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COVID-19 Measures: Leveraging Investment Agreements to Protect Foreign Investments

National governments have responded to COVID-19 with a panoply of measures, including travel restrictions, limitations on business operations, and tax benefits. Notwithstanding their legitimacy, these measures can negatively impact businesses by reducing profitability, delaying operations or being excluded from government benefits. As described below, for companies with foreign investments, investment agreements could be a powerful tool to recover or prevent loss resulting from COVID-19 related government actions.

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Background

Investment agreements include individually negotiated contracts between the investor and host state as well as a network of bilateral and multilateral investment and international trade agreements between states (such as USMCA or “NAFTA 2.0” and the Energy Charter Treaty). Both types of investment agreements support foreign investment by protecting foreign investments and foreign investors from certain actions of the host government that could devalue the investment. Almost universally, investment agreements prohibit the host state from expropriating the investment either directly or indirectly, subjecting it to unfair or unequal treatment or imposing discriminatory measures. If the host government violates these protections, foreign investors typically are permitted to bring an arbitration claim directly against the host government to recover losses. These protections apply even when government measures are implemented to respond to national emergencies like COVID-19. For example, foreign investors successfully leveraged bilateral investment treatment to recover losses related to Argentina’s 2001-2003 emergency economic measures.

Whether a foreign investor could recover its losses against the host government is a fact-intensive analysis. However, given the scope of COVID-19 measures, it is anticipated that some governmental actions, either individually or cumulatively, will harm foreign investments in violation of an investment agreement. Below, we outline key questions to consider while monitoring three types of common government action: (i) compulsory restrictions on personal and business activities (such as limitations on travel and business operations), (ii) new tax provisions and (iii) economic relief packages.

Compulsory Restrictions

A foreign investment that suffers losses due to restrictions on business operations could have a claim against the host government for its losses. For example, in response to COVID-19, the Spanish government has been empowered to seize private production lines to produce medical equipment,¹ and the United States is similarly permitted to do so under the Defense Production Act²—both of which could violate an investment agreement depending on their application. Other

¹ Government of Spain, Real Decreto 463/2020 (14 March 2020), available at <https://www.boe.es/eli/es/rd/2020/03/14/463>.

² Pub.L. 81-774.

CORONAVIRUS INFORMATION & UPDATES

examples include the recent bill passed by the Peruvian Congress to suspend the collection of tolls, including for tolls owned by foreign investors,³ and India's export restriction on 26 pharmaceutical ingredients.⁴

When assessing a compulsory restriction, the foreign investor should consider the following, any of which may indicate a violation of an investment agreement:

- Have the restrictions led to a seizure or nationalization of the foreign investment?
- Have the restrictions destroyed the value of the investment or prevented the company from controlling its foreign investment?
- Have the restrictions been imposed openly and are the restrictions proportionate to the risk?
- Have the restrictions been imposed in a discriminatory manner, such that they negatively impact foreign-owned businesses?
- Do the restrictions contradict any guarantee or benefit specifically granted to the foreign investment?

New Tax Provisions and Economic Relief

Currently, many governments are attempting to mitigate the economic effects of COVID-19 by reducing or delaying tax payment obligation or providing specific economic benefits. Some governments, including the United States, are incorporating key stimulus provisions into the tax systems, in the hope of more quickly getting money distributed to businesses in need. In the future, governments will likely be more aggressive in enforcing tax laws generally in order to fund economic stimulus packages related to COVID-19. In all these situations, foreign investors should evaluate whether governments are discriminating against foreign businesses in the application of taxes and/or economic benefits, which could indicate an investment agreement violation:

- Are foreign investors or investments excluded from tax benefits or other economic relief?
- Are additional taxes being imposed that significantly reduce the value of the foreign investment?
- Are new taxes being imposed only on foreign-owned businesses?
- Is the process for contesting a tax assessment or obtaining a tax benefit or other economic benefit unduly burdensome or futile for foreign-owned businesses?
- Did the government guarantee the investor a specific tax rate or tax treatment that has since been revoked?

Conclusion

Regardless of the goals of COVID-19 measures, it is likely that some regulations enacted in response to the crisis will violate the rights afforded to foreign investors under investment agreements, either through the cumulative impact of the regulations or one or more particular instances of substantial overreach. As a result, companies should monitor government measures and their effects on foreign investments. In addition to the substantive protections, investment

³ Cosmo Sanderson, *Peru warned of potential ICSID claims over covid-19 measures*, GAR, April 9, 2020.

⁴ Government of India, Notification No. 50/ 2015-2020 (3 March 2020), available at https://dgft.gov.in/sites/default/files/Noti%2050_0.pdf.

CORONAVIRUS INFORMATION & UPDATES

agreements have the benefit of allowing covered investors to enforce their rights directly against the host government through an independent, neutral arbitration. The ability to adjudicate these disputes outside of a host country's court system is particularly powerful, given that national courts could be subject to closures or be biased towards retaining government funds.