

COVID-19 PRESSURE POINTS: PANDEMIC RESPONSE VS INVESTMENT TREATY RULES

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Legal Briefings

As states take extraordinary Covid-response measures, we assess potential conflicts with international investment obligations

The COVID-19 pandemic has brought about an unprecedented level of state action as governments around the world make difficult decisions in response to the spread of the virus. Over the past few months this has resulted in a variety of measures in different countries, including the suspension of contractual rights, social distancing regulations, the requisitioning or nationalisation of private property, the closure of borders, export and travel restrictions, and bail-outs of state carriers.

In such extraordinary times, a degree of interference with private rights is almost inevitable. Many states are balancing multiple concerns, looking to protect public health and absorbing expert evidence in a fast-moving environment, whilst trying to mitigate both economic and societal damage in the short and longer term. However, even in times of crisis, states nonetheless have domestic and international law obligations (including under investment treaties), which impose standards against which their conduct may be held to account. Depending on the circumstances, state action in response to the COVID-19 pandemic which fails to meet these standards could give rise to claims.

This article describes the potential international investment law protections which may be relevant in response to COVID-19. It also discusses the key considerations for states and foreign investors alike when assessing whether state action may infringe a state's international law obligations.

PROTECTIONS FOR FOREIGN INVESTORS UNDER INVESTMENT TREATIES

A foreign investor may enjoy protections under an international investment agreement (an **IIA**), which if breached by state action can give rise to the right to make a claim. An IIA is an agreement between two or more states containing reciprocal undertakings for the promotion and protection of private investments made by nationals of the state signatories in each other's territories. Such agreements have historically been entered into to provide confidence to foreign investors that their investment will not be negatively affected by certain types of irregular action by the state hosting the investment (the **host state**) and that if it is, to enable the investor to claim damages. Most commonly, these IIAs are bilateral arrangements (called bilateral investment treaties, or **BITs**), multilateral treaties or free trade agreements containing investment protections.

The definitions of investor and investment vary between different IIAs but the definition of investment often includes a broad and non-exhaustive list of categories of assets. Whilst IIAs are state-to-state agreements, they usually contain provisions allowing an investor from one state to enforce the guarantees as to the treatment of their investment in the host state through international arbitration before an independent tribunal.

Each treaty must be considered on its terms but IIAs commonly include the following investment protections:

1. a protection against the unlawful expropriation of an investment without adequate compensation, whether directly or indirectly through a series of governmental acts which encroach on an investment and result in it being deprived of value;
2. the guarantee of fair and equitable treatment (or **FET**). Claims under FET provisions typically fall into two broad categories: prohibitions against a denial of justice and claims based on administrative decision-making. Not all regulatory changes will constitute a violation of the FET standard, and the existence of such protections does not deprive a state of its ability to exercise its regulatory powers. However, where the state's exercise of its regulatory power is arbitrary or based on procedural unfairness or lack of due process, bad faith, discrimination or a failure to protect an investor's legitimate expectations as to how they will be treated, a FET claim may be warranted;
3. a guarantee of full protection and security for the investment and for the investor. Whilst this is generally understood to concern physical protection, it may also encompass legal protection;
4. guarantees of treatment no less favourable than that given either to nationals of the Host State of the investment or to nationals of third states, which prevent the host state discriminating against the foreign investor; and
5. the right to repatriate profit and capital.

Some treaties specifically guarantee non-discriminatory treatment with respect to restitution, compensation or other valuable consideration for losses due to civil strife or state of emergency.

TREATY OBLIGATIONS IN THE CONTEXT OF COVID-19

On the one hand, states are undoubtedly facing significant challenges in balancing the need to protect public health with the prospect of short and long term economic damage. On the other hand, many foreign investors are facing wide-ranging governmental interference in multiple aspects of their business (including, in many jurisdictions, restrictions on the use and movement of their employees, the use of their property and the enforcement of their contractual rights). Some investors have questioned whether the extent of the measures imposed is justified, or whether the measures are proportionate to the serious economic damage which they can inflict.

Based on the standard protections found in IIAs outlined above, key considerations as to whether a state's response to COVID-19 is consistent with its international law obligations may include:

- the evidential basis for state measures introduced to address the pandemic in different ways;
- the length of time for which measures are imposed and the regularity with which they are reviewed;
- whether measures restricting private rights and freedoms are proportionate based on the anticipated benefit in terms of fighting the virus and the possible negative impact of those actions on the affected investors;
- whether steps have been taken to mitigate the damage caused by the measures;
- whether the measures impact unequally or disproportionately on one sector, group or type of company or individual impacting the foreign investor;
- whether the enforcement mechanisms used by states to implement COVID-19 regulations are consistent with domestic legislation;
- whether, particularly in the context of any requisitioning or nationalisation, any provision has been made for compensation and, if so,

- how such compensation is calculated; and
- the availability (or otherwise) of compensation for all who are similarly affected (including whether nationals of the host State are placed in a better position than foreign investors);
- whether the measures imposed are capable of, and are being used for, purposes beyond tackling COVID-19;
- whether any assurances have been given to sectors, companies or individuals as to their treatment in the context of COVID-19 and whether those assurances were fulfilled; and
- whether existing laws are being used to address COVID-19 in a manner which is inconsistent with their legislative intent.

States may find it important, for a multitude of reasons, to retain comprehensive contemporaneous records of the reasons for decisions, as well as ensuring that communications with individual investors, as well as industry and sector groups, are clearly documented.

For investors, it will also be important to keep contemporaneous records of the impact on the investment(s) affected by state action. Any communications with states, particularly those seeking or receiving assurances as to treatment, should be carefully recorded and those records preserved.

OTHER RELEVANT CONSIDERATIONS

The fact that state action has negatively affected a foreign investment does not automatically lead to an actionable breach of an IIA. This will depend on the nature of the state action and the circumstances in which it has been taken, the wording and interpretation of the IIA, and whether the IIA contains exemptions or prudential carve outs which apply in certain circumstances (such as national security, public health or public order). In such extraordinary circumstances there may be defences available to a state, either based on the wording of the relevant treaty or on customary international law (including defences based on necessity, distress or *force majeure*).

In summary, notwithstanding the fact that COVID-19 presents an unprecedented and fast-developing challenge, the guarantees given to foreign investors under IIAs remain relevant to an assessment of state action in response to the pandemic. Whilst the question of whether an investor may be entitled to damages under an IIA is fact and treaty-specific, the prospect of such claims is therefore relevant to states and investors alike.

For more information about our investment treaty practice, and to find a key contact in a relevant jurisdiction, please click [here](#).

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ANDREW CANNON
PARTNER, CO-HEAD,
PUBLIC
INTERNATIONAL LAW
PRACTICE, DEPUTY
HEAD, GLOBAL
ARBITRATION
PRACTICE , LONDON
+44 20 7466 2852
Andrew.Cannon@hsf.com



**CHRISTIAN
LEATHLEY**
PARTNER, NEW YORK
+1 917 542 7812
Christian.Leathley@hsf.com



HANNAH AMBROSE
SENIOR ASSOCIATE,
LONDON
+44 20 7466 7585
Hannah.Ambrose@hsf.com