

# International Framework of Investment Law

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# Outline

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## Standards of Protection

- Expropriation
  - Traditional Expropriation
  - Indirect Expropriation
  - Strife
- Transfer of Funds
- Subrogation
- Umbrella Clause

# IIAs: *Typical Elements*

- **Scope of Application**
  - Definition of covered “investments”
  - Definition of covered “investors”
  - Temporal scope
  - Territorial scope
- **Standards of Treatment**
  - Relative standards:
    - National Treatment (NT)
    - Most Favoured Nation Treatment (MFN)
  - Absolute standards:
    - International Minimum Standard of Treatment (IMS)
    - Fair and Equitable Treatment (FET)
    - Full Protection and Security (FPS)
- **Standards of Protection**
  - Protection against unlawful expropriation
  - Compensation in cases of strife
  - Transfer of funds
  - Subrogation
  - Umbrella Clause
- **Dispute Settlement**
  - State to State
  - Investor – State Arbitration (ISDS)

Two main  
categories of  
IIAs:

• Bilateral  
Investment  
Treaties (BITs)

• Investment  
Chapters in  
Preferential  
Trade  
Agreements  
(PTAs)

# EXPROPRIATION

- Direct: Transfer of title or outright seizure
  - Creeping expropriation: an indirect expropriation that occurs as a result of a cumulative series of measures over time
- Indirect: Total or substantial deprivation of the substantial rights associated to an investment, without actual formal transfer or seizure, having equivalent effects to a direct expropriation.
  - Regulatory taking: does it require a separate category?

*Starrett Housing Corporation v. Islamic Republic of Iran*, an Iran-United States Claims Tribunal case involving the take-over by an Iranian government-appointed manager of an apartment project developed by a US company:

*"[it] is recognized in international law that measures taken by a state can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the state does not purport to have expropriated them and the legal title to the property formally remains with the original owner."*

# Protection against expropriation

## Finland Model BIT

1. Investments by investors of a Contracting Party in the territory of the other Contracting Party shall not be expropriated, nationalised or subjected to any other measures, direct or indirect, having an effect equivalent to expropriation or nationalisation (hereinafter referred to as "expropriation"), except for a purpose which is in the public interest, on a non-discriminatory basis, in accordance with due process of law, and against prompt, adequate and effective compensation.
2. Such compensation shall amount to the value of the expropriated investment at the time immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier. The value shall be determined in accordance with generally accepted principles of valuation, taking into account, inter alia, the capital invested, replacement value, appreciation, current returns, the projected flow of future returns, goodwill and other relevant factors.
3. Compensation shall be fully realisable and shall be paid without any restriction or delay. It shall include interest at a commercial rate established on a market basis for the currency of payment from the date of dispossession of the expropriated property until <sup>b</sup> the date of actual payment.

# Protection against expropriation

## The US approach (Model BIT 2004)

1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (“expropriation”), except:
  - (a) for a public purpose;
  - (b) in a non-discriminatory manner;
  - (c) on payment of prompt, adequate, and effective compensation; and
  - (d) in accordance with due process of law and Article 5 [Minimum Standard of Treatment](1) through (3).
2. The compensation referred to in paragraph 1(c) shall:
  - (a) be paid without delay;
  - (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (“the date of expropriation”);
  - (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and
  - (d) be fully realizable and freely transferable.
3. If the fair market value is denominated in a freely usable currency, the compensation referred to in paragraph 1(c) shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.
4. If the fair market value is denominated in a currency that is not freely usable, the compensation referred to in paragraph 1(c) – converted into the currency of payment at the market rate of exchange prevailing on the date of payment – shall be no less than: (...)

“Neither of the Contracting Parties shall take, either directly or indirectly, measures of expropriation, nationalization or any other measures having the same nature or the same effect against investments of investors of the other Contracting Party, unless the measures are taken in the public interest, on a non discriminatory basis, and under due process of law, and provided that provisions be made for effective and adequate compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriatory action was taken or became public knowledge, whichever is earlier. The amount of compensation, interest included, shall be settled in the currency of the country of origin of the investment and paid without delay to the person entitled thereto without regard to its residence or domicile”.



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- It is lawful to expropriate any asset or industry. But it is unlawful to do it arbitrarily
  
  - Four conditions for a taking to be lawful:
    1. Public purpose
      - Genuine public need, and good faith
      - In practice States have been granted a wide margin of appreciation
  
    2. Non-discrimination
      - Under CIL expropriations solely on the basis that the foreign national belongs to a specific racial, religious, cultural, ethnic or national group are not allowed.
      - Highly context specific
  
    3. Due process of law
      - Some basic legal mechanisms, such as reasonable advance notice, fair hearing, unbiased and impartial adjudicator. Legal procedure must grant the affected investor with a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard.
  
    4. Compensation: IIAs typically address 4 issues:
      - Standard of compensation and valuation methods
      - Date for determining compensation
      - Convertibility and transferability
      - Payment of interest

# What rights can be expropriated?

- **Property rights**
- Contractual Rights?
- Intangibles that are not property rights? (e.g. “market share”)
- Economic expectations, loss of profit?

## Charanne v. Spain (2016)

*Spain had not affected the claimants’ shareholder rights and that T-Solar was still in operation, turning a profit and in possession of its assets (...). Therefore, the claimants actually complained of a reduction in the profitability of T-Solar and, consequently, of the value of their shares. This reduction does not justify an indirect expropriation claim in itself.*

# Expropriation: Case Law

- Trademarks and cigarette packaging



BIT between Brunei Darussalam and the Republic of Korea (2000)	BIT between Egypt and Thailand (2000)
<p style="text-align: center;">“Article 5 Expropriation</p> <p>1. Investments of investors of one Contracting Party shall not be nationalised, expropriated or otherwise subjected to any other measures having an effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for public purpose and against <b>prompt, adequate and effective compensation</b>. The expropriation shall be carried out on a non-discriminatory basis in accordance with legal procedures.</p> <p>2. Such compensation shall amount to the fair market value of the expropriated investments immediately before expropriation was taken or before impending expropriation became public knowledge, whichever is the earlier, shall include interest at the applicable commercial rate or LIBOR rate, whichever is higher, from the date of expropriation until the date of payment and shall be made without undue delay, be effectively realisable and be freely convertible and transferable.” (emphasis added)</p>	<p style="text-align: center;">“Article 5 Nationalization or Expropriation</p> <p>1. [...]</p> <p>(b) Investments of investors of either Contracting Party or any of its natural or juridical persons shall not be directly or indirectly nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation, in the territory of either Contracting Party except for a public purpose, and against <b>payment of compensation. Such compensation shall be adequate, effectively realizable, made without delay and freely transferable in freely convertible currencies. Such measures are taken on a non-discriminatory basis and subject to review by due process of law.</b></p> <p>(c) Such compensation shall amount to the market value of the investment expropriated on the date the measure was taken.” (emphasis added)</p>

- The historic debate on the compensation formula:
  - Hull formula: prompt, adequate and effective
  - Fair, just, appropriate...
- How much? Determining the amount of damages is always a tricky business....

PCIJ: Chorzów Factory (Germany vs. Poland, 1928)

*“...an illegal act...reparation must, as far as possible, wipe out consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed..”*

- Legal v. Illegal Expropriation.
  - PICJ distinguished between illegal expropriation which require total reparation of status quo ante (which includes lost profits) and legal expropriations requiring fair and just compensation equal to the”value of the undertaking at the moment of disspoesion”.

Is this an illusory distinction?

- Fair Market Value:

*Starret Housing Corp. vs. Iran* fair market value was defined as

- “...the price that a willing buyer would pay to a willing seller in circumstances in which each had good information, each desired to maximize his financial gain, and neither was under duress or threat, the willing buyer being a reasonable business person.”

- Different methods to calculate fair market value

- Discounted cash flow analysis: what someone is willing to pay today in order to receive anticipated cash flows in future years. Business as going concern (examination of history of operations and assessment based on estimation of future profits subject to a discounted cash flow analysis).
- Net book value, replacement or liquidation value

# Indirect Expropriation

- There are no specific rules to determine whether a measure constitutes an indirect expropriation
- Requires a case by case analysis
- However, some basic principles have to be examined

# Indirect Expropriation

Factor 1: *Determining the economic impact of the measure*

- Deprivation shall be total or at least substantial
- A mere interference or a partial negative effect does not constitute an indirect expropriation
- Duration of the measure
- Rejecting explicitly the "sole effects" doctrine



## ***SD Myers v. Canada***

*“In this case, the Interim Order and the Final Order were designed to, and did, curb SDM’s initiative, **but only for a time**. Canada realized no benefit from the measure. The evidence does not support a transfer of property or benefit directly to others. **An opportunity was delayed**. The Tribunal concludes that **this is not an expropriation case**”*

## ***Feldman v. Mexico***

*“... the regulatory action **has not deprived the Claimant of control of his company, . . . interfered directly** in the internal operations... or displaced the Claimant as the controlling **u<sup>b</sup> shareholder**”*

## ***Pope & Talbot v. Canada***

*“...the test is whether that interference is sufficiently restrictive to support a conclusion that the property has been “taken” from the owner...mere interference is not expropriation; rather, a **significant degree of deprivation** of fundamental rights of ownership is required”*

## ***CME v. Czech Republic***

*“...the Media Council’s actions and omissions...caused the destruction of the [joint-venture’s] operations, **leaving the [joint venture] as a company with assets, but without business”**.*

# Indirect Expropriation

## Factor 2: *Interference with investor's expectations*

- Legitimate expectations need not to be based on specific and explicit undertakings or representations of the host State *Azurix v. Argentina*
- Legitimate expectations require “specific commitments given by the regulating government to the then putative foreign investor *Methanex v. USA*”
- An investor cannot expect that an existing regulatory framework will remain unchanged absent a specific commitment from the host State *Charanne v. Spain*

# Indirect Expropriation

Factor 3: *Analysis of the nature, the purpose and character of the measure*

- Do the “purpose” and “nature” of the measure matter?
- NOT necessarily
- Finally, the “public purpose” is one of 4 requirements

## **Phelps Dodge (Iran-USA)**

*“The Tribunal fully understands the reasons why the respondent felt compelled to protect its interests through this transfer of management, and the Tribunal understands the financial, economic and social concerns that inspired the law pursuant to which it acted, **but those reasons and concerns cannot relieve the Respondent of the obligation to compensate Phelps Dodge for its loss**”*

## **Santa Elena v. Costa Rica**

*“While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus be legitimate, **the fact that the property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking**”*

*“Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: **where property is expropriated, even for environmental purposes, whether domestic or international, the state’s obligation to pay compensation remains**”*

## **Tecmed v. Mexico**

*“The principle that the State’s exercise of its sovereign power within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable”*

## **Feldman v. Mexico**

*“...not all government regulatory activity that makes it difficult or impossible for an investor to carry out a particular business, change in the law or change in the application of existing laws that makes it uneconomical to continue a particular business, **is an expropriation....**”*

## **Methanex v. USA**

*“As a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alias, a foreign investor or investment is not deemed expropriatory and compensable...”*

# Indirect Expropriation

## *USA BIT Model 2004, Annex B*

The Parties confirm their shared understanding that:

1. Article [Expropriation and Compensation] is intended to reflect **customary international law** concerning the obligation of States with respect to expropriation.
2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a **tangible or intangible property right or property interest** in an investment.
3. Article 6 [Expropriation and Compensation](1) addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.
4. The second situation addressed by Article 6 [Expropriation and Compensation](1) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

# Indirect Expropriation

## USA BIT Model 2004, Annex B (Cont.)

4.

- (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:
- (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
  - (ii) the extent to which the government action interferes with distinct, **reasonable investment-backed expectations**; and
  - (iii) the **character** of the government action.
- (b) **Except in rare circumstances**, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.



# TRANSFER OF FUNDS

# Transfer of funds

## Article 4

Either Party shall in respect of all investments guarantee to nationals or companies of the other Party the transfer of the invested capital, of the returns therefrom and in the event of liquidation, the proceeds of such liquidation.

## Article 6

(1) Transfers under paragraphs (2) or (3) of Article 3, under Article 4 or Article 5 shall be made without undue delay and at rates of exchange applicable to current transactions on the date the transfer is made.

(2) The rate applicable to current transactions shall be based on the par value agreed with the International Monetary Fund taking into account the provisions of Section 3 of Article 4 of the Articles of Agreement establishing the International Monetary Fund.

(3) In case no rate of exchange within the meaning of paragraph (2) above exists at the time of transfer the appropriate authorities of the Party in the territory of which the investment is situated shall admit a rate of exchange which is just and reasonable.

Germany –  
Pakistan  
BIT (1959)

# Transfer of funds

## ARTICLE V

1. Each Party shall permit all transfers related to an investment to be made freely and without delay into and out of its territory. Such transfers include: (a) returns; (b) compensation pursuant to Article IV; (c) payments arising out of an investment dispute; (d) payments made under a contract, including amortization of principal and accrued interest payments made pursuant to a loan agreement directly related to an investment; (e) proceeds from the sale or liquidation of all or any part of an investment; and (f) additional contributions to capital for the maintenance or development of an investment.
  
2. Except as provided in Article IV paragraph 1, transfers shall be made in a freely usable currency at the prevailing market rate of exchange on the date of transfer with respect to spot transactions in the currency to be transferred. The free transfer shall take place in accordance with the procedures established by each Party; such procedures shall not impair the rights set forth in this Treaty.
  
3. Notwithstanding the provisions of paragraphs 1 and 2, either Party may maintain laws and regulations (a) requiring reports of currency transfer; and (b) imposing income taxes by such means as a withholding tax applicable to dividends or other transfers. Furthermore, either Party may protect the rights of creditors, or ensure the satisfaction of judgments in adjudicatory proceedings, through the equitable, nondiscriminatory and good faith application of its law.

# Transfer of funds

- It is “fundamental to the freedom to make a foreign investment and an essential element of the promotional role of BITs” (*Continental Casualty v. Argentina*)
- What funds can be transferred?
  - List of the assets and funds that can be repatriated, most include inward and outward transfers (some only inward)
    - Capital invested
    - Returns on investment
    - Funds for repayment of loans
    - Proceeds from compensation
    - Proceeds from the liquidation of sale of the investment
    - Unspent earnings of expatriate personnel
  - Although transfer provisions are usually broadly drafted, not all trans-border movements of funds can be considered “related to an investment” (*Continental Casualty v. Argentina*).
  - The price received for entrepreneurial activities of the investor's subsidiaries is not a return (*Rusoro v. Venezuela*)

# Transfer of funds

- Explicit conditions for transfer:
  - Time: “Without delay”, “Promptly”, “Timeframe” (one year?)
  - Currency: Freely convertible currency, market rate of exchange prevailing at the time of the transfer.
- Implicit:
  - Almost no treaty grants absolute rights of transfer, and they exist subject to the laws of the host State. E.g: implementation of foreign exchange controls (dual system of formal and informal market) fall within the financial and economic sovereignty of states and do not constitute an undue restriction (*OI European Group v. Venezuela*)
  - Monetary sovereignty of the host State. What happens if it changes currency? (e.g. Greece abandons Euro)
  - Regulations on “capital transactions” are admissible – as opposed to “current transactions” (e.g. foreign trade payments, interest loans).

# Transfer of funds

- Exceptions relating to laws and regulations relating to:
  - Bankruptcy, insolvency or protection of the rights of creditors
  - Issuing, trading or dealing in securities, futures, options or derivatives
  - Criminal or penal offences and the recovery of the proceeds of crime or money laundering
  - Financial reporting or record keeping of transactions when necessary to assist law enforcement or financial regulatory authorities
  - Ensuring compliance with orders or judgments in judicial or administrative proceedings
  - Taxation
  - Social security, retirement or compulsory savings schemes
  - Severance entitlements for employees
  - Formalities required to register or satisfy requirements of central bank and financial authorities.

# Transfer of funds

- Balance of Payments safeguard
- When capital movements or payments cause or threaten to cause:
  - Difficulties for balance of payment purposes
  - External financial difficulties
  - Difficulties for macroeconomic management including monetary policy or exchange rate policy
  - Safety, soundness, integrity or financial responsibility of financial institutions.
- Conditions: limited duration, non discrimination, minimum impact, IMF articles

# Transfer of funds – Case law

- A US company, acquired shares in an Argentine company (CNA) when the workers' accident insurance sector was privatized in Argentina in 1996. It then acquired additional shares in 2000 (near 100% of the shares).
- As a response to the economic crisis in Argentina of 2001-2002, the Government adopted measures that included the elimination of the dollar-peso parity and the conversion into pesos of all obligations specified in dollars, the proclamation of a state of public emergency, the postponement of the payment of the public debt, and the limitation of transfers of funds outside of Argentina (with the exception of certain current transactions)
- CNA claimed that the adoption by Argentina of a measure to limit cash withdrawals and to prohibit transfers out of the country of freely disposable funds held short term at its banks by CNA, was a breach of Argentina-US BIT.



# Transfer of funds – Case law

- Article V of the Argentina-US BIT states, among other things, 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.”
- The Tribunal found that although a foreign investor shall be able to remit from the investment country the income produced, the reimbursement of any financing received or royalty payment due, and the value of the investment made, plus any accrued capital gain in case of sale or liquidation, this guarantee “is not without limit” and that the guarantee “does not mean that any trans-border movement of funds by such subsidiary is ‘related to an investment’”, as it was not the kind of transfer that needed to be protected to ensure that a foreign investor will be able to enjoy the financial benefits of a successful investment.

*u<sup>b</sup> • What would you decide?*

# SUBROGATION

# Subrogation

## Article 12 Subrogation

If a Contracting Party or its designated agency makes a payment to any investor of that Contracting Party under an indemnity, guarantee or insurance contract, pertaining to an investment of such investor in the Area of the other Contracting Party, the latter Contracting Party shall recognise the assignment to the former Contracting Party or its designated agency of any right or claim of such investor on account of which such payment is made and shall recognise the right of the former Contracting Party or its designated agency to exercise by virtue of subrogation any such right or claim to the same extent as the original right or claim of the investor. As regards payment to be made to that former Contracting Party or its designated agency by virtue of such assignment of right or claim and the transfer of such payment, the provisions of Articles 10, 11 and 13 shall apply mutatis mutandis.

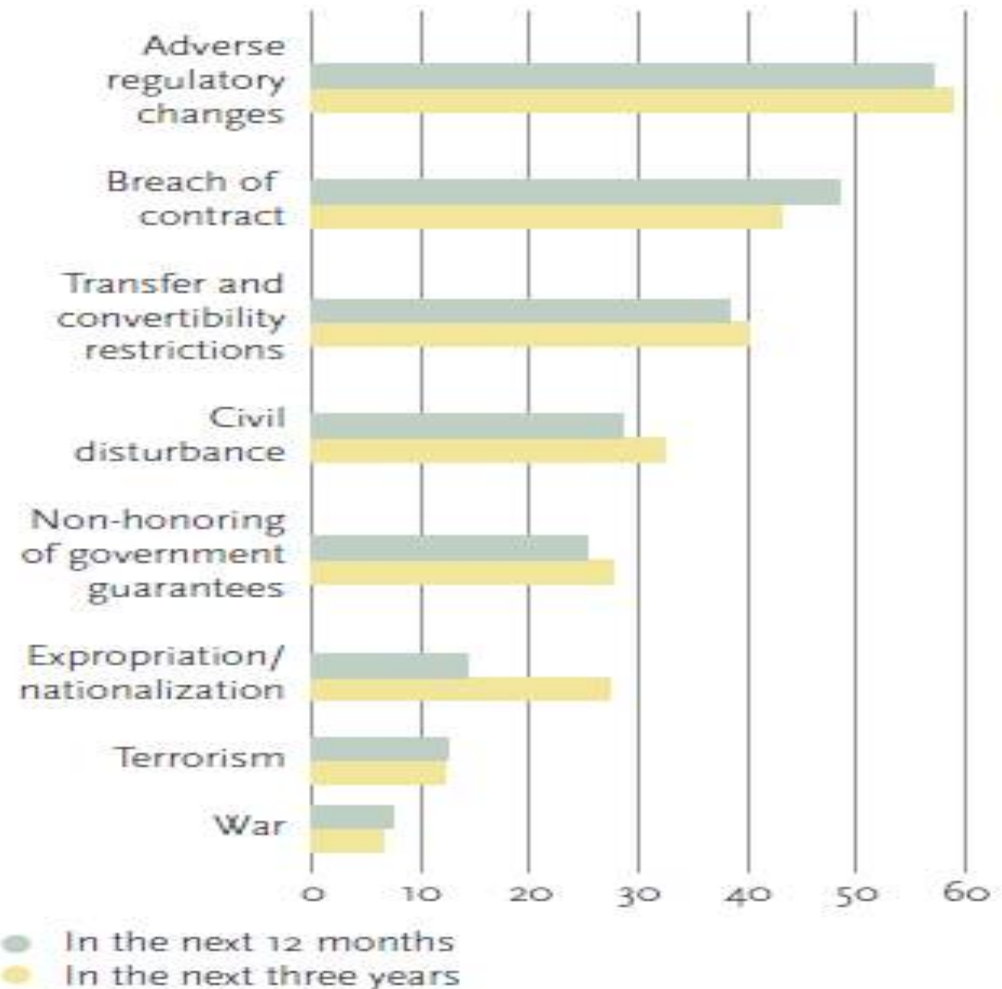
# Subrogation

- From the foreign investor's perception, the main constraints to invest in a country are macroeconomic instability and limited access to financing.
- Other constraints associated with developing countries are political risks (mainly adverse regulatory activity followed by breach of contract and transfer or convertibility restrictions), limited infrastructure capacity and limited access to qualified staff.
- Political risk insurance (PRI) tends to become more important concerns for investors only insofar as the macroeconomic environment is benign and funds are easily accessible.

# Stability and predictability is key for investors

**FIGURE 1.6 TYPES OF POLITICAL RISK OF MOST CONCERN TO INVESTORS IN DEVELOPING COUNTRIES**

Percent of respondents



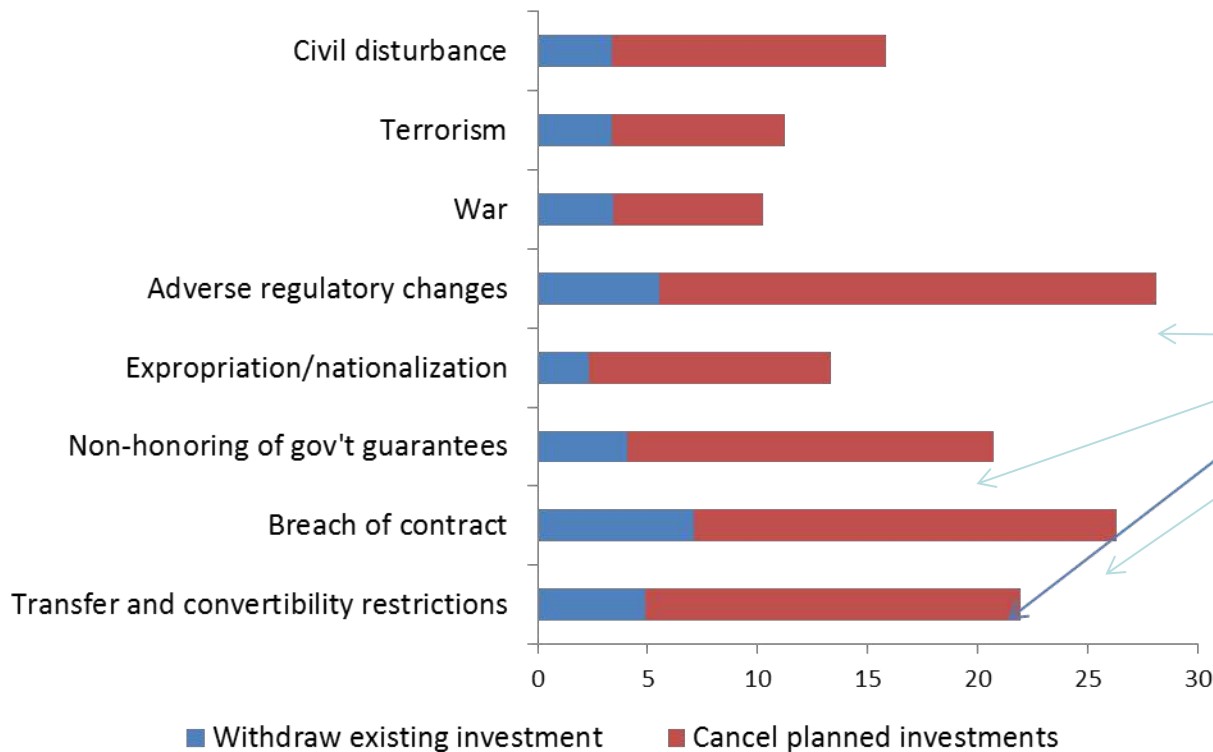
Source: MIGA-EIU Political Risk Survey 2012

Note: Percentages add up to more than 100 percent because of multiple selections

# Stability and predictability is key for investors

One out of four corporate investors either withdrew from an existing investment or canceled planned investments due to political risk concerns...

Source: WIPR 2012



Political risks that investors are most concerned about relate to government actions

# Subrogation

- Some home states provide PRI to their enterprises investing in least developed countries.
- This has been the practice of some countries, like the Overseas Private Investment Corporation (OPIC) in the United States, NEXI (Japan), SINOSURE (China), ONDD (Belgium), EDC (Canada), ECGD, (Britain), COFACE (France), EFIC (Australia) and SERV (Switzerland), and the Dutch Development Organization, as well as some development agencies, like the World's Bank Multilateral Investment Guarantee Agency (MIGA).
- Other countries have delegated the management of their investment guarantees scheme to private companies. E.g: Germany has appointed a consortium formed by PwC and Euler Hermes Aktiengesellschaft.

# Subrogation

- The large majority of IIAs usually provide for a mechanism of subrogation, which means that if an insurer covers the losses suffered by an investor in the host State, it acquires the investor's right to bring a claim and may exercise it to the same extent as, previously, the investor.
- Few exclude this subrogation and leave the dispute to inter-state settlement provisions generally found in IIAs.
- By 2015, from 700 PRI insurances MIGA reported that it has been able to resolve disputes that would have led to claims in all but two cases, and both of those claims were paid. MIGA also has paid six claims resulting from damage related to war and civil disturbance.
- *But how many cases are? Why?*



# UMBRELLA CLAUSE

# The Umbrella Clause

*“Each Contracting State shall fulfil any other obligations it may have entered into with regard to investments in its territory by investors of the other Contracting State.” [Art. 7 German Model BIT]*

*“Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.” [Art. 2 UK Model BIT]*

*“Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the other Contracting Party.” [Art. 11 Switzerland-Pakistan BIT]*

# The Umbrella Clause

- A breach of contract is not necessarily a violation of international law
- The umbrella clause is an international law obligation created by treaty that a host State shall...
  - 'observe any obligation it may have entered into'
  - 'constantly guarantee the observance of the commitments it has entered into'
  - 'observe any obligation it has assumed'  
(*and other variants*)
- Governments must meet their contractual obligations and not abuse their sovereign powers to invalidate their obligations

# Case Law

- Questions
  - Do breaches by governments of their contractual obligations may give rise to a treaty claim?
  - Is there a problem of privity?
- Early cases:
  - *SGS v. Pakistan* Decision on Jurisdiction (2003) holds that, the legal consequences of the clause are so far-reaching in scope, so automatic and unqualified and sweeping in their operation, and so burdensome in their potential impact upon a State that “clear and convincing evidence” of the Contracting Parties’ shared intent must be adduced [**Prudential Approach**]
  - *SGS v. Philippines* Decision on Jurisdiction (2004) the clause makes it a breach of the BIT for the host State to fail to observe binding commitments, including specific contractual commitments, but it does not convert it on an issue of international law and is still governed by the investment agreement [**Effective Meaning Approach**]

# Case Law

- Early cases:
  - *Impregilo v. Pakistan* Decision on Jurisdiction (2005) holds that, it is a precondition for the operation of the umbrella clause that the contract be concluded between the investor and the host State (not a State Owned Enterprise). Although an absolute trend is not yet clear, there are several awards that follow this idea. **[Privity]**
- Recent cases:
  - *SGS v. Paraguay* Award (2012): **[Extensive Understanding]**. “One can characterize every act by a sovereign State as a “sovereign act”, including [its] acts to breach or terminate contracts to which the State is a party”. The tribunal did not interpret the wording of the Umbrella Clause, but found that every act of the state could potentially breach the treaty

# The Umbrella Clause

- On questions of whether the umbrella clause can elevate a contractual breach into a treaty breach, to whether it can bind non signatories to the investment agreement (privity of contract issues), arbitral tribunals are yet to reach consensus on these matters. Many arbitral tribunals reached different conclusions concerning the interpretation of this clause.
- States are beginning to leave umbrella clauses out of their IIAs and model BITs, in an attempt to make sure that only international law principles are protected and not merely contractual obligations.

# The Umbrella Clause

- **Arguments pro Umbrella - Why not?**
  - Comprehensive protection of investments more attractive for investors
  - Neutral dispute resolution forum is the core matter of any BIT
  - Better drafting can reduce legal uncertainty
- **Arguments con Umbrella – Is it necessary?**
  - Legal uncertainty
  - Should international public law be used to solve commercial disputes? Should ISDS be used for settlement of petty disputes?
  - Increased public opposition

# *Questions?*

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