 2002 Agreement as it contains a range of explicit procedural and substantive safeguards in relation to investor-State dispute settlement (ISDS), reinforcing the Government's right to regulate.

## **Reasons for Australia to take the proposed treaty action**

5. The 2019 Agreement will terminate the 2002 Agreement and replace its broadly drafted older-style provisions with updated provisions reflecting Australia's modern investment treaty practice.
6. ISDS is a key feature of both the 2019 Agreement and the 2002 Agreement. ISDS is an enforcement mechanism that allows foreign investors to directly enforce the investment protections in treaties, such as: a minimum standard of fair and equitable treatment; having their investments treated no less favourably than those of other foreign investors; and receiving compensation if investments are expropriated or nationalised.
7. The 2019 Agreement includes detailed procedural safeguards in its ISDS mechanism. These changes: narrow the scope of the ISDS mechanism; encourage the settlement of disputes; promote due process; prevent forum shopping; and generally enhance efficiency, consistency and State Party control in relation to the dispute settlement process.
8. The updated provisions ensure greater certainty for investors and governments with respect to their rights and obligations under the 2019 Agreement. Australian companies operating in Uruguay will still be able to bring an ISDS claim for breaches of any applicable investment protections under the 2019 Agreement.
9. The 2019 Agreement demonstrates the Government's commitment to pursuing ISDS reform.

## **Obligations**

10. The 2019 Agreement explicitly recognises the Government's right to regulate and protect legitimate public welfare objectives, such as public health and the environment (Preamble).
11. Article 1 of the 2019 Agreement tightens the drafting of key definitions. The definition of 'investment' has been updated to include a clarification regarding the characteristics of an investment. The definition of 'investor of a Party' now incorporates a substantial business activities test for 'company of a Party'.
12. Article 4 of the 2019 Agreement comprises a modern provision regarding the minimum standard of treatment. The 2019 Agreement explicitly links and limits the fair and equitable treatment obligation and the full protection and security obligation to the customary international law minimum standard of treatment of aliens. The changes in the 2019 Agreement clearly delimit a highly litigated investment obligation.
13. Article 5 of the 2019 Agreement deals with the most favoured nation (MFN) treatment obligation. The MFN obligation requires the host State to give covered investments and investors treatment that is no less favourable than the treatment that it accords to the investments and investors of any third country in like circumstances. Article 5 of the 2019 Agreement, now explicitly incorporates the concept of 'like circumstances' to enable distinctions on the basis of legitimate public welfare objectives. A 'Maffezini clause' has

also been added to explicitly prevent investors from using MFN to import more favourable ISDS procedures from other treaties.

14. Article 7 of the 2019 Agreement covers expropriation. Expropriation occurs when the ownership of a covered investment is legally transferred or otherwise taken or seized from an investor. Expropriation can also be indirect, where the State has taken an action or series of actions that have the effect equivalent to direct expropriation, by depriving the investor of the economic use and enjoyment of the investment, without formal transfer of title or outright seizure. Expropriation is only legal under certain conditions and failure to comply with those conditions will result in a breach of the expropriation provision. Article 7 of the 2019 Agreement has been updated to include reference to Annex B, which elaborates on indirect expropriation. Annex B provides detailed guidance on some of the factors to be considered in determining indirect expropriation. It also contains an explicit statement of the ‘police powers doctrine’ that non-discriminatory regulatory actions to protect legitimate public welfare objectives do not constitute indirect expropriations. These changes clearly delimit a highly litigated investment obligation.
15. Article 9 of the 2019 Agreement relates to the transfer of funds. This provision guarantees covered investors the right to make transfers related to an investment in and out of the country freely and without unreasonable delay. It now explicitly provides for temporary safeguard measures in which a Party may adopt or maintain measures inconsistent with this guarantee in relation to serious balance of payments difficulties, external financial difficulties and serious difficulties for macroeconomic management (Article 9(4)).
16. Article 11 of the 2019 Agreement expands the circumstances in which the benefits of the 2019 Agreement may be denied. The agreement of the other Party is no longer required for the denial of benefits.
17. Article 14 of the 2019 Agreement makes significant changes to the ISDS mechanism. The 2019 Agreement introduces a range of modern procedural safeguards, including: expedited review of preliminary objections regarding the tribunal’s competence (Article 14(18)); enhanced transparency for ISDS proceedings (Article 14(19)); and a code of conduct providing a detailed set of ethical rules for arbitrators (Annex C).
18. Article 15 of the 2019 Agreement adds explicit general and security exceptions, and Article 16 adds an explicit taxation exception. These provisions reinforce the Government’s right to regulate.
19. Article 17(5) of the 2019 Agreement provides that upon entry into force, the 2019 Agreement will terminate the 2002 Agreement. Notwithstanding the grandfathering provisions in the Article 15(3) of the 2002 Agreement, upon entry into force, the provisions for termination set out in Article 17(6) of the 2019 Agreement will supersede the provisions for termination contained in the 2002 Agreement.

## **Implementation**

20. No legislative changes are required for the 2019 Agreement to enter into force.
21. The 2019 Agreement is in line with Australia’s recent free trade agreement practice.

## **Costs**

22. The 2019 Agreement will not affect regulatory costs.
23. The Office of Best Practice Regulation has been consulted and advised that a Regulation Impact Statement is not required.

## **Future treaty action**

24. Article 17(2) states that the 2019 Agreement may be amended by written agreement between the Parties.
25. Any such amendments shall enter into force thirty days after the date of the latter notification through diplomatic channels that each Party has fulfilled its domestic requirements for the entry into force, or such other date as the Parties agree (Article 17(2)).
26. All amendments will be subject to Australia's domestic treaty-making requirements, including tabling and consideration by the Joint Standing Committee on Treaties.

## **Termination**

27. Article 17(3) states that either Party may terminate the 2019 Agreement at any time after it has been in force for fifteen years by giving one year's written notice to the other Party. In these circumstances, pursuant to Article 17(4), the 2019 Agreement shall continue to be effective for a further period of fifteen years from the date of its termination in respect of investments made before the date of termination of the 2019 Agreement.

## **Contact details**

Investment Law Section  
Office of Trade Negotiations  
Department of Foreign Affairs and Trade

## **ATTACHMENT ON CONSULTATION**

### **Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments**

(Canberra, 5 April 2019)

**[2019] ATNIA 13**

**[2019] ATNIF 12**

#### **CONSULTATION**

28. The States and Territory governments were consulted through the Commonwealth-State-Territory Standing Committee on Treaties. No concerns were raised by the States and Territories.
29. External stakeholders, including the Australian Chamber of Commerce and Industry, the Minerals Council of Australia and the Australian Fair Trade & Investment Network, were consulted as part of the bi-annual Trade and Investment Law Outreach events held by the Department of Foreign Affairs and Trade.