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# The Rise of the Nonstate Actor: The New Face of the Bilateral Investment Treaty in the Middle East

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*This Essay will argue that the bilateral investment treaty, as the primary tool within international investment law for protecting the rights of foreign investors against sovereign states, are outdated and fail to account for the role of violent nonstate actors in modern Middle East geopolitics. In its current state, the bilateral investment treaty unfairly and unjustly holds host states accountable for the actions of nonstate actors. This Essay seeks to mitigate the failures of the state-centric model by proposing that bilateral investment treaties be amended to reflect the political realities of the Middle East. This Essay advances the proposition that foreign investors be required to purchase political risk insurance as a condition of investment in the Middle East and reliance upon protections of the bilateral investment treaty. Under this model, the bilateral investment treaty may only be relied on in situations where the state actor is either solely liable or found to be unreasonably entangled with the responsible nonstate actor.*

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## I. INTRODUCTION

### *A. Background*

In the 1990s, the bilateral investment treaty (BIT) became the primary tool, within international investment law, for protecting the rights of foreign investors against sovereign states.[1] International investment law now finds itself in a state of transition as the role and identity of the nation state enter unchartered territory. Before addressing the evolution of international investment law, this Essay will provide historical context on the emergence of the BIT, its functions, and its purported objectives.

The BIT is a treaty between two sovereigns, and was designed to "attract foreign investment by providing security to foreign investors."[2] This promise was particularly meaningful for developing countries, where there was a high risk of expropriation and a lack of institutional security.[3] In modern times, obligations under the BIT framework continue to be negotiated primarily between developed and developing countries.[4] BITs became especially popular due to the failings and inconsistencies of customary international law.[5] More specifically, the customary principles of international law offered no effective enforcement mechanism against host countries that reneged on their contractual obligations or interfered with a foreign investment.[6] The BIT provided clarity on the role of domestic law, what constituted an investment, who qualified as an investor, and solidified the host "country's agreement regarding its obligations if a dispute arises in the future."[7] By consenting to arbitral proceedings as the primary mechanism of dispute resolution, developing host countries essentially contracted away their sovereign rights to suit. The emergence of this system was seen by many as a "revolutionary transformation in international adjudication."[8] At their core, BITs introduced a profound risk mitigation

1. Pieter Bekker & Akiko Ogawa, *The Impact of Bilateral Investment Treaty (BIT) Proliferation on Demand for Investment Insurance: Reassessing Political Risk Insurance After the 'BIT Bang,'* 28 ICSID REV. 314, 315-16 (2013); Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 70 (2005).

2. Tom Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance*, 25 INT'L REV. L. & ECON. 107, 108 (2005).

3. *Id.*

4. *Id.* at 108-09.

5. Salacuse & Sullivan, *supra* note 1, at 68.

6. *Id.* at 69.

7. Deborah L. Swenson, *Why Do Developing Countries Sign BITs?*, 12 U.C. DAVIS J. INT'L L. & POL'Y 131, 133 (2005).

8. GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 95 (2007).

tool, whereby foreign investors were granted the legal authority to bring a direct claim against a sovereign before an arbitral tribunal.[9]

The question remains, why would states agree to such a treaty and willingly constrain their sovereignty? Ultimately, liability was seen as a necessary tradeoff for the projected influx of wealth and resources, often in the form of foreign direct investment (FDI). This global influx of capital dramatically changed the face of international investment law.[10] The BIT served as an effective tool to attract FDI, thereby advancing the economy of the host states. However, what many states failed to comprehend was the breadth of liabilities associated with this new system. The hopes of competing for FDI and accumulating economic benefits gave birth to unforeseen investment protections and the imposition of extensive state liabilities.

### B. *The Complication of Nonstate Actors*

The protections and liabilities afforded to the investor by the BIT are the result of a reciprocal promise between two sovereign entities.[11] The basic tenet being that only the nation state itself can agree to constrain its sovereignty. While such a requirement is pivotal to the functioning of the International Investment Agreement (the IIA Regime), the prevalence and rising significance of nonstate actors challenge the continuance of traditional investor-state dispute settlements. Globally, nation states are increasingly outsourcing official obligations to nonstate entities, and consequently diluting their official powers.[12] The reliance on nonstate entities to fulfill state obligations is not novel, but in the context of the Middle East, this reliance is beginning to unravel the very foundation of BITs and the IIA Regime. The increase in armed conflict and demise of governmental entities in the Middle East have led to the diffusion of state power and the empowerment of violent nonstate actors.[13] As the identity of the nation state becomes increasingly difficult to distinguish from that of the nonstate actor, the question arises, to whom are the BIT obligations imputed? In other words, where does the sovereign end and the nonstate actor begin? The future of the IIA Regime is contingent upon recognition of the delicate line separating nonstate actors from state actors.

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9. Bekker & Ogawa, *supra* note 1, at 315.

10. KARL P. SAUVANT, E15 TASK FORCE ON INV. POL'Y, THE EVOLVING INTERNATIONAL INVESTMENT LAW AND POLICY REGIME: WAYS FORWARD 11 (2016) ("[T]he investment regime consists in the main of over 3,000 international investment agreements (IIAs). The great majority of these agreements are bilateral investment treaties (BITs) . . . .").

