

KEY THEMES

Government intervention and economic nationalism has increased significantly in the last two years, and is likely to do so even more with the unexpected unfolding of recent events. During this session we focused on key risk areas and how international protections can be leveraged and enforced directly against states and state entities.



Macro-environmental drivers

- Government intervention, where it is protective of 'national interests' or 'national security', has increased significantly over the last 10-15 years.
- It has heightened with the pandemic, where we have seen all matters of healthcare become issues of national security.
- The situation in Ukraine has only exacerbated this issue.
- State intervention in energy security is nothing new, but the environment has become more febrile around it.
- We also have sectors such as food and agriculture taking centre stage, and of course the impact of wide-ranging sanctions on a very large scale.

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Local lens: The UK

In the UK, we've seen these issues of state intervention come to the fore in recent times, and well before the current energy crisis. Wide-scale nationalisation in certain sectors was on the cards in the Labour Party's manifesto prior to the last general election.

The recently enacted National Security & Investments Act 2021 broadly allows the UK government to screen foreign investments and, in some circumstances, claw them back, across a wide variety of sectors. This is part of a trend that comes hand in hand with a more "protectionist" stance, stemming from the underlying political mood.

Which sectors and companies are most affected?

The individuals and companies who are affected are not necessarily the ones that come immediately to mind - it is no longer just the usual suspects in, for instance, the energy or extractive industries sectors, where much of the attention was focused historically.

It is also, for example, PE funds active in sectors such as healthcare, pharma, transportation, financial services - and others - who are suddenly seeing their assets and their activities subjected to a much greater level of state scrutiny.

Alongside energy shortages, we are likely to see bread shortages in parts of the world, which will drive state intervention and protectionist measures.

Two key responses

For companies that are affected by state interference and that are suffering or are likely to suffer significant losses as a result of state interference, there are two key possible responses:

- 01** First, any investor (large or small) will be wise to consider state interference as part of its up front risk assessment and critically plan for it.
 - An important element of such planning is treaty structuring, i.e. ensuring that your investment is protected at an international level against unlawful state interference.
 - International law does not prevent state interference (a sovereign can always 'kick a company out') but ensures that it is done in a non-discriminatory manner and against prompt and adequate compensation (among other things).
 - The tribunal that decides whether there was a breach is also separate and independent from the state, which offers neutrality and avoids unnecessary disputes before the national courts.
- 02** Second, and once these international protections are secured, it is a whole different issue as to how they are deployed.
 - In investor-state disputes, international protections are a necessary lever in negotiations but it is not always necessary to trigger an arbitration or to run it to the very end. This incurs significant costs and wastes time for both sides.

- Multinationals are often 'playing in the back yard' of a country. It is increasingly important to have a 'social licence to operate' in that back yard.
- Companies and investors are now increasingly held accountable for their actions in the host state, by the states in which they operate as well as their own stakeholders and other interested parties, such as NGOs.
- Even investment tribunals have accepted a number of counterclaims, and, while these are still rare, they are increasing, together with other ways in which investors are held accountable.
- To invest into a country often means a partnership between the investor and the state; partnerships break down and international protections against unlawful takeovers or interference are key, but they are part of a broader context of the investor's conduct in the host state as well as the global implications of that dispute.



Key takeaway

There is a shift in government interference and investment protection that has triggered a rethink of investor-state disputes. It is necessary but no longer enough to benefit from international protections; as an investor, you are in a partnership with the state and are increasingly held accountable for your conduct.