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Nataša Vujinović

Public Political Risk Investment Insurance

A Comparative Legal Study of Selected EU Member States' and MIGA's Political Risk Investment Insurance Schemes with Special Reference to Germany

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To Mila and Martin,
for believing in me, supporting every step I take and
encouraging and loving me the way you do.

Мили и Мартину,
јер вјерујете у мене, подржавате сваки мој корак и
подстичете и волите ме како само ви знате.

Table of Contents

Abbreviations

AAD	Arbitral award default
AJPIL	Austrian Journal of Public and International Law
AJIL	American Journal of International Law
Am Rev Intl Arb	American Review of International Arbitration
Am U Intl L Rev	American University International Law Review
APV	Adjusted present value
ARIEL	Austrian Review of International and European Law
BIT	Bilateral investment treaty
Bpifrance AE	Bpifrance Assurance Export
Cal L Rev	California Law Review
CAO	Compliance Advisor/Ombudsman (MIGA and IMF)
CCF	Capitalised cash flow
CCP	Common commercial policy (of the EU)
CESCE	Compañia Española de Seguros de Crédito a la Exportación (Spanish Export Credit Insurance Company)
CLJ	Cambridge Law Journal
CMLRev	Common Market Law Review
COFACE	Compagnie Francaise de l'Assurance pour le Commerce Exterieur
Conn L Rev	Connecticut Law Review
Cornell Int'l LJ	Cornell International Law Journal
COSEC	Companhia de Seguro de Créditos (Portuguese ECA)
CYELS	Cambridge Yearbook of European Legal Studies
DCF	Discounted cash flow
DoJ	Denial of justice
DPCI	Droit et pratique du commerce international (International Trade Law and Practice)
Duke J Comp & Intl L	Duke Journal of Comparative & International Law
E&S	Environmental and social
ECA	Export Credit Agency
ECB	European Central Bank
ECIO	Greek Export Credit Insurance Organisation
EGAP	Exportní garanční a pojišťovací společnost (Czech Export Guarantee and Insurance Corporation)
EIB	European Investment Bank
EILA Rev	European Investment Law and Arbitration Review
EJIL	European Journal of International Law

EKN	Exportkreditnämnden (Swedish PRI provider)
Emory Intl L Rev	Emory International Law Review
ESAP	Environmental and Social Action Plan
ESHR	Environmental, social and human rights
ESIA	Environmental and Social Impact Assessment
ESRS	Environmental and Social Review Summary
EU	European Union
EU MS(s)	Member State(s) of the European Union
EuConst	European Constitutional Law Review
EXIMBANKA SR	Export-Import Bank of the Slovak Republic
FDI	Foreign direct investment
FET	Fair and equitable treatment
Fordham L R	Fordham Law Review
FTA	Free Trade Agreements
Harv Int'l LJ	Harvard International Law Journal
Hastings Int'l & Comp L Rev	Hastings International and Comparative Law Review
ICLQ	International and Comparative Law Quarterly
ICSID Rev	ICSID Review
ICSID Rev-FILJ	ICSID Review – Foreign International Law Journal
IFC	International Finance Cooperation
IIA	International Investment Agreement
IIPPA	International Investment Promotion and Protection Agreement
IMF	International Monetary Fund
Int J L C	International Journal of Law in Context
Int J L M	International Journal of Law & Management
IPA	Investment Protection Agreement
J Energy & Nat Resources L	Journal of Energy & Natural Resources Law
J Int'l L	Journal of International Law
J Intl Arb	Journal of International Arbitration
JIBL	Journal of International Banking Law
JIDS	Journal of International Dispute Settlement
JWIT	Journal of World Investment & Trade
JWTL	Journal of World Trade Law
JZ	Juristen Zeitung
KUKE	Export Credit Insurance Corporation Joint Stock Company (Polish ECA)
Law & Policy Intl Bus	Law & Policy in International Business
LIEI	Legal Issues of Economic Integration
MEHIB	Hungarian Export Credit Insurance
MIGA	Multilateral Investment Guarantee Agency
NJW	Neue Juristische Wochenschrift
NYL Sch J Intl & Comp L	New York Law School Journal of International and Comparative Law

NYU Envtl L J	New York University Environmental Law Journal
ODL	Office du Ducroire Luxembourg
OeKB	Oesterreichische Kontrollbank Aktiengesellschaft
ONDD	Office national du ducroire | Nationale Delcrederedienst (Belgian ECA)
OPIC	Overseas Private Investment Corporation (former USA PRI provider)
Pace Int'l L Rev	Pace International Law Review
PRI	Political Risk (Investment) Insurance
PwC	PricewaterhouseCoopers GmbH Wirtschaftsprüfungsgesellschaft
RGDIP	Revue Générale de Droit International Public
RIW	Recht der Internationalen Wirtschaft
Int'l Bus LJ	International Business Law Journal
San Diego Int'l LJ	San Diego International Law Journal
Santa Clara J Int'l L	Santa Clara Journal of International Law
SDR	Special Drawing Rights
SID Bank	Slovenska izvozna in razvojna banka (Slovene export and development bank)
Sw J Intl L	Southwestern Journal of International Law
Syracuse J Int'l L & Com	Syracuse Journal of International Law and Commerce
TDM	Transnational Dispute Management
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
Va J Intl L	Virginia Journal of International Law
WAMR	World Arbitration & Mediation Review
WBG	World Bank Group
WiRO	Wirtschaft und Recht in Osteuropa
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZEuS	Zeitschrift für Europarechtliche Studien
ZVersWiss	Zeitschrift für die gesamte Versicherungswissenschaft

A. Introduction

The Ph.D. dissertation at hand aims to address public political risk investment insurance (hereinafter also: PRI) schemes of certain Member States of the European Union (hereinafter: EU MSs) and the Multilateral Investment Guarantee Agency (hereinafter: MIGA).[1] The analyses encompass MIGA's and selected EU MSs' national investment insurance schemes for political risk, with focus on the German government-sponsored PRI scheme. Before going into deeper analysis of different features of the prospective topic, the necessity for and the importance of a research on this subject matter as well as the aims and aspirations regarding its contribution to the field will be addressed.

I. Necessity for and importance of this research

The necessity for and the importance of researching public political risk investment insurance by analysing MIGA's underwriting scheme and comparing the selected EU MSs' insurance schemes are addressed from the

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1 In accordance with common usage, the notions "insurance" and "guarantee" are hereinafter used interchangeably. As a result, the term "PRI" is used to refer to both forms of coverage, guarantee and insurance. Although there are legal distinctions between them under international law and under many domestic laws, the scholars as well as MIGA and national PRI providers use them as synonyms. Stricto sensu, in guarantees, guarantors guarantee that certain obligations from the main contract will be fulfilled either by the contractor or in his omission by the guarantor himself. Insurance contracts are characterised by payment of an adequate premium, appropriate for the covered risk. For further information on the differentiation and the reasoning behind eg MIGA's interchangeable use of the two terms, see Ines Potocnik, *Die Multilaterale Investitions-Garante-Agentur (MIGA): Völkerrechtliche Analyse der Rechts-, Organisations- und Handlungsformen der Multilateralen Investitions-Garantie-Agentur sowie deren Streitbeilegungsmechanismen unter Berücksichtigung neuerer Entwicklungen* (Quickdruck München 1999) 123–124; Heinz Rindler, 'The Insurance of Austrian Investments Abroad against Political Risks: A Comparative Approach with Special Regard to Developmental Aspects' (1994) 47 AJPIL 17, 25–26. See also Gerhard Loibl, 'Foreign Investment Insurance Systems' in Detlev Ch Dicke (Ed), *Foreign Investment in the Present and a New International Economic Order* (University Press Fribourg Switzerland 1987) 102.

academic point of view as well as from points of view of three different interest groups in question. To be more precise, the three interest groups to be distinguished when contemplating about the topic at hand are the capital exporting country ie the country of origin or home country of the investment, the investor itself and the host country ie the capital receiving country.

To begin with, capital exporting countries' main interest in backing up investments is to facilitate investment flows[2] by encouraging investors to invest in politically more risky environments. Countries which offer government-sponsored insurances aim to promote their national economies,[3] support their development-oriented policy goals,[4] as well as to influence and oversee their capital outflow by supporting only the investments which fulfil the previously set up prerequisites. Thereby, they regulate their investment policies: some underwrite only new investments, some do whereas some do not insure investments of foreign corporations with a presence in domestic territories or foreign subsidiaries of national companies, some cover only the "traditional perils" of political risk insurance – expropriation, political violence, currency inconvertibility and non-transfer – whereas some include further risks in their offers.[5] These different policies are only examples of the public PRI schemes.

At the moment, there is no uniform and homogenous policy for insurance schemes offered by each of the EU MSs.[6] The status quo is that each of the EU MSs with a public investment insurance scheme in place implements its own approach. Furthermore, with the application of the Treaty of Lisbon and the transfer of exclusive competence over foreign

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2 Angelos Dimopoulos, 'Foreign Investment Insurance and EU Law' in Marc Bungenberg, August Reinisch and Christian Tietje (eds), *EU and Investment Agreements: Open Questions and Remaining Challenges* (Nomos 2013) 172.

3 Kaj Hobér and Joshua Fellenbaum, 'Political Risk Insurance and Investment Treaty Protection' in Marc Bungenberg and others (eds), *International Investment Law* (Nomos 2015) 1522, para 15. See also the undertaken survey of 16 public political risk investment insurance schemes (out of which 7 are EU MSs) having the same outcome in Kathryn Gordon, 'Investment Guarantees and Political Risk Insurance: Institutions, Incentives and Development' in *OECD Investment Policy Perspectives 2008* (OECD 2008) 96.

4 Kausar Hamdani, Elise Liebers and George Zanjani, 'An Overview of Political Risk Insurance' (2005) A Research Note for the Federal Reserve Bank of New York <https://www.researchgate.net/publication/260403914_An_Overview_of_Political_Risk_Insurance> accessed 28 June 2020.

5 For further information at this point, see Gordon (n 3) 98, 118.

6 Dimopoulos (n 2) 175–176.

direct investment (hereinafter: FDI) to the EU, the question of EU competence over existing public political risk investment insurance schemes arises as a reasonable one. Thus, conducting research on EU MSs' public PRI schemes is relevant and necessary as well as invaluable. It will not only provide a comparative overview of the public PRI schemes currently offered but also shed some light on the best practice for a potential common approach. It goes without mentioning that parallel analyses of MIGA's insurance scheme can not only be beneficial but also a crucial part of the research. This is because MIGA, with its current 182 member states, represents the largest multilateral investment insurance provider worldwide in terms of membership.[7]

Coming back to the tripartite interest group division, PRIs are important and necessary also from investors' point of view. Investors are businessmen whose main goal is to generate profit from their investment. Commercial risks are the risks inherent in any business environment. Investors are 'presumed to be willing to run'[8] these risks and might be able to anticipate them.[9] Otherwise, the incorrect assessments carry a price to pay. However, political risks are usually not foreseeable for investors. The burdens become even higher when investing into a foreign country,[10] the actions and omissions of which are highly unforeseeable and unpredictable, but nonetheless influential on the investment. Furthermore, not only actions and omissions of the political regimes in power in the host country at the moment of investing, but also the ideological shifts of regimes, may represent political perils for investors.[11] Therefore, investors are seeking for ways how to share and shift the burdens of risks and dangers threatening their foreign investments. PRI cover comes in handy in this respect. Nonetheless, not all types of political risk insurance are attractive for potential investors. Public PRI cover garners more attention, especially due to the fact that it is provided on behalf of or with the

7 Information available at <www.miga.org/who-we-are/member-countries/> assessed 28 June 2020. Other international providers are regional schemes, the Inter-Arab Investment Guarantee Corporation, and the African Trade Insurance Agency.

8 TM Ocran, 'International Investment Guarantee Agreements and Related Administrative Schemes' (1988) 10(3) J Int'l L 341, 344.

9 S Linn Williams, 'Political and Other Risk Insurance: OPIC, MIGA, EXIMBANK and Other Providers' (1993) 5(1) Pace Int'l L Rev 59, 59.

10 Ibid.

11 See Robert Ginsburg, 'Political Risk Insurance and Bilateral Investment Treaties: Making the Connection' (2013) 14 JWIT 943, 948.

support of the state. Furthermore, when it comes to EU investors investing into, on the one hand still politically unstable countries, but on the other hand, countries that are rich with unexploited natural and energy resources and therefore attractive, the importance of PRI is even greater.

The practical relevance and the necessity for public political risk insurance from the EU investors' point of view demands researching public PRI schemes and analysing them. A comparative research, as the one anticipated in the dissertation at hand – offering analyses of MIGA's and individual EU MSs' insurance schemes – is relevant and helpful. It provides a comprehensive study of what national public political risk investment insurance schemes of various investors' home states offer and where they stand compared to the public schemes of the other EU MSs as well as MIGA. Moreover, the best practices are identified and suggestions for a potential common approach on the EU level made.

Concerning the interests of host countries, these are normally to welcome foreign capital and try to attract it, due to the fact that foreign investments usually contribute to the economic growth and development as well as the augmentation of domestic resources.[12] In their national provisions, these being integrated in constitutions or implemented in special laws on foreign investments, as well as their Bilateral Investment Treaties, host countries normally guarantee the non-violation of foreign investors' and investment' rights in some form in order to ensure an acceptable domestic investment climate.[13] In addition, public PRI schemes of capital exporting countries and MIGA play an important role for this interest group as well. In particular, if the insured event is to occur, capital exporting countries might exercise diplomatic pressure on host countries to avoid its occurrence and make them change their behaviour.[14] If the insured event has already occurred and the investor's country has subrogated into investor's rights, which is a common consequence, the claim against the host country lies with the capital exporting country or MIGA itself. Thus, analyses of particularities of those PRI schemes and the knowledge about them is beneficial for host countries as well.

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12 See Ocran (n 8) 341.

13 For more on investment climate, consult Ibrahim FI Shihata, *MIGA and Foreign Investment: Origins, Operations, Policies and Basic Documents of the Multilateral Investment Guarantee Agency* (Martinus Nijhoff Publishers 1988) 7–13.

14 See Kernaghan Webb, 'Political risk insurance, CSR and the mining sector: An illustration of the regulatory effects of contracts' (2012) 54(5) Int J L M 394, 400.

Conducting research on public PRI schemes of the EU MSs' and MIGA is not only relevant from the practical point of view for the three elaborated interest groups, but it also represents a topic that is important and relevant for analysing from the scientific and academic points of view. As mentioned, at the moment, the EU MSs which do have public PRI schemes implement different policies and have various approaches established within their schemes. After the Treaty of Lisbon and the transfer of exclusive competence over FDI to the EU, the question of the EU competence in the area of political risk investment insurance and the future of the national public insurance schemes arises. Therefore, there is a legitimate need from the scientific point of view to conduct a comparative legal study of the currently effective EU MSs' public PRI schemes, comparing them at the same time to MIGA. Such a scientific study could offer hints as to which implemented solutions are the best and the most appropriate. Hopefully, it would be beneficial at the time when the EU engages in exercising its competence in the field.

II. The aims of this dissertation and its aspired contribution to the field

The dissertation at hand aims to offer a comprehensive comparative legal study of the public PRI schemes currently in force in the EU MSs and the MIGA. Additionally, by comparing the respective schemes, this dissertation intends to identify the approaches applied, their advantages and disadvantages, and at the end offer a model which could be taken into account when establishing any form of a common one at the EU level.

Following the introductory part of the dissertation, the second chapter defines and addresses the core notions this dissertation focuses on. When it comes to foreign investments, the difference between foreign direct and portfolio investments as well as the consequences and importance of such a distinction is addressed. Concerning political risks, their definition and categories are elaborated. Next, political risk investment insurance in general is addressed, followed by the comparison of public and private insurances and analyses of the remaining benefits of public PRI schemes over private ones. The next subchapter compares protection offered by BITs and national legislation of the host countries with the one of PRI schemes. As a result, the last subchapter identifies a remaining necessity for the existence of PRI.

The third chapter offers a more specific introduction into the respective insurance schemes. Firstly, historical development, organisation, member-

ship and activities of the MIGA will be analysed, and secondly, the public schemes of the EU MSs will be introduced. Although 20 of the 27 EU Member States offer a government-sponsored PRI, the dissertation at hand deals with the PRI schemes in force in Germany, Austria, Belgium, Czech Republic, France, Luxembourg, Slovenia and Spain. The focus of the analyses was set on the aforementioned countries due to the accessible information on their public PRI schemes being available in one of the languages spoken by the author. This chapter will furthermore briefly deal with the transfer of exclusive competence over the FDI to the EU and its implications on the field of investment insurance. The aforementioned issue will be analysed and addressed in so far as to illustrate and explain the potential implications of the transfer of competence on investment insurance schemes and their future developments. The author is aware that comprehensive analyses of the transfer of powers are far beyond the scope of the dissertation at hand.

Thereafter, comprehensive analyses of the respective insurance schemes are offered in the fourth chapter. Issues elaborated on concern political risks covered, eligibility for cover, application and procedure for insuring investment, terms of coverage, procedural aspects during the insurance and up until compensation payment, subrogation and recovery and dispute settlement under the political risk insurance as well as co- and reinsurance. Analyses are offered as a model firstly in respect of MIGA, then the German scheme and at the end of the selected public schemes of the EU MSs in comparison to the German scheme. The German public scheme has been elected to be elaborated on in such a detailed manner since Germany is one of the leading countries in insurance through its national provider,[15] and the thesis at hand is submitted at a German university.

The next chapter identifies and proposes practices to be potentially followed in future endeavours to implement the EU competence in the field of political risk investment insurances. Thereafter, the last chapter represents the conclusion.

As far as the aspired contribution to the field is concerned, the issue of the currently active public political risk investment insurance schemes of the EU MSs and their future is a hot topic; however, it is still unresolved. The dissertation at hand endeavours to represent a valuable contribution in that respect. Furthermore, the author is unaware of the existence of a

15 Alberto Tita, 'Investment Insurance in International Law: A Restatement on the Regime of Foreign Investment' (2010) 11 JWIT 651, 653.

single research project offering a comparative legal study of all the above-mentioned schemes and in the context in which this study aims to put it. Having in mind the scientific need for and the practical relevance of such research, the author is confident that the dissertation at hand will represent a considerable contribution to the field.

B. Introductory analyses of the core terms and issues

In order to later properly analyse the political risk investment insurance schemes, it is necessary to firstly address, define and analyse the core notions this dissertation focuses on.

I. Foreign investment

To begin with, the most basic definition of an investment would probably be the one designating an investment as a 'commitment of resources by a physical or legal person to a specific purpose in order to earn a profit or to gain a return'.[16] As for a foreign investment, it may be designated as the 'transfer of tangible or intangible assets from one country into another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets'.[17]

Three characteristics are considered to be the most important when analysing any investment form: the property and contractual rights resulting from an investment, the control over an investment and the enterprise form in which an investment is made.[18] As for the first, the transfer of certain property and contractual rights in an investment – those being either equity or debt – represents the legal consequence of an investment in an undertaking.[19] In particular, an equity investment provides an investor with an ownership interest (eg shares of stock in a company or fixed assets), whereas an investment in the form of debt includes a claim to be repaid or an entitlement to fixed payments of principal and interest in

16 Jeswald W Salacuse, *The Law of Investment Treaties* (2nd edn, Oxford University Press 2015) 26.

17 Muthucumaraswamy Sornarajah, *The International Law of Foreign Investment* (3rd edn, Cambridge University Press 2010) 8. For further information on the notion of investment, including its definitions in international investment agreements and ICSID Convention, see Jan Asmus Bischoff and Richard Happ, 'The Notion of Investment' in Marc Bungenberg and others (eds), *International Investment Law* (Nomos 2015) 495ff, paras 1–47.

18 Salacuse (n 16) 27.

19 According to ibid 28.

arranged periods with an expiry date (eg loans and bonds).[20] Whether an investment into an enterprise occurs as an equity or debt investment, and which rights it brings along, depends on many circumstances including the prevailing law, the interest rates and the risks encountered.[21] Investments mostly occur as a mixture of both equity and debt.

In terms of the extent of control which an investor has over an enterprise or an asset the investment was made in, the investor's ability to determine the actions and policies of an enterprise should not be confused with ownership rights in an enterprise as the latter may be bound to too low of an ownership share to allow the exercise of any decision-making rights.[22] Investor's control over an enterprise is present when it has the rights to select the members of an enterprise's governing board and thereby exercise influence.[23] In addition, host countries are interested in knowing who is controlling enterprises on their territories,[24] especially if restrictions from predominant foreign control exist in certain fields, as for example production and sale of arms, ammunition, explosives for military use, military equipment and media in Bosnia and Herzegovina.[25] Furthermore, the existence or non-existence of control on the investor's side leads to the differentiation between foreign direct and portfolio investment.

Moving on to the legal form of the enterprise in which the investment is made, the foreign company may have different legal forms of organisation. The crucial differentiation is the one between a branch, where an enterprise or an asset is owned directly by an investor, and a subsidiary, where it is owned by a separate legal entity in which the investor has an equity interest.[26] The enterprise's legal form depends both on investor's will and on the host state, which may prescribe the available forms.[27] Furthermore, both the investor and the functioning of an undertaking bear the consequences of the enterprise's legal form. Such consequences may vary among country's legal systems and different legal attributes to requirements allocated to different legal forms of an enterprise.[28]

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20 Ibid.
21 See ibid.
22 Ibid 29.
23 Ibid 28.
24 Ibid.
25 See Law on the Policy of Foreign Direct Investment into Bosnia and Herzegovina, Official Gazette of BiH 17/98, 13/03, 48/10 and 22/15, Art 4(a).
26 Salacuse (n 16) 30–31.
27 For further information, see ibid 31.
28 For further information, see ibid.

Having addressed the notion of foreign investment and the main features of different investment forms, individual examinations of the most frequent forms of international investment follow.

1. Foreign direct investment

The differentiation between foreign direct investment and portfolio investment is the most frequent and relevant distinction concerning various forms of foreign investments. It stems from the distinction of an investor having or not having the right to exert control over an investment.[29] The FDI is an investment where a foreign investor owns the assets for the purposes of controlling and managing their use.[30] In order to identify direct investment and facilitate the differentiation to portfolio investment in practice, investor's equity ie ordinary shares or voting rights in the foreign company need to be at least 10 per cent for an investment to qualify as an FDI.[31] By obtaining ownership rights and control over assets and enterprises in the host country, foreign investors become influential on local and national economies of the host country. Moreover, domestic policies, politics and culture of a host country might stand under the influence of FDIs, as those normally represent long-term projects and involve far more than just money and asset transfers.[32]

2. Portfolio investments

In contrast to an FDI, a foreign portfolio investment does not confer on the investor the participating rights regarding the control or management over a foreign company.[33] It represents cross border movements of money for the sake of making profit and no controlling intentions whatsoever.[34] In addition, foreign portfolio investments are usually rather shorter-term projects and are less exposed and noticeable to the host state. For exam-

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29 See ibid 30; Sornarajah (n 17) 8.
30 See Sornarajah (n 17) 8.
31 See Daniel D Bradlow and Alfred Escher, *Legal aspects of foreign direct investment* (Kluwer Law International 1999) 21; Salacuse (n 16) 30, 38–39; IMF, Balance of Payments Manual (5th edn, IMF 2010) 86 para 362.
32 For further information, see Salacuse (n 16) 39.
33 Ibid 30.
34 See Sornarajah (n 17) 8.

ple, stock shares of a domestic company may be sold online without the host country being aware of the sale and/or of the incoming foreign capital, whereas direct investments in a foreign country occur in a more transparent and controllable way for the host state, sometimes even being conditioned upon its approval.[35]

The differences between an FDI and a portfolio investment resulted in historically different treatment with regard to the protection offered by (customary) international law. More specifically, portfolio investments were – unlike FDIs, since physical property was subject to diplomatic protection and state responsibility principle – unprotected by customary international law.[36] As for the protection by international law itself, the majority opinion justifies the different standards of protection by the existence of particularities of the two investment forms, while a minority argues there should be no distinction in the protection given due to both types of investments being prone to the same risks.[37] There are not only arguments for the same level of protection but also arguments that portfolio investments are now to be included in the notion of FDIs.[38]

Nevertheless, the differentiation between FDI and portfolio investment remains relevant for the dissertation at hand since many public PRI schemes limit their cover to FDIs only.[39] In addition, the exclusive EU competence in the investment sector underlines the relevance of the aforementioned distinction. To be more precise, only the competence for FDIs was expressly transferred to the EU, as is evident from Art 207(1) of the Treaty on the Functioning of the European Union (hereinafter: TFEU).

3. International loans and bonds

International loans provided by financial institutions in one country to undertakings in a foreign country represent a form of foreign investment.[40] Such loans may be provided by a single bank or a consortium of financial institutions; group loans being offered mostly to share the risks accompanying larger loans.[41] International loans are not only provided

35 See ibid 9.
36 For further information, see ibid.
37 See ibid.
38 Indicated as in ibid.
39 See infra under D.I.2.a)bb) at 186ff.
40 Salacuse (n 16) 40.
41 See ibid.

by unrelated financial institutions but may also be provided by a parent company to its subsidiaries and affiliates (the so-called downstream loan).[42] Furthermore, loans by subsidiaries and affiliates to the parent company are possible as well (the so-called upstream loan).

If, by issuing guarantees, financial or government institutions support companies selling goods on credit to foreign companies, such credits are actually international loans.[43] Suppliers' and others' credits are to be considered a form of investment up to the moment when the full amount of the purchase is paid, despite the fact that no actual money is involved in the transfer.[44] Nevertheless, the supplier committed capital – in the form of goods – to the transaction and has a claim over the purchase price and eventually the belonging interest.[45] Thus, the investment-nature of suppliers' and others' credits results from the commitment of capital on the supplier's side.

When some of the needed capital for the activities of corporations and governments is raised by issuing bonds and other negotiable instruments to investors in foreign countries, such negotiable instruments represent forms of foreign investments.[46] After their issuance, these negotiable instruments may as well be traded among investors on the capital market.[47]

II. Political risk

In general terms, risk could be seen as a possibility that something unpleasant or unwelcome will happen; a situation involving exposure to danger.[48] In legal terms, and in the spirit of investment law, risk could be defined as a chance of occurrence of an event which could influence the investment's actual return, create losses and damage investor's property.[49] From the point of view of insurance law, risk is usually defined as 'the chance or

42 See ibid.
43 Ibid 41.
44 Ibid.
45 Ibid.
46 Ibid 40.
47 Ibid.
48 English dictionary powered by Oxford at <https://www.lexico.com/definition/risk> accessed 28 June 2020.
49 Compare with Predrag Cvetković, 'Rizici podobni za izdavanje garancije MIGA' (2002) 5–8 Pravo i privreda 724, 726.

degree of probability of loss to the subject matter of an insurance policy'.[50] Risks are generally categorised into economic risks (subcategorised into commercial risks and economic risks stricto sensu), political risks and disaster risks.[51]

1. Commercial versus political risk

The terms political risk and non-commercial risk coexist as synonyms.[52] Since there is no common understanding of political risks,[53] they are defined in comparison to and in contrast to commercial risks.

In terms of investment law, political risks represent the likelihood that extraordinary, unexpected measures negatively influencing foreign investment will be introduced by the host state.[54] In other words, political risk represents a possibility of an intervention of a government or of other authorities of a country resulting in depriving an investor of its rights and reducing the value of its investment.[55] Various categories of political risks are faced by investors and covered by the PRI industry. These tend to have in common that they are unpredictable political events caused by arbitrary or discriminatory government omissions or actions which damage foreign investors and deviate from generally accepted principles of international law.[56] However, not only government and political institutions but also

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50 Bryan A Garner (ed), *Black's Law Dictionary* (9th edn, Thomson Reuters 2009) 1442.

51 Peter Schaufelberger, *La protection juridique des investissements internationaux dans lex pays en development: Etude de la garantie contre les risqué de l'investissement et en particulier de l'Agence multilateral de garantie des investissement (AMGI)* (Imprimerie Chabloz 1993) 58–59.

52 See Cvetković, 'Rizici podobni za izdavanje garancije MIGA' (n 49) 727 n 16.

53 Raoul Ascari, 'Political Risk Insurance: an Industry in Search of a Business?' (2010) SACE Working Paper N. 12, 3. See also ibid 14.

54 Hobér and Fellenbaum (n 3) 1519, para 5.

55 Cvetković, 'Rizici podobni za izdavanje garancije MIGA' (n 49) 726.

56 Julian GY Radcliffe, 'The Principles of Managing Political Risk and the Use of Insurance' in Fariborz Ghadar, Stephen J Kobrin, Theodore H Moran (eds), *Managing International Political Risk: Strategies and Techniques* (The Landegger Programm in International Business Diplomacy, School of Foreign Science, Georgetown University 1983) 98. Criticised by Heinz Rindler, *Der Schutz von Auslandsinvestitionen durch die MIGA: unter besonderer Berücksichtigung der Beteiligungsgarantie des Bundes und des völkerrechtlichen Investitionsschutzes* (Manz 1999) 8. On the nature of political risk, compare Stefan Sinn, 'Second thoughts on MIGA' (1986) 21(6) Intereconomics 269, 271ff.

minority groups and separatist movements may cause political acts classifying as political risks.[57] Thus, a broader definition could be offered designating political risk as 'the probability of disruption of the operations of companies by political forces and events, whether they occur in host countries or result from changes in the international environment'.[58]

In contrast to political risks, commercial risks are occurrences in the domain of influence of contractual parties, which are normally subjects of private law. Their consequences are therefore borne by the contractual parties ie the investors. Commercial risks are inherent to the activity of conducting business in competitive market economies and exist in politically stable environments as well; the non-fulfilment of contractual obligations or the insolvency of a contractual partner being typical examples.[59]

The following example may serve to illustrate the distinction between commercial and political risk. A failure of a publicly owned company to deliver the contracted products necessary for the foreign investor's company would constitute a political risk if the reasons for the non-delivery are of a purely political nature. In case the delivery were to not occur due to the economic inability of the publicly owned company, this would be considered to be the result of the choice of contractual partner; thus, a usual business risk – a commercial risk.[60] Therefore, the essence of the differentiation between political and commercial risks is the origin of the circumstances causing the risk – those stemming either from regular competition that each business entity in a market economy has to cope with or those being exclusively of a political nature. This differentiation may often be difficult to make in practice.[61]

Notwithstanding the abovementioned, there are risks which are to a certain extent politically-related but which have a relevant commercial feature too. These are also important to mention since delimitating their nature and quantifying them in any way proves impossible and results in PRI insurers not covering them.[62] Such risks are currency devaluation,

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57 See MIGA, *World Investment and Political Risk 2011* (The World Bank 2011) 21.

58 Ibid. For historical approaches on contemplations on the notion of political risk, consult Jason Webb Yackee, 'Political Risk and International Investment Law' (2014) 24 Duke J Comp & Int'l L 477, 479ff.

59 Cvetković, 'Rizici podobni za izdavanje garancije MIGA' (n 49) 727.

60 See ibid 728 n 21.

61 See Rindler, *Der Schutz von Auslandsinvestitionen durch die MIGA* (n 56) 8–9.

62 Paola Morales Torrado, 'Political Risk Insurance and Breach of Contract Coverage: How the Intervention of Domestic Courts May Prevent Investors from Claiming Insurance' (2005) 17 Pace Int'l L Rev 301, 311.

inflation, legitimate change of legislation in a country and interference by authorities in the grant or renewal of licences and permits.[63]

2. Categories of political risk and political risk investment insurance (PRI) industry's approach towards them

In academia, political risks are classified into three basic and relatively broad categories: risks connected to political violence, risks of expropriation and other deprivations of investor's property rights and risks connected to currency conversion and transfer.[64] Nonetheless, further approaches have been present: some designating defaults on sovereign obligations (from arbitral awards, contracts and loans) as a distinct fourth category,[65] others focusing only on breaches of contracts by the host government, stating that these are the fourth category,[66] and finally, some even treating de facto expropriation as a special category.[67]

The dissertation at hand employs an approach of its own. It addresses indirect expropriation under other expropriatory risks. In addition, some further political risks are analysed; breach of contract among them as a standalone risk.

a) Risks connected to political violence

Political violence may occur in various forms: war, coup d'état, revolution, rebellion, riot, insurrection, terrorism, sabotage or civil strife.[68] Distinguishing them proves relevant as not every PRI scheme covers all of these forms.[69] Thus, they are to be briefly defined.

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63 Consult ibid.

64 See Hobér and Fellenbaum (n 3) 1519, para 5; Williams (n 9) 59.

65 See Gordon (n 3) 98.

66 Ocran (n 8) 344.

67 See Paul E Comeaux and N Stephan Kinsella, *Protecting Foreign Investment Under International Law: Legal Aspects of Political Risk* (Oceana Publications 1997) 3.

68 See Hobér and Fellenbaum (n 3) 1519, para 5; Williams (n 9) 59; MIGA, Operational Policies of 6 January 2015, paras 1.48 – 1.49 <https://www.miga.org/sites/default/files/archive/Documents/Operational-Policies.pdf> accessed 28 June 2020 (hereinafter: MIGA Operational Policies).

69 Compare eg Investment Guarantees of the Federal Republic of Germany, General Terms and Conditions in the version of July 2017 <https://www.investition

To begin with, war can be defined as an actual, international and widespread armed conflict, a state of hostility between two or more nations or states[70] or, broadly speaking, between different political communities (those again being either states or entities intending to become states).[71] A civil war, as its subgroup, is an armed conflict within one state, normally between its government and another group usually intending to become a state itself.[72]

A coup d'état exists if a small group suddenly and violently overthrows the existing government. The qualifying prerequisite for a coup d'état, distinguishing it from other acts of political violence, is the 'control of all or part of the armed forces, the police, and other military elements'.[73] Thus, a coup d'état has its roots within the state structure itself. Contrary to a revolution, which is usually achieved by large numbers of people working for basic social, economic and political change,[74] a coup d'état is an abrupt replacement of leading government personnel normally having no influence in changes in social and economic rights.[75]

Moving on, large-scale violence directed against the state by its own civilian population, trying to change the government or some of its policies but not the society itself, qualifies as a rebellion.[76] Furthermore, if

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sgarantien.de/_Resources/Persistent/f/6/a/e/f6ae76c725e7fd360fd8f53d357b9e8a30f9de6a/DIA-AGB-engl-200127-WEB.pdf> accessed 28 June 2021 (hereinafter: General Terms and Conditions of the German PRI) § 4(1) and MIGA, Convention Establishing the Multilateral Investment Guarantee Agency, Art 11(a)(IV) <https://www.miga.org/sites/default/files/archive/Documents/MIGA%20Convention%20(April%202018).pdf> accessed 28 June 2020 (hereinafter: MIGA Convention); MIGA, Commentary on the Convention Establishing the Multilateral Investment Guarantee Agency, para 16 <https://www.miga.org/sites/default/files/archive/Documents/commentary_convention_november_2010.pdf> accessed 28 June 2020 (hereinafter: Commentary on MIGA Convention); MIGA Operational Policies (n 68), paras 1.48 – 1.49.

70 See Garner (n 50) 1720.

71 See Brian Orend, 'War', *The Stanford Encyclopedia of Philosophy* (Fall 2008 Edition) <http://plato.stanford.edu/archives/fall2008/entries/war/> accessed 4 December 2020.

72 See ibid.

73 See The Editors of Encyclopaedia Britannica, 'Coup d'etat', *Encyclopædia Britannica* (31 January 2020) <http://www.britannica.com/topic/coup-detat> accessed 28 June 2021.

74 See also Garner (n 50) 435.

75 See 'Coup d'etat', *Encyclopædia Britannica* (n 73).

76 See Tim Delaney, 'Collective violence', *Encyclopædia Britannica* (6 June 2016) <http://www.britannica.com/topic/collective-violence> accessed 28 June 2021.

more than three individual civilians gather in a public place for common purposes, both lawful and unlawful, acting in a violent manner in disobedience of a lawful authority and terrorising the public or an institution, such a gathering would represent a riot.[77]

Insurrection is a violent revolt against an oppressive authority which includes an organised and armed uprising threatening the stability of the government or the existence of political society.[78] This characteristic is allegedly missing in riots and other offences connected with mob violence, which are 'however serious they may be and however numerous the participants, simply unlawful acts in disturbance of the peace which do not threaten the stability of the government or the existence of political society'.[79] In the author's opinion, such allegations are to be taken with a pinch of salt, namely because very numerous and serious revolt actions, even without previous intention and organisation, can easily take on the characteristics of far more reaching measures, destabilising ruling powers and existing political structures. The possibility of such developments should not be neglected.

Terrorism is probably the most complex and controversial form of political violence. Modern comprehension of terrorism would label it as a 'form of warfare in which a social movement that opposes the state directs violence toward civilians rather than the military or the police'.[80] Terrorists, completely misusing Machiavelli's concept of an "end justifying the means", justify their bombings, kidnappings, tortures, mass murders, etc by political or ideological objectives they manically pursue, even if innocent people are harmed.[81] Encouragement of constant fear among the population is among their means.

Furthermore, sabotage involves deliberate destruction of property or slowing down of working processes in order to damage an economic system or weaken a nation in a time of national emergency.[82] Lastly, civil commotion is to be defined. It is the public uprising of a large number

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77 See MIGA Operational Policies (n 68), para 1.49; The Editors of Encyclopaedia Britannica, 'Riot', *Encyclopædia Britannica* (11 April 2018) <http://www.britannica.com/topic/riot> accessed 28 June 2021; Garner (n 50) 1441.

78 Garner (n 50) 879.

79 See ibid.

80 See Delaney (n 76).

81 See ibid.

82 See The Editors of Encyclopaedia Britannica, 'Sabotage', *Encyclopædia Britannica* (03 August 2012) <http://www.britannica.com/topic/sabotage-subversive-tactic> accessed 28 June 2021; Garner (n 50) 1452.

of people, usually many more people than in a riot, who may damage property and harm people while assembled.[83]

As demonstrated, political violence can take different forms. Still, all of them share a common feature: they are inherently unpredictable.[84] Furthermore, the host state and its government usually have little control over them[85] and thereby relatively limited responsibility for losses occurring to foreign investors.[86] Under international law, the host state's responsibility and the duty to remedy damages that emerged from destruction of the property of its nationals in armed conflicts is to be established only when the host state is in violation of international law.[87] This is the case also when the host state fails to prevent damages done to foreign citizens by domestic private persons.[88] If under international law even the acts "not actually committed by the state" can be "attributed to the state", the host state could be held responsible for investor's damages and losses resulting from such an act of political violence.[89] Moreover, not only de iure government is to be held responsible for the damages, but in certain cases, also the de facto government potentially incorporated in rebellious groups.[90] Obviously, losses and damages to foreign investment have to occur as direct causes of political violence, which may sometimes be difficult to establish.[91]

Notwithstanding the aforementioned, PRI providers are still covering risks of political violence.[92] In order to offer coverage, insurers condition

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83 See Garner (n 50) 279.

84 Marvin W Tubbs, 'Political Risk Insurance: The Potential Effects of Privatization on Credit Availability' (1997) 16 Ann Rev Banking L 553, 560–561.

85 Hobér and Fellenbaum (n 3) 1519, para 5.

86 See Williams (n 9) 59; Comeaux and Kinsella (n 67) 16.

87 For further information, see Rindler, *Der Schutz von Auslandsinvestitionen durch die MIGA* (n 56) 173–175.

88 For further information, see ibid.

89 Williams (n 9) 59. For further information, see Rindler, *Der Schutz von Auslandsinvestitionen durch die MIGA* (n 56) 174.

90 For further information, see Rindler, *Der Schutz von Auslandsinvestitionen durch die MIGA* (n 56) 175.

91 Hamdani, Liebers and Zanjani (n 4).

92 Although the public PRI scheme of the USA (until 20 December 2020 Overseas Private Investment Corporation (OPIC), thereafter US International Development Finance Corporation (DFC)) is not subject to analyses in the dissertation at hand, as the oldest and the most prominent public PRI scheme in the world, it is provided as an example sometimes. Against this background, see how OPIC examined investor's eligibility for its coverage against political risks in Robert B Shanks, 'Insuring Investments and Loans Against Currency Inconvert-

all the aforementioned forms of violence to be carried out in pursuit of political goals.[93] In addition, a causal link between an act of political violence and the occurred damage must exist.[94] When it comes to its scope, political violence cover may insure losses from damage caused to the physical assets and/or losses of business income resulting from such damage of assets.[95] With regard to recovery for claims paid out on grounds of political violence, PRI providers are on thin ice, namely 'one cannot pursue one's subrogation rights against host governments that cannot control insurgent violence'.[96] Thus, the risks of political violence are considered as non-recoverable.[97]

At this point, a particularity of coverage for terrorism is to be shortly addressed. After 11 September 2001, the terrorism coverage market experienced a boom.[98] Traditionally, terrorism insurance and PRI have been separate markets.[99] A stand-alone terrorism coverage is considered to be part of the property insurance market.[100] However, the separation between PRI and terrorism insurance is arguably non-sensical, especially in emerging markets where terrorism cannot be separated from other political violence risks and may evolve into one of its forms.[101] In any case, the merger of

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ibility, Expropriation, and Political Violence' (1986) 9(3) Hastings Intl & Comp L Rev 417, 428–429.

93 See MIGA Operational Policies (n 68), para 1.50; General Terms and Conditions of the German PRI (n 69), § 4(1) prescribing at the very outset that only the "following political events" are covered.

94 For information on potential difficulties in its establishment, see Ulrich Hübner, 'Rechtsprobleme der Deckung politischer Risiken' (1981) ZVersWiss 1, 5–6. Information on OPIC's examination of the direct causation available in Pablo M Zylberglait, 'OPIC's Investment Insurance: The Platypus of Governmental Programs and Its Jurisprudence' (1993) 25 Law & Policy Intl Bus 359, 411–417.

95 See eg MIGA Operational Policies (n 68), para 1.52.

96 Shanks (n 92) 428.

97 Symposium Panelists and Participants, 'Discussion of New Products and New Perspectives in Political Risk Insurance' in Theodore H Moran and Gerald T West (eds), *International Political Risk management: Looking to the Future* (The World Bank 2005) 198.

98 Charles Berry, 'The convergence of the terrorism insurance and politial risk insurance markets for emerging market risk: Why it is necessary and how it will come about' in Theodore H Moran, Gerald T West and Keith Martin (eds), *Political Risk Management: Needs of the Present, Challenges for the Future* (The World Bank 2008) 16.

99 Ibid 13.

100 Ibid 19–20.

101 For detailed argumentation, see ibid 18–28.

both markets has already begun.[102] Certain PRI providers started offering terrorism insurance as well.[103]

b) Risk of expropriation and other deprivations of investor's property rights

aa) Forms of investors' property rights deprivations

Forms of host country's deprivations of investor's property rights vary from indirect and direct expropriation to nationalisation and confiscation. These have considerably changed in nature since the 1970s when it was common for domestic governments to deprive foreign investors of their property rights without any compensation.[104] Nowadays, such outright seizures have become relatively rare, while more concealed forms have taken over in host countries' practices.[105]

Expropriation in general may be defined as a discriminatory act by the host government that is limiting or infringing ownership, control or rights to the investment either through a single action or through an accumulation of acts by the government.[106] In terms of expropriation as a political risk, it presupposes that a loss with respect to an investment occurs as a result of the aforementioned actions.[107] Most expropriations are made by

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102 Ibid 28ff.

103 See MIGA Operational Policies (n 68), para 1.49(a)(iii). On OPIC's incentives to offer terrorism coverage and its political violence coverage, see Edie Quintrell, 'Commentary' in Theodore H Moran, Gerald T West and Keith Martin (eds), *Political Risk Management: Needs of the Present, Challenges for the Future* (The World Bank 2008) 40–41.

104 Fabrizio Ferrari and Riccardo Rolfini, 'Investing in a Dangerous World: a New Political Risk Index' (2008) 6 SACE Group Working Paper, 7.

105 Comeaux and Kinsella (n 67) 10; August Reinisch, 'Expropriation' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook on International Investment Law* (OUP 2008), 408–409. Paulsson offered the basic conclusions emerging from the case law of the last decade. See Jan Paulsson, 'Indirect expropriation: is the right to regulate at risk?' (2006) 3(2) TDM 1, 6–11.

106 MIGA, *World Investment and Political Risk 2011* (n 57) 21. For definitions of expropriation in treaties, consult Ursula Kriebaum, 'Expropriation' in Marc Bungenberg and others (eds), *International Investment Law* (Nomos 2015) 966–970, paras 17–27.

107 Surya P Subedi, *International Investment Law: Reconciling Policy and Principle* (2nd edn, HArt Publishing 2012) 118.

means of administrative acts (eg resolutions or denial of authorisations), but they can also occur as a consequence of legislative measures (eg tax or labour regulations) and judicial decisions.[108]

In cases of direct or outright expropriation, the host government directly deprives an investor of its property through formal transfer of title or outright physical seizure.[109] In particular, tangible and/or intangible property is forcibly removed from investors by means of administrative or legal measures[110] which show the host government's open, deliberate and unequivocal intent to expropriate.[111] However, when assessing expropriation, the proclaimed intent to expropriate is a secondary element as the effect of the host state's conduct is crucial.[112]

Expropriation may also be undertaken by the host country by "only" interfering in the use of a property. In cases of such indirect expropriation, an investor keeps ownership rights de iure but de facto loses the possibility to effectively use the investment in a commercially meaningful way.[113] Possible scenarios include effective loss of management or control as well as a significant reduction of the value of an investment.[114] Indirect expropriation may come either as a de facto or a creeping expropriation. De facto expropriation results from an instantaneous taking.[115] Creeping expropriation, on the contrary, consists of a series of single acts and/or omissions, mostly imposing restrictions and controls, possibly non-expropriatory in their nature when considered individually, which all together gradually deprive investors of their fundamental rights in the investment

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108 UNCTAD, *Expropriation: UNCTAD Series on Issues in International Investment Agreements II* (United Nations 2012) 15.

109 Ferrari and Rolfini (n 104) 7.

110 Kriebaum (n 106) 970, para 29.

111 UNCTAD, *Expropriation* (n 108) 7.

112 W Michael Reisman and Robert D Sloane, 'Indirect Expropriation and its Valuation in the BIT Generation' (2004) Faculty Scholarship Series, Paper 1001, 121. For detailed elaborations on the dichotomy of the importance of government's intent and effect on investment and the so-called "sole effect doctrine", see Rudolf Dolzer, 'Indirect Expropriations: New Developments?' (2002–2003) 11 NYU Envtl L J 64, 79–93.

113 Kriebaum (n 106) 971, para 32; Comeaux and Kinsella (n 67) 8. See also eg ICSID, no ARB/05/8, *Parkerings-Campagniet AS vs Republic of Lithuania*, award of 11 September 2007, para 437; ICSID Additional Facility, no ARB(AF)/97/1, *Metalclad Corporation vs Mexico*, award of 30 August 2000, para 103.

114 UNCTAD, *Taking of Property: UNCTAD Series on Issues in International Investment Agreements* (United Nations 2010) 2.

115 Kriebaum (n 106) 974, para 45.

and destroy its value.[116] It mostly becomes clear that these single acts are part of a larger expropriatory taking only later in time.[117] Instantaneous de facto expropriation is, in comparison to the creeping one, far less difficult to determine due to a single expropriatory measure occurring in a single point in time.[118]

Still, states have sovereign rights to exercise their legislative powers and pass regulatory acts without financial consequences even if negative effects to foreign investments may thereby occur.[119] Nonetheless, the right to regulate is not unlimited.[120] It is widely acknowledged however, that although affecting foreign investments, these regulatory acts should not amount to expropriation. In case they do, they should not be non-compensable.[121] Such acts may also amount to indirect expropriation and require compensation even if undertaken for public purpose.[122] It proves hard to establish regulatory takings and differentiate between sovereign non-compensable regulatory prerogatives, the economic consequences of which investors have to bear on their own, and cases when such regulatory actions amount to expropriation and entitle investors to compensation.[123]

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116 See Comeaux and Kinsella (n 67) 8–9; Ferrari and Rolfini (n 104) 7; ICSID, no ARB96/1, *Compañía del Desarrollo de Santa Elena, S. A. vs The Republic of Costa Rica,* award of 17 February 2000, para 76; ICSID, no ARB/02/08, *Siemens A.G. vs Republic of Argentina,* award of 6 February 2007, para 263. For further information consult Kriebaum (n 106) 975–979, paras 50–69. See also Reinisch, 'Expropriation' (n 105) 431–432, contemplating the possibility of indirect expropriation occurring through state's omissions.

117 Reisman and Sloane (n 112) 124.

118 Kriebaum (n 106) 975, para 49.

119 Ibid 1000, para 149. See also ICSID, no ARB(AF)/99/1, *Marvin Roy Feldman Karpa v. United Mexican States*, award of 16 December 2002, para 103.

120 ICSID, no ARB/03/16, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary,* award of 2 October 2006, paras 423–424.

121 For further information, see UNCTAD, *Expropriation* (n 108) 80–86. Otherwise argued by Sornarajah (n 17) 388–389. Analyses on the approach of the ECHR to compensation for regulatory expropriation undertaken in Hélène Ruiz Fabri, 'The approach taken by the European Court of Human Rights to the assessment of compensation for "regulatory expropriations" of the property of foreign investors' (2002–2003) 11 NYU Envtl L J 148, 148–173.

122 ICSID, no ARB96/1, *Compañía del Desarrollo de Santa Elena, S. A. vs The Republic of Costa Rica,* award of 17 February 2000, paras 71 and 72. See Thomas W Wälde and Borzu Sabahi, 'Compensation, Damages, and Valuation' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook on International Investment Law* (OUP 2008) 1080.

123 Kriebaum (n 106) 1000, para 151. See also UNCTAD, *Expropriation* (n 108) 12; Reinisch, 'Expropriation' (n 105) 432–438.

Investors try to protect themselves from regulatory changes by entering into agreements with host countries which include stabilisation clauses promising them to not experience consequences of regulatory changes.[124]

Moving on, opposing opinions are available when it comes to an investment which is only in part affected by an expropriatory measure.[125] Whether a partial intervention into investor's property rights qualifies as expropriation depends on whether the property right which was affected can be considered an investment on its own or only constitutes a part of an overall business which is to be considered an investment.[126] Partial expropriation should be approved in the former case.[127]

With respect to further measures depriving investors of their property rights, nationalisation is to be addressed. It refers to a broader and more general taking of private property in host state's territory or overtaking of foreign investments in an entire industry or one of its sectors by the host country for the purpose of social or economic reform, intending to achieve State control of the economy.[128] As transfer of ownership is one of the main features of nationalisation, it differs from expropriation by intensity rather than by legal nature.[129]

Confiscation is the host country's deprivation of property without compensation, undertaken as a measure of punishment to the owner.[130] It also includes transfer of ownership. The punishment comes as a sanction for criminal activity, political activity, etc.

Notwithstanding the above, expropriatory deprivations of investors' property rights are not entirely forbidden. International legal theory and practice recognise the sovereign right of a country to expropriate investors' property in its territory under certain conditions.[131] If made for public purpose, in public interest or for public benefit (depending on various ap-

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124 Frederick E Jenney, 'A sword in a stone: Problems (and a few proposed solutions) regarding political risk insurance coverage of regulatory takings' in Theodore Moran, Gerald West and Keith Martin (eds), *International Political Risk Management: Needs of the Present, Challenges for the Future* (The World Bank 2008) 178.

125 For further information, see Kriebaum (n 106) 1010–1013, paras 187–199.

126 UNCTAD, *Expropriation* (n 108) 23.

127 See Kriebaum (n 106) 995, para 124.

128 See UNCTAD, *Expropriation* (n 108) 5.

129 Predrag Cvetković, *Međunarodnopravna zaštita stranih investicija od nekomercijanih rizika*, Doktorska disertacija, 2004, 51.

130 Comeaux and Kinsella (n 67) 7.

131 ICSID, no ARB/02/01, *LG&E Energy Corp, LG&E Capital Corp, and LG&E International, Inc vs Argentine Republic,* decision on liability 3 October 2006,

proaches), if made without discrimination, in accordance with due process of law and against payment of compensation, expropriation is considered to be legal, ie lawful.[132] To the contrary, unlawful expropriation is carried out without meeting one of the aforementioned criteria.[133] The reasoning behind this differentiation is that legal and illegal actions and their consequences have to be distinguished.[134] Furthermore, different legal bases cause the duty to indemnify: unjust enrichment of the host state in case of lawful expropriation and a combination of a punitive and a compensatory measure in case of unlawful expropriation.[135] Against this background, lawful expropriation entitles to compensation whereas unlawful expropriation calls for restitutio in integrum.[136] However, as restitution in kind is

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para 186; ICSID, no ARB/08/1, *Marion Unglaube vs Republic of Costarica*, award of 16 May 2012, para 205; Kriebaum (n 106) 962, para 2.

132 For further information, see Kriebaum (n 106) 1017, para 216. For further information, see ibid 1017–1029, paras 216–257; August Reinisch, 'Legality of Expropriations' in August Reinisch (ed), *Standards of Investment Protection* (OUP 2008) 171–199; UNCTAD, *Expropriation* (n 108) 27–52; ICSID, no ARB/03/16, *ADC Affiliate Limited and ADC & ADMC Management Limited vs Republic of Hungary*, award of 2 October 2006, paras 434–440.

133 Subedi (n 107) 118. Some consider non-payment of compensation for expropriation as a criterion of another quality which does not ipso facto render an expropriation unlawful. See Sergey Ripinsky and Kevin Williams, *Damages in International Investment Law* (British Institute of International and Comparative Law 2008) 67; Irmgard Marboe, 'Valuation in Cases of Expropriation' in Marc Bungenberg and others (eds), *International Investment Law* (Nomos 2015) 1061, para 10. For more detailed elaboration, see Irmgard Marboe, *Calculation of compensation and damages in international investment law* (OUP 2009) 52–62, paras 3.32 – 3.56.

134 Irmgard Marboe, 'Compensation and Damages in International Law: The limits of "Fair Market Value"' (2006) 7 JWIT 723, 726. Supported also by Ripinsky and Williams (n 133) 65.

135 Zouhair Kronfol, *Protection of Foreign Investment: A Study in International Law* (AW Sijthoff 1972) 95–96.

136 See Subedi (n 107) 118; Reinisch, 'Legality of Expropriations' (n 132) 200–203. The foundations of this principle were laid down in PCIJ, PCIJ Series A, no 17, *Case Concerning the Factory at Chorzów (Claim for Indemnitiy) (Merits)*, 13 September 1928, 47. See Wälde and Sabahi (n 122) 1056–1062. For detailed analyses of compensation for lawful and unlawful expropriation, consult Ripinsky and Williams (n 133) 71–88; Marboe, 'Valuation in Cases of Expropriation' (n 133) 1060–1072, paras 8–41; Marboe, *Calculation of compensation and damages* (n 133) 76, para 3.99 ff; Marboe, 'Compensation and Damages in International Law' (n 134) 733, 743–751. Contested by Audley Sheppard, 'The Distinction between Lawful and Unlawful Expropriation' (2008) 2(1–2) WAMR 137,157.

rarely feasible in practice and usually ends up in its monetary equivalent, great similarity appears in the legal effects of lawful and unlawful expropriations.[137] Still, in financial terms, unlawful expropriation is argued to result in higher or equal, but never lower, monetary compensation than lawful expropriation.[138] Nonetheless, fair market value of an investment is typically awarded in practice in both cases.[139] Thus, the legal effects of lawful and unlawful expropriation are highly similar in type as well as in actual financial means awarded to eliminate their consequences.[140] Hence, the differentiation between consequences of a legal and illegal behaviour has good theoretical and moral background but seems to have reduced practical value.[141]

bb) Establishing the occurrence of expropriation

When determining whether expropriation occurred, firstly it has to be identified whether the right which was allegedly expropriated has been previously protected.[142] Thereafter, host country's actions and their intensity are examined. In particular, an expropriatory measure has to be attributable to the host country and undertaken in its sovereign capacity.[143] Furthermore, the interference with property rights has to be substantial.[144]

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137 See Kronfol (n 135) 98–100. The only case where restitution in integrum was actually awarded is the *Topco / Calasiatic vs The Government of the Libyan Arab Republic*¸ award of 19 January 1977.

138 See UNCTAD, *Expropriation* (n 108) 114; Subedi (n 107) 124–125. See also Marboe, 'Compensation and Damages in International Law' (n 134) 728; Reisman and Sloane (n 112) 136.

139 UNCTAD, *Expropriation* (n 108) 116.

140 Ripinsky and Williams (n 133) 88. Confirmed in ICSID, no ARB/08/1, *Marion Unglaube vs Republic of Costa Rica*, award of 16 May 2012, para 307.

141 See Cvetković, *Međunarodnopravna zaštita stranih investicija od nekomercijanih rizika* (n 129) 71. Marboe, 'Compensation and Damages in International Law' (n 134) 726.

142 Kriebaum (n 106) 963, para 7.

143 UNCTAD, *Expropriation* (n 108) 104.

144 See Kriebaum (n 106) 982, para 80; ICSID, no ARB/02/01, *LG&E Energy Corp, LG&E Capital Corp, and LG&E International, Inc vs Argentine Republic*, decision on liability 3 October 2006, para 191; ICSID, no Arb/07/22, *AES Summit Generation Limited and AES-Tisza Erömü Kft vs The Republic of Hungary*, award 23 September 2010, para 14.3.1. For further information, see UNCTAD, *Expropriation* (n 108) 63–78.

A causal link between the state measure and the deprivation must exist.[145] However, the relevance of expropriatory intents is disputed.[146] In any case, the host state does not need to benefit from the deprivation of property for expropriation to occur.[147] Moreover, the effects the measure has on investor's reasonable and investment-backed expectations are to be taken into account as well.[148]

Establishing the occurrence of expropriation is particularly difficult in cases of regulatory takings due to challenges in delimitating between legitimate state regulation and regulatory expropriation. Indicators for the expropriatory nature of a regulatory measure include lack of public purpose, due process, proportionality and fair and equitable treatment, as well as discrimination and benefit to the host country.[149] As these are only indicators, each assessment should be made on a case-by-case basis, bearing the elaborations of the previous paragraph in mind.[150]

cc) Valuation of compensation

(a) Valuation methods

Three broad categories of valuation methods are used to determine the value of an investment: cost-based or asset-based methods, market-based or transaction-based methods and income-based methods.[151] In addition, ref-

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145 UNCITRAL case, *Link-Trading Joint Stock Company vs Department for Customs Control of the Republic of Moldova*, final award 18 April 2002, para 91.

146 For further information, see Reinisch, 'Expropriation' (n 105) 444–447; Kriebaum (n 106) 995–999, paras 126–148; UNCTAD, *Expropriation* (n 108) 70–73.

147 For further information, see Reinisch, 'Expropriation' (n 105) 442–444.

148 See OECD, '"Indirect Expropriation" and the "Right to Regulate" in International Investment Law' OECD Working Papers on International Investment 2004/04, 19–20.

149 See UNCTAD, *Expropriation* (n 108) 94–104; Reinisch, 'Expropriation' (n 105) 434–438.

150 For further information on determination of indirect expropriation in the context of regulatory measures, consult OECD (n 148). For information on the practice of the arbitral tribunals, see Kriebaum (n 106) 1005–1006, paras 170–173; Michael Parisi, 'Moving toward transparency? An examination of regulatory takings in international law' (2005) 19 Emory Intl L Rev 383, 401–411.

151 Richard Walck, 'Methods of Valuing Losses' in Marc Bungenberg and others (eds), *International Investment Law* (Nomos 2015) 1046–1056, paras 5–40; International Valuation Standards Committee, International Valuation Guidance

erence has been made to actual investment value and hybrid methods.[152] Furthermore, valuation methods are also grouped into backward-looking methods, based on the historic cost of investments, and forward-looking methods, focusing on investment's ability to generate profits.[153]

Cost-based or asset-based methods sum up the values of individual assets of a business to arrive at its end value.[154] They are appropriate for generic, easily replaceable assets, the costs of which may be easily determined.[155] With respect to investments, these methods neglect to account for the value of an investment which exceeds the value of its individual assets – which is in certain cases the core value of a business.[156] The asset-based methods include the book value, the replacement value and the liquidation value. The book value represents the difference between the enterprise's assets and liabilities as recorded in its financial statements.[157] Some refer to it only as an accounting term and deprive it of any significance as a valuation method.[158] Since the book value reflects the market value of an asset at the moment of its purchase[159] and it may change with time, the connection between the book value and the actual market value of an asset may be weakened.[160] This discrepancy may be remedied by adjusting

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Note No 6 on Business Valuation, 8th ed 2007, § 5.14. For detailed elaborations, see Ripinsky and Williams (n 133) 192–226; Marboe, *Calculation of compensation and damages* (n 133) 188–293, paras 5.08 – 5.359.

152 Petar Đundić, 'Metodi izračunavanja naknade za izvršenu eksproprijaciju' (2015) 49(4) Zbornik radova Pravnog fakulteta, Novi Sad 1845, 1856; Manuel A Abdala and Pablo B Spiller, 'Damage Valuation of Indirect Expropriation in International Arbitration Cases' (2003) 14 Am Rev Intl Arb 447, 455–456; Ripinsky and Williams (n 133) 231–234.

153 See UNCTAD, *Expropriation* (n 108) 117.

154 Ripinsky and Williams (n 133) 218.

155 Walck (n 151) 1048, para 11.

156 For further information, see Ripinsky and Williams (n 133) 218–219.

157 See Legal Framework for the Treatment of Foreign Investment, Volume II, Guidelines on the Treatment of Foreign Direct Investment (The World Bank 1992) Chapter 4, para 6.

158 See Marboe, 'Valuation in Cases of Expropriation' (n 133) 1076, para 51; Comeaux and Kinsella (n 67) 89; Sornarajah (n 17) 450–451.

159 However, Marboe, *Calculation of compensation and damages* (n 133) 269, para 5.282 argues that the book value, being a result of an enterprenerial decision, usually understates the actual value of an asset.

160 See Mark Kantor, *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* (Kluwer Law International 2008) 238; Ripinsky and Williams (n 133) 221–222; Abdala and Spiller (n 152) 456; William Lieblich, 'Determining the Economic Value of Expropriated Income-Producing Property in International Arbitrations' (1991) 8 J Int Arb 59, 64–69.

the book value to the market value and applying the so-called adjusted book value valuation method.[161] When it comes to liquidation value, it represents the value at which (individual or all) assets of an enterprise could be sold in case of liquidation to a willing buyer without any liabilities of the enterprise.[162] As for the replacement value, it represents the amount of money required to replace the individual assets of the enterprise in their actual state as of the date of taking.[163] Both methods presuppose the existence of a free market and have, though rarely, been employed in the arbitral practice.[164]

Moving on, the market-based method presupposes the existence of a developed market for an asset in question with several buyers and sellers and several similar or substitute goods as well as a continuous flow of transactions.[165] When it comes to companies, it analyses statistical figures of comparable companies by comparing metrics of guideline companies to different relevant financial parameters and using them to project a value for the company in question.[166] However, difficulties as to the determination and lack of comparability may arise.[167]

When it comes to income-based methods, frequently used in valuations of compensation are discounted cash flow (hereinafter: DCF), capitalised cash flow (hereinafter: CCF) and adjusted present value (hereinafter: APV) methods.[168] In order to determine compensation by means of the DCF method, the realistically expected profits of an investment in each future year of its economic life have to be estimated and reduced for each year's

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161 See Ripinsky and Williams (n 133) 222; Kantor, *Valuation for Arbitration* (n 160) 230–249; Thomas Stauffer, 'Valuation of assets in international takings' (1996) 17 Energy Law Journal, 459.

162 Guidelines on the Treatment of FDI (n 157) Chapter 4, para 6. For further information, see Kantor, *Valuation for Arbitration* (n 160) 250–252; Ripinsky and Williams (n 133) 224.

163 Guidelines on the Treatment of FDI (n 157) Chapter 4, para 6.

164 For further information, see Abdala and Spiller (n 152) 455; Đundić (n 152) 1854; Ripinsky and Williams (n 133) 219–220; Marboe, *Calculation of compensation and damages* (n 133) 284, 289–293, paras 5.328 ff and 5.346 – 5.359.

165 Abdala and Spiller (n 152) 454.

166 Walck (n 151) 1050, para 17. For information on how this method works, see Ripinsky and Williams (n 133) 213–216. On comparability and comparable companies, see also Kantor, *Valuation for Arbitration* (n 160) 119–130.

167 See Walck (n 151) 1050, para 18; Marboe, 'Valuation in Cases of Expropriation' (n 133) 1074, para 46; Ripinsky and Williams (n 133) 215.

168 For further information on the income based approach, see Marboe, *Calculation of compensation and damages* (n 133) 205–297, paras 5.68 – 5.273.

expected expenditures – the net cash flow.[169] Since money in the future values less than in the present, the net cash flow for each year has to be discounted by a factor reflecting the time value of money, expected inflation and the risk associated with such cash flow under realistic circumstances.[170] The result represents the amount of compensation for the expropriated investment.[171] The DCF method has been both praised[172] and criticised.[173] Although case law shows examples rejecting to employ it,[174] the arbitral practice has widely applied it in valuating compensation.[175] As for the CCF method, it identifies the company's historical income amount, multiplies it by the rate at which the income is expected to grow in the future and then divides it by the discount rate minus the future growth rate.[176] It is used to evaluate companies with relatively stable earnings

169 Abdala and Spiller (n 152) 458; Guidelines on the Treatment of FDI (n 157) Chapter 4, para 6. For a comprehensive analysis on the important components of the DCF valuations, consult Kantor, *Valuation for Arbitration* (n 160) 131–207. For elaborations on and comparison of lost profits in the DCF method and lucrum cessans, see Ripinsky and Williams (n 133) 294–299; Lieblich (n 160) 75–76.

170 Guidelines on the Treatment of FDI (n 157) Chapter 4, para 6. See also Lieblich (n 160) 73. For further information on discount rates in the DCF method, consult Kantor, *Valuation for Arbitration* (n 160) 140–173; Marboe, *Calculation of compensation and damages* (n 133) 244–258, paras 5.193 – 5.238.

171 For further information on the DCF method, its employment and relevant features, consult a concise elaboration of Marboe, 'Compensation and Damages in International Law' (n 134) 736–740.

172 Ripinsky and Williams (n 133) 200; Đundić (n 152) 1851–1852. See also Lieblich (n 160) 73–75, 78.

173 Ripinsky and Williams (n 133) 200–201; Wälde and Sabahi (n 122) 1074. See also Walck (n 151) 1052, para 27; Sornarajah (n 17) 451.

174 Eg ICSID, no ARB (AF)/00/2, *Técnicas Medioambientales Tecmed S.A. vs The United Mexica States*, award of 29 May 2003; ICSID, no ARB/97/3, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. vs Argentine Republic*, award of 20 August 2007. Analyses available in UNCTAD, *Expropriation* (n 108) 120–121. Structured analyses of the reasons for rejecting income approach in general are available in Marboe, *Calculation of compensation and damages* (n 133) 260–267, paras 5.246 – 5.273.

175 ICSID, no ARB/81/1, *AMCO Asia Corp and Others vs The Republic of Indonesia*, award of 20 November1984, para 271; ICISD, no ARB/01/16, *ADC Affiliate Ltd and ADC & ADMC Management Ltd vs The Republic of Hungary*, award of 27 September 2006, para 502. For further analyses, see Ripinsky and Williams (n 133) 202–205.

176 See Kantor, *Valuation for Arbitration* (n 160) 216.

and relatively consistent rate of growth.[177] Moving on to the adjusted present value (APV) method, it aims to separately asses the unleveraged company and the impacts of leverage, which is relevant in cases of capital structure of a company changing over the damages period.[178] It proves very complex, costly and time consuming.[179]

In addition to the elaborated methods, both in academia and in practice some further approaches have been mentioned.[180] Actual investment value represents the actual amount of capital which was invested into the expropriated investment until the moment of taking.[181] The reasoning behind it is that investors have the right to recover the invested capital, making a return equal to the former costs.[182] The advantages of this approach lie in the fact that the expenditures may be easily found and taken with greater certainty.[183] In addition, it allegedly balances between the investor-favoured and host-state-favoured approaches, leading to a compensation figure which is perceived as equitable.[184] Nonetheless, it may easily be disconnected from the market value.[185]

The various methods should not be viewed as alternative to one another.[186] Whenever possible, multiple methods should be used to best balance their strengths and avoid their weaknesses.[187] If various methods have been applied in valuations, the results should be compared and, if differing, reconciled by giving each of the methods certain significance based on

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177 Walck (n 151) 1051–1052, paras 22–24. For further information on the CCF method, consult Kantor, *Valuation for Arbitration* (n 160) 215–230.

178 Walck (n 151) 1051, paras 25–26.

179 For more detailed elaborations on the APV, see Kantor, *Valuation for Arbitration* (n 160) 209–214.

180 Abdala and Spiller (n 152) 455–456; ICSID Additional Facility, no ARB(AF)/97/1, *Metalclad Corporation vs The United Mexican States*, award of 30 August 2000; ICSID, no ARB/98/4, *Wena Hotels Limited vs Arab Republic of Egypt,* award of 08 December 2000; ICSID, no ARB/97/3, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. vs Argentine Republic,* award of 20 August 2007. For further information, consult Ripinsky and Williams (n 133) 226–231.

181 Đundić (n 152) 1856.

182 Abdala and Spiller (n 152) 456. See also Ripinsky and Williams (n 133) 226. For the comparison between actual investment value and book value, consult ibid 230.

183 Ripinsky and Williams (n 133) 229.

184 For further information, see ibid 231.

185 Ibid 229–230.

186 Kantor, *Valuation for Arbitration* (n 160) 27–30; Walck (n 151) 1048, para 10.

187 Walck (n 151) 1056, para 40.

the circumstances of each case and features of each of the valuation methods.[188] Thus, hybrid methods and approaches may appear as well.[189]

(b) Valuation date

Setting the valuation date plays a significant role in valuation of an investment for the purpose of determining compensation for its expropriation. In particular, an investment, the value of which fluctuates, is assessed at that moment, interest[190] is calculated as of that moment and the remaining lifetime of an investment is influenced by setting the valuation date.[191] In case of lawful expropriation, the date of valuation is the date of expropriation or the date when the information on the upcoming expropriation became public knowledge, if that happened earlier.[192] Value of the expropriated investment immediately before each of these moments should be taken into account in order to avoid diminishing its value and benefiting from it.[193]

In case of unlawful expropriation where the value of the expropriated investment decreased after the expropriation, the date of valuation should be the date of expropriation and topped by additional damages incurred until the date of the award.[194] It is however held that in cases of unlawful expropriations where the value of an investment increased after the expropriation, the date of valuation should be moved forward in time to the

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188 For further information, see Walck (n 151) 1053, paras 28–31. See also Ripinsky and Williams (n 133) 235.

189 Abdala and Spiller (n 152) 459; ICSID, no ARB(AF)/00/2, *Técnicas Medioambientales Tecmed, S.A. vs United Mexican State*, award of 29 May 2003; ICSID, no ARB/84/3, *Southern Pacific Properties (Middle East) Ltd. vs Arab Republic of Egypt*, award of 20 May 1992. For further information on see Marboe, *Calculation of compensation and damages* (n 133) 294–298, paras 5.360 – 5.375. Ripinsky and Williams (n 133) 231–234.

190 Further information on awarding interest in valuation of compensation available in Marboe, 'Compensation and Damages in International Law' (n 134) 751–755; Marboe, *Calculation of compensation and damages* (n 133) 317–392, paras 6.01 – 6.301; Wälde and Sabahi (n 122) 1106–1110.

191 For further information on the valuation date and related issues, see Ripinsky and Williams (n 133) 243–259; Wälde and Sabahi (n 122) 1081–1082.

192 Lieblich (n 160) 72.

193 Marboe, *Calculation of compensation and damages* (n 133) 127, para 3.255. For further information on valuation date in lawful expropriations, see ibid 128–131, paras 3.256 – 3.265.

194 Marboe, 'Valuation in Cases of Expropriation' (n 133) 1081, para 63.

date of the arbitral award in order to accommodate awarding an investor the amount that puts him in the same position in which he would have been had the expropriation not happened.[195]

In cases of creeping expropriation, it proves very challenging to determine the moment of expropriation, and thereby the date of valuation, since it is rarely identifiable.[196] Arbitral practice has often gone with the moment where deprivations of investors' rights have become irreversible.[197] Alternative approaches have been proposed as well.[198]

dd) PRI for expropriatory risks

PRI providers insure eligible investments against expropriatory risks conducted by and/or attributable to the sovereign acts of the host government for a contracted period of time. In particular, insurers as well as arbitral tribunals consider only sovereign acts of the host government to be under their coverages, thereby excluding acta iure gestionis.[199] Furthermore, some PRI schemes explicitly stipulate to cover only unlawful takings.[200] The reasoning behind it is that an insurer will be able to recover the paid claim only for wrongful acts since the host government may be held

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195 See ICSID, no ARB/03/16, *ADC Affiliate Limited and ADC & ADMC Management Limited vs Republic of Hungary*, award of 2 October 2006, para 497. For further information, see Ripinsky and Williams (n 133) 244–245; Marboe, *Calculation of compensation and damages* (n 133) 131–135, paras 3.266 – 3.277; Marboe, 'Compensation and Damages in International Law' (n 134) 751–753.

196 Reisman and Sloane (n 112) 133. For case law overview dealing with determination of the moment of expropriation, consult Shain Corey, 'But Is It Just? The Inability for Current Adjudicatory Standards to Provide "Just Compensation" for Creeping Expropriations' (2013) 81 Fordham L R 973, 999–1001.

197 See Marboe, *Calculation of compensation and damages* (n 133) 135, para 3.279.

198 Reisman and Sloane (n 112) 146–149. Supported by Corey (n 196) 1006, 1009.

199 See Mark Kantor, 'Are you in good hands with your insurance company? Regulatory expropriation and political risk insurance policies' in Theodore H Moran, Gerald T West and Keith Martin (eds), *Political Risk Management: Needs of the Present, Challenges for the Future* (The World Bank 2008) 152–159; MIGA Operational Policies (n 68), para 1.35.

200 See EGAP, General Insurance Conditions for Insurance of Investments in Foreign Countries against the Risk of Prevention of the Transfer of Returns on Investment, Expropriation and Politically Motivated Violent Damage in the version of 15 June 2016 (hereinafter: EGAP General Insurance Conditions I), Art 11(2)(b) <https://www.egap.cz/dokumenty//field/image/produkty/vpp-i-2016-en.pdf> accessed 28 June 2021; Zylberglait (n 94) 370.

liable only for acts that are illegal under local law or international legal standards.[201]

Risks covered by PRI include expropriation, confiscation, nationalisation and other measures in their effects equivalent to expropriation.[202] These equivalent measures are in some schemes mentioned to include inter alia sequestration, seizure, attachment and freezing of assets as well as creeping expropriation.[203] When it comes to regulatory takings, some insurers cover them explicitly while underlining that they exclude from their coverages non-discriminatory, bona fide regulatory measures of general application pursuing various public purposes.[204] As for partial expropriation, some insurers offer coverage of both total and partial expropriation.[205]

In order to trigger the coverage against expropriatory risk, it has to be established that expropriation of any type has occurred in the first place. This can be very difficult for the PRI providers in the same way as for arbitral tribunals, especially in cases of regulatory expropriations or creeping expropriations, for example.[206] PRI policies may prescribe that host government actions have to last for a certain waiting period in order to determine whether they amount to expropriation and to avoid claims on the smallest interventions.[207]

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201 Jenney, 'A sword in a stone' (n 124) 171.

202 See CESCE, Foreign Investment Insurance Policy, General Conditions for Investors of 12 January 2006 (Póliza de Seguro de Inversiones en el Exterior, Condiciones Generales para Inversores – hereinafter: CESCE General Conditions for Investors) Art 2.1 (in Spanish) at <http://www.cesce.es/sites/all/themes/cesce/Docs/CG_inversiones_exterior_Inversores.pdf> accessed 28 June 2021; General Terms and Conditions of the German PRI (n 69), § 4(1)(a).

203 MIGA Operational Policies (n 68), paras 1.31, 1.38.

204 MIGA Convention (n 69), Art 11(a)(ii); MIGA Operational Policies (n 68), para 1.37; CESCE General Conditions for Investors (n 202) Art 2.1.1. For further information on regulatory expropriation, consult Kantor, 'Are you in good hands with your insurance company?' (n 199) 137–170; Jenney, 'A sword in a stone' (n 124) 171–187.

205 Eg CESCE General Conditions for Investors (n 202), Art 2.1.1. (A).

206 Jenney, 'A sword in a stone' (n 124) 173.

207 See MIGA Operational Policies (n 68), para 1.41 – 1.42.

c) Risks connected to currency conversion and transfer

The ability to convert currencies and to repatriate profits and capital is crucial for foreign investors.[208] Currency convertibility is essential also for the repayment of foreign-denominated loans as well as for the fulfilment of further hard currency obligations.[209] Therefore, the risks of restriction or control of the conversion of local currency into foreign (stable and hard) currency and the transfer of the (exchanged) currency out of the host country are commonly insured against by the public PRI providers as well as guaranteed against by international law.

Speaking of international law, although states have the freedom to lead their monetary policies and take measures to achieve their goals, customary international law developed certain limitations for the sake of protection of the property of foreign nationals.[210] Moreover, international treaty law – for example, IMF Agreement – offers the terms of admissibility of transfer restrictions.[211] In addition, bilateral investment treaties (hereinafter: BITs) include provisions on convertibility and transfer of funds related to foreign investments.[212]

Host countries have a great deal of control over the risks connected to currency conversion and transfer. Active currency inconvertibility manifests itself when host countries take active steps which prevent investors from converting their funds, mostly by adopting restrictive regulations.[213] Various reasons may motivate host countries to do so: problems with managing a balance of payments or crises being the most common. In

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208 Jeswald Salacuse and Nicholas Sullivan, 'Do BITs really work?: An Evolution of Bilateral Investment Treaties and Their Grand Bargain' (2005) 46 Harv Intl L J 67, 85. See Daniel W Riordan and Edward A Coppola, 'Currency Transfer and Convertibility Coverage: An Old Reliable Product or Just an Old Product?' in Theodore H Moran and Gerald T West (eds), *International Political Risk management: Looking to the Future* (The World Bank 2005) 184–185, explaining why banks and corporate bond issuers consider them essential and buy insurance from currency inconvertibility.

209 Shanks (n 92) 426.

210 See Rindler, *Der Schutz von Auslandsinvestitionen durch die MIGA* (n 56) 178.

211 For further information, see ibid 178–179.

212 For further information on BIT guarantees against currency inconvertibility and restriction of transfer of exchanged currency, see infra under B.IV.1.b) at 81-82.

213 Jennifer DeLeonardo, 'Are Public and Private Political Risk insurance Two of a Kind?: Suggestions for a New Direction for Government Coverage' (2005) 45 Va J Intl L 737, 747; Comeaux and Kinsella (n 67) 15.