The Current Barriers To International Health Cooperation

By **Alexander Burdulia, Mark Uhrynuk and Reb Wheeler** (May 22, 2020)

Alexander Burdulia

Mark Uhrynuk

Reb Wheeler

Few events in modern history have been as comprehensively disruptive as the COVID-19 pandemic, which is simultaneously upending the global markets, our daily lives and everything in between.

While the picture is grim for now, and the future uncertain, history has shown us time and again that we will overcome the current challenges — we may remember that in the first pandemic of the 21st century, the 2002 SARS outbreak, eight months passed between the identification of the first infection and the World Health Organization's announcement that the pandemic had been contained.

Although it is difficult to compare the scope and impact of these two crises, one thing is certain: The current crisis will end and, when it does, the world will be different than it was before. In the business context this means that opportunities will arise in certain industries, while others will experience significant and enduring challenges to existing business models.

Given the acute global focus on health that has come with the pandemic, and as longer-term trends toward wellness continue to progress, we expect to see interesting and innovative post-pandemic developments and business strategies arise in the health care industry.

The global nature of the pandemic and the degree to which scientists around the world are already collaborating to address COVID-19[1] suggest that these new opportunities will benefit from extensive cross-border collaboration in terms of data sharing, innovation and commercializing new technologies, and that the market for these new products will be truly international.

It is clear, now more than ever, that the risk that viruses and other pathogens pose to global health knows no borders. Accordingly, the human need for health care goods and services demands collaborative, borderless solutions.

International Trade Impeded

Unfortunately, the current environment is creating hurdles for the inevitable resumption of cross-border collaboration that will give rise to these new developments.

To date, over 219 countries, territories and areas have implemented mobility restrictions in response to the pandemic,[2] and these barriers are already having a serious impact — according to the UN Conference on Trade and Development's Investment Policy Monitor, negotiations for numerous international investment treaties have been cancelled or postponed, and it is "likely that 2020 will register the lowest number of international investment agreements concluded since 1985."[3]

At the same time, governments around the world are grappling with the tension between protecting their populations, including by nationalizing parts of the health care industry as seen in Spain,[4] and promoting a private-sector response to design, innovate and bring to market critical new technologies.

This policy debate is playing out in some countries, like Hungary and the Philippines, against an ideological backdrop of rising authoritarian nationalism. These political landscapes have set the stage for potentially dramatic emergency expansions of executive power, with unpredictable implications for international business, global trade and private sector technology development.

Indeed, technology is currently playing a crucial role in the global response to COVID-19, as public and private actors alike are analyzing unprecedented levels of personal health, location and other data to better understand and address the pandemic. While these initiatives have generated invaluable insights, the rapidly evolving situation has sometimes required mass collection of personal data and its frequent, uninterrupted exchange among various parties, which has prompted concerns about whether these efforts have complied with existing data privacy laws.[5]

If regulators later determine that personal data was mishandled during the crisis and subsequently retool existing data privacy regimes as a result, the already complex regulatory landscape that international businesses must navigate to share and transfer data across borders could become even more complicated.

FDI in the Spotlight

In addition, governments continue to construct more direct barriers to international collaboration, sometimes motivated by increasingly isolationist politics and ideologies, in the form of restrictions on foreign direct investment, or FDI.

United States

The U.S., for example, has been updating its national security regulatory regime and adopting expansive new rules to better address potential national security implications of FDI into the U.S. for several years, with a particular focus on businesses involving critical technologies, critical infrastructure and sensitive personal data. Investments in certain health care companies have attracted scrutiny under this regime based on their use of personal data and contributions to critical technologies, and that focus is likely to increase in the wake of the COVID-19 pandemic.

The Committee on Foreign Investment in the United States, the interagency committee authorized to review certain transactions involving non-U.S. persons, saw its authority strengthened and modernized through new rules finalized shortly before the explosion of the COVID-19 pandemic. The new rules, implementing the Foreign Investment Risk Review Modernization Act, give CFIUS expanded powers to address risks associated with non-controlling investments by non-U.S. persons in covered U.S. businesses.[6]

In the COVID-19 context, it remains to be seen how these new rules, coupled with ongoing tensions between the world's two largest economies, will impact CFIUS's review of Chinese FDI into the U.S. In recent years, the authorities have closely scrutinized a number of proposed investments by Chinese-controlled parties into U.S. businesses and, in several cases, blocked them. Even in this challenging economic environment, the U.S. authorities are unlikely to temper their existing assessment of potential risks to US national security from China-related transactions.