11. Ginsburg, *supra* note 2, at 108.

12. Trevin Stratton, *Power Failure: The Diffusion of State Power in International Relations*, 1 INFINITY J. 2, 2 (2008).

13. *Id.* at 5-6.

In this Essay, I will first present the tenets of the traditional statist approach to international law, highlighting the failures of this approach in the face of nonstate actors in the Middle East. By explaining the diffusion of power in that region, I will argue that the IIA Regime must recognize the true intent of the BIT and the nuanced distinctions between nonstate and state actors when making classification decisions. States are increasingly held accountable for the actions of nonstate actors under security and expropriation clauses of their respective BITs. As it becomes more difficult to discern the nonstate from the state actor, the ability to make this distinction becomes more crucial to the legitimacy and survival of the investor-state dispute settlement system. Additionally, this Essay will explore the role of political risk insurance as an alternative means of protecting FDI. In doing so, this Essay will describe a possible framework for resolving the liability gap when investment treaty obligations are triggered by the actions of nonstate actors.

This framework will explore the degree to which BITs should transform into insurance policies against terrorism. In certain instances, police power protections traditionally provided for under these investment treaties have effectively imposed strict liability on host states. In my proposal, I seek to account for the failures of the state-centric model by suggesting that BITs be amended to reflect the political realities of the Middle East. I propose that, as a condition of investment in the region and reliance upon the protections of the BIT, foreign investors should be required to purchase political risk insurance. BITs should therefore only be relied on in situations where the state actor is either solely liable or found to be unreasonably entangled with the responsible nonstate actor. In situations where the harm to investment resulted from the violent actions of nonstate actors, and not the state, investors will rely on their political risk insurance policies. This proposal will support the survival of BITs and serve as a model for future investments in the Middle East by protecting both investors and host states suffering from the rise of violent nonstate actors.

## II. THE FALL OF STATISM IN THE MIDDLE EAST

### *A. The Statist Approach*

Historically, international law was limited to the regulation of inter-state affairs, specifically, inter-state armed conflicts.[14] It was not until the 1990s that a surge of treaties dealing with inter-state non-armed conflicts were

14. Anthea Roberts & Sandesh Sivakumaran, *Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, 37 YALE J. INT'L L. 107, 108 (2012).

created.[15] The three sources of international law—treaties, customs, and general principles—recognized nation states as the exclusive source of legitimate lawmaking.[16] As a result, only nation states could enter into treaties and recognize customary legal principles.[17] This statist approach limited the subject of international law to sovereign entities for two reasons:

> First, only states are subjects of international law—meaning that states are the sole entities that enjoy rights and obligations under international law, as well as the capacity to enforce international law . . . . Second, classical positivist justifications based on "voluntarism" require international law to be derived from the consent of those it governs.[18]

Although statism recognizes the influence of international organizations in lawmaking, it limits the creation of laws and treaties to state actors.[19] As a result, the BIT is drafted by the states, for the states, and is imbued within the classical theories of statism. In order to acquire statehood under the Montevideo Convention of 1933, the state, as a person of international law, must "possess . . . (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states."[20] The exclusive powers of statehood and stringent requirements of recognition are, however, extremely problematic when applied to modern political realities. Under the definition set forth by the Montevideo Convention, recent nonstate actors, including insurgent groups such as the Islamic State in Syria and Iraq, Hezbollah in Lebanon, Hamas in Palestine, and the Taliban in Afghanistan, could acquire statehood status.[21] The proliferation of nonstate actors following the 2011 Arab Spring Revolution in the Middle East serves as evidence of their expanding role in the performance of traditional state functions.[22] With the nonstate actor engaging in "transnational relations – linking political systems, economies, and societies," statism is premised on a reality that has ceased to exist in the region.[23] Assuming a significant role in political life in the Middle East, modern nonstate actors engage in trade, possess land, and operate militia groups mirroring those of host states. Nonstate actors have effectively taken

15. *Id.*
16. *Id.* at 109.
17. *Id.*
18. *Id.* at 111-12.
19. *Id.* at 112.
20. *Id.* at 111.
21. *See generally* Vincent Durac, *Crisis and New Agenda of the Arab States: The Role of Non-State Actors in Arab Countries After the Arab Uprisings*, 2015 IEMED MEDITERRANEAN Y.B. 37, 37 (discussing the increasing significance of nonstate actors in the Middle East).
22. *Id.*
23. *Id.*

on or shared the role of traditional state entities. The concept of statehood has been diluted as violent nonstate actors increasingly exhibit the very indicia that grant states exclusive lawmaking power under the Montevideo Convention.

### B. *The Rise of Nonstate Actors*

The involvement of nonstate actors in international disputes is not a new phenomenon, however, as globalization and modern developments have permitted these organizations to entrench themselves in roles and territories formerly reserved for sovereign entities.[24] The "permeability of borders, global trade in arms, resources, and chemicals," along with "[n]ew forms of media and communication," has empowered and emboldened nonstate entities.[25]

The diverse array of nonstate actