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STATE OF EMERGENCY IN TURKEY

On 20 July 2016, the Turkish government announced a state of emergency[1] for the entire country in response to the failed military coup which took place on 15 July 2016. The state of emergency is scheduled for a period of three months, starting from 21 July 2016. The decision of the Turkish government on the announcement of the state of emergency has been published in the Turkish Official Gazette on 21 July 2016 and subsequently approved by the Turkish Parliament. In this client alert, we briefly explain the legal basis of a state of emergency in Turkey and its legal impacts for foreign investors with a particular focus on the protection provided under international law.

Legal Framework Applicable to a State of Emergency in Turkey

The legal basis of the state of emergency is Article 120 of the Turkish Constitution and Law No. 2935 on State of Emergency (the "**SoE Law**")[2]. The Constitution and the SoE Law foresee that a state of emergency may be announced in the event of, among others, serious indications of widespread acts of violence aimed at the destruction of the free democratic order or fundamental rights and freedoms. The maximum term of a state of emergency is limited to six months by law; parliament may terminate or extend the duration of the state of emergency for periods of four months upon recommendation by the government.

The most important impact of the state of emergency is the right of the Turkish government to issue decree laws on matters which relate to the state of emergency. A decree law is an executive decree made pursuant to a delegation from the parliament and having the full force of legislation. In a state of emergency, the Turkish government may issue decree laws without being subject to restrictions set forth in the Constitution for issuance of decree laws. This means that in case of a state of emergency, fundamental rights, individual rights, and political rights, unlike under normal circumstances, may be regulated by decree laws.

The announcement of the state of emergency does not per se restrict citizen movements or activities. However, certain measures such as curfew orders, limitation of access to certain areas for public safety, or search and confiscation without a court order may be adopted. A possible measure which might affect businesses in general would restrict the right of employers to make their employees redundant. The exceptions to such redundancy restrictions include voluntary leave by an employee, situations which are against good faith and ethics, terminations on grounds of health issues, automatic termination of employment contracts signed for a defined period, or situations of ordinary retirement. As of the date of this client alert, no measure has been adopted yet. The Turkish government announced its intention not to adopt any measure which could affect the normal course of daily life and the economy.

[1] The decision of the Council of Ministers no: 2016/9064.

[2] Law dated 25 October 1983, published in the Official Gazette dated 17 October 1983 and numbered 18204.

Protection of Foreign Investments in Case of a State of Emergency

At the outset of the state of emergency period investors should be aware of the protection provided under international law.

Investment protection treaties signed by Turkey usually contain clauses which specifically deal with measures taken by state parties in relation to extraordinary circumstances. In general, such clauses provide for national treatment and most favored nation treatment in relation to any measures such as restitution or compensation. An example is the Article 5 of the Bilateral Investment Treaty between Turkey and Austria, as follows:

> *"Investors of one Contracting Party whose investments suffer losses owing to war or other armed conflicts, a state of emergency or other equivalent events in the territory of the other Contracting Party, shall be accorded by the latter Contracting Party, as regards any measures taken in this respect, treatment no less favorable than that accorded to its own investors or investors of any third State."*

On the other hand, according to the generally accepted requirements in article 25 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts[3] elaborated by the International Law Commission of the United Nations, circumstances to be considered as a state of "*necessity*", with the effect of precluding the wrongfulness of acts contrary to customary international law, are very strict. Such requirements are the following: (i) the measures taken are the only way for the state to safeguard an essential interest against grave and imminent peril; and (ii) the act does not seriously impair an essential interest of the state or states towards which the obligation exists, or of the international community as a whole. In any case, necessity cannot be invoked by a state as a ground for precluding the wrongfulness if the international obligation in question excludes the possibility of invoking necessity, or the state has contributed to the situation of necessity.

The relationship between the provisions of the investment protection treaties and customary international law is one of the most controversial points that have arisen from investment treaty awards at the occasion of cases filed against Argentina in the early 2000s.[4]

In light of the approach of the Turkish government to promote foreign investments, the adoption of measures which would affect foreign investments in general is not expected. Nevertheless, the legal situation in Turkey may lead to uncertainty for international investors and Turkey may be exposed to future claims for alleged breach of investment protection treaties as a result of the measures to be adopted during the recently announced period of the state of emergency.

[3] The Draft Articles on Responsibility of States for Internationally Wrongful Acts is a codification of the rules governing state responsibility. It reflects the international law that exists on state responsibility. It does not impose obligations on states but defines the rules that determine the legal consequences of a failure to fulfill international obligations.

[4] CMS vs Argentina (ICSID Case No. ARB/01/8); LG&E vs Argentina (ICSID Case No. ARB/02/1); Sempra Energy vs Argentina (ICSID Case No. ARB/02/16).

About WOLF THEISS

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