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ARGENTINA AND OTHER STATES ADOPT CURRENCY RESTRICTIONS, RAISING POTENTIAL INVESTMENT TREATY CLAIMS

To Our Clients and Friends:

On September 1, 2019, Argentina introduced a number of new restrictions on foreign currency transactions, reversing its four-year-old policy that had eliminated such controls. This move follows similar recent capital restrictions imposed by other States. Such regulations may give rise to investment treaty claims by foreign investors.^[1] In particular, depending on the circumstances, these measures may violate investors' rights to (i) the free transfer of funds into and out of the host State; and (ii) fair and equitable treatment. Investors can directly enforce these rights against States via international arbitration.

Argentina and Other States Impose Currency Restrictions and Similar Measures

In the last few years, a number of States have imposed controls to stem capital outflows. In 2015, for example, Venezuela severely limited the permitted number of currency exchange transactions at the official rate and then set an artificially low Venezuelan bolivar to US dollar exchange rate. This significantly devalued the bolivar, wiping out billions of dollars of value held in monetary assets by multinational companies, while effectively preventing those companies from engaging in currency transactions to mitigate these losses.^[2] In June 2019, Tanzania also restricted currency exchanges by imposing new, stricter regulations on foreign exchange bureaus and shutting down around a hundred of them.^[3]

Most recently, last month, Argentina introduced currency restrictions that may detrimentally impact, among others, foreign companies that maintain investments in Argentina. On September 1, 2019, Argentina issued Decree 609/2019 announcing the new currency controls and mandating that Argentina's central bank (*Banco Central de la República Argentina* or "BCRA") establish the relevant guidelines and regulations.^[4] Subsequently, the BCRA issued Communication "A" 6770, describing the specific exchange procedures to be implemented and how they will operate in practice.^[5] The decree and BCRA communication, *inter alia*, require (i) exporters to convert foreign currency obtained into Argentine pesos; and (ii) both companies and individuals to obtain BCRA authorization before either purchasing foreign currency on the local foreign exchange market, or transferring funds abroad in certain situations.^[6] Moreover, to access the local foreign exchange market, companies and individuals are now required to submit an affidavit detailing the nature of the relevant transactions and affirming compliance with the new rules.^[7]

Additionally, the regulations require companies and other legal entities to obtain authorization from the BCRA before transferring dividends or profits abroad^[8] or accessing the local currency exchange

market for purchases of certain instruments.[9] These currency restrictions will remain in effect through December 31, 2019.

Such Measures May Violate Investment Protections

As explained in an earlier alert Gibson Dunn released in respect of the measures imposed by Venezuela in 2015,[10] the currency restrictions described above may violate obligations these States owe to foreign investors. In particular, many investment treaties contain a free transfer provision pursuant to which State Parties guarantee that investors from the other State Parties can freely transfer their investments and/or funds relating to that investment, typically without delays and at the exchange rate prevailing at the time of the transfer request. This includes investment treaties entered into by Venezuela, Argentina, and Tanzania. For example, the Argentina-US bilateral investment treaty provides at Article V that “[e]ach Party shall permit all transfers related to an investment to be made freely and without delay into and out of its territory.”[11] The Tanzania-UK bilateral investment treaty states at Article 6 that “[e]ach Contracting Party shall in respect of investments guarantee to nationals or companies of the other Contracting Party the unrestricted transfer of their investments and returns.”[12]

Arbitral tribunals have found that the free transfer guarantee is a “*fundamental*” and “*essential element*” of investment treaties,[13] and that currency control restrictions which “*effectively imprison the investors’ funds*” violate this guarantee.[14] Thus, if the measures introduced by Argentina and other States prevent a foreign investor from, *inter alia*, re-patriating profits earned from its investment, these States may have breached their free transfer obligations.

Moreover, many investment treaties (including those entered into by the States referenced above) oblige State Parties to treat investments of investors from the other State Parties fairly and equitably.[15] Tribunals have found that conduct that violates the free transfer guarantee may also breach the fair and equitable treatment standard.[16] Thus, there may be multiple bases upon which a foreign investor can hold these States accountable for damage such measures have caused to their investments.

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Gibson Dunn lawyers have extensive experience advising clients on investment treaty arbitration, including in the context of currency restrictions and breaches of the free transfer guarantee contained in investment treaties. If you have any questions about how your company is impacted by capital controls or currency restrictions in markets where it is operating, we would be pleased to assist you.

[1] States who are party to Bilateral Investment Treaties with Argentina include: Australia, Austria, Belgium, Canada, China, Costa Rica, Croatia, Czech Republic, Denmark, Finland, France, Germany, Italy, Korea, Mexico, Netherlands, Panama, Peru, Philippines, Poland, Portugal, Russia, Spain, Sweden, Switzerland, U.K., U.S.A., and Vietnam.

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- [2] Gibson Dunn, *Venezuela’s Currency Regulations May Violate Investment Treaty Protections*, 25 February 2015, <https://www.gibsondunn.com/venezuelas-currency-regulations-may-violate-investment-treaty-protections/>.
- [3] Reuters, *Tanzania issues new rules to tighten foreign currency exchange controls*, 25 June 2019, <https://www.reuters.com/article/tanzania-currency/tanzania-issues-new-rules-to-tighten-foreign-currency-exchange-controls-idUSL4N23W2KT>.
- [4] Presidencia de la Nación, “Mercado Cambiario – Deuda Pública,” Decreto No. 34.187, Boletín Oficial, 1 September 2019
- [5] Banco Central de la República Argentina, “Exterior y Cambios. Adecuaciones,” Comunicación “A” 6770, 1 September 2019.
- [6] *Id.*
- [7] *Id.* at ¶ 18.
- [8] *Id.* at ¶ 10.
- [9] These include debt instruments, investments, financial derivatives, loan grants to non-residents, deposits, currency hoarding, and transfers among residents. *Id.* at ¶ 5.
- [10] Gibson Dunn, *supra* note 2.
- [11] Argentina-U.S. BIT, Art. V.
- [12] Tanzania-U.K. BIT, Art. 6.
- [13] *See Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, ¶ 239.
- [14] *See Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶ 735.
- [15] *See, e.g.,* Argentina-U.S. BIT, Art. II(2) (“*Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.*”); Tanzania-U.K. BIT, Art. 2(2) (“*Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.*”).
- [16] *See AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, Award, 1 November 2013, ¶ 425.

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