Europe

In Europe, the European Commission has warned that opportunistic foreign entities may seek to acquire critical EU health care capacities during the crisis. In order to protect these businesses, the EC has called on member states to make full use of existing FDI screening mechanisms and even implement new regulations as necessary.[7]

It appears Germany is already following the guidance and considering measures to relax an existing requirement for the presence of an actual security threat for the authorities to block proposed FDI into Germany.[8] The new rules would permit the German government to block foreign investments that it deems potentially threatening. Elsewhere on the continent, Italy and Spain have each taken steps to increase the number of industries within which their respective governments may block FDI into their countries.[9]

Asia-Pacific

In the Asia-Pacific region, Australia has lowered the numerical threshold for government review of FDI to $0 for the duration of the crisis, reportedly out of a concern that foreign companies could take control of distressed Australian businesses.[10] Similarly, India announced that FDI into India from neighboring countries, including China, will now require government approval.[11]

Conversely, the Prime Minister of Vietnam has publicly called for an increase in FDI into Vietnam to help lift the country out of the current economic slump, which may foreshadow a similar approach by emerging market economies elsewhere.[12]

Despite these efforts, it is possible that the growing preference for protectionist foreign policies in many nations will impact trade relations around the world more broadly, as the UNCTAD predicts up to a 40% drop in global FDI during 2020-2021, potentially reaching the lowest level since the Global Financial Crisis.[13]

The Chinese story provides hope for the future, however, as the crisis currently appears to be largely under control in China and regulators are now rolling back various pandemic-related impediments to international collaboration. The Ministry of Commerce and National Development and Reform Commission are each taking steps to stabilize foreign trade and investment into China as the economy rebuilds, including by promoting foreign investment projects and assisting foreign-invested enterprises in resuming production.[14]

When the crisis inevitably subsides elsewhere around the world, we expect other national regulators to take similar steps to break down the virus-era barriers to international collaboration that are arising now.

Health Care Impact

Accordingly, we expect to see cross-border collaboration accelerate on a variety of health care initiatives during the global economic rebound. The explosion in telehealth that began during the crisis, now fueled in part by the U.S. Federal Communications Commission's $200 million program to fund such services,[15] suggests growing consumer acceptance of the virtual delivery of health care services, which may develop into a long-term trend.

This shift could mirror China's rapid embrace of e-commerce after the 2002 SARS outbreak, which was helped by various government interventions in response to that pandemic. Lengthy quarantines during the COVID-19 pandemic have further driven the use of health and wellness mobile applications in general — a popular meditation app saw a 19-fold increase in users of a calming exercise in the last week of March, and an online mental health consultation application saw a 30% monthly increase in consultations during the crisis.[16]

As trends toward health and wellness progress globally, these virtual and mobile service delivery mechanisms may create opportunities for multinational corporations and investors to market innovative health care products seamlessly around the world.

Research and development and production of health care products may similarly see a boost from the post-pandemic recovery, as governments look to rebuild national stockpiles of vaccines and personal protective equipment, or PPE, and as individuals become more sensitive to preparedness.

Market participants may remember that China made half of the world's face masks before the pandemic and began hoarding them when the crisis broke out,[17] leading to global shortages that have illustrated the need for a geographically diverse PPE supply chain. In response to these shortages, governments are already allocating funding for new manufacturing and R&D efforts on a massive scale.

The U.S. CARES Act has allocated $27 billion in funding for vaccines and PPE, while the EC recently approved an €80 million financial support package for a biotech company working to develop a coronavirus vaccine in Europe.

The global nature of supply chains means that suppliers in the developing world could fulfill much of this new demand, particularly for PPE and medical device components, creating opportunities for international joint ventures that would help lift up the communities and economies most severely impacted by the crisis.

Overcoming Barriers to Cooperation

Like most facets of the COVID-19 pandemic, the related opportunities in the health care industry that will arise in the coming months and years are difficult to predict. This exercise is unfortunately complicated by the barriers to international business that are now becoming more apparent across the globe.

In particular, it now seems that imminent cross-border collaboration in sensitive health care and life science businesses that may be critical in a future pandemic, such as those involving innovative biopharma technologies or relying on personal data, may be complicated as this sector moves to the forefront of national security concerns for the U.S. and other countries.

The lens of history has shown us, however, that protectionist policies do not necessarily protect forever, or from the kinds of threats that know no borders. It is certain that governments will ultimately relax many of these restrictions in the future, enabling life-changing cross-border collaboration touching every corner of the business world — from factories in China to trading floors in London, laboratories in Silicon Valley to conference rooms in Johannesburg, and everywhere in between.

As we have seen in the past, we expect the post-pandemic environment to illustrate that when the world comes together, the opportunities are endless and the benefits are enduring.

Alexander W. Burdulia is a registered foreign lawyer, and Mark Uhrynuk and Reb Wheeler are partners, at Mayer Brown LLP.

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[6] To learn more about FIRRMA and its impact on FDI into the U.S., we invite you to read our comprehensive article discussing the legislation here, as well as our subsequent updates covering the rules implementing its provisions here, here and here.

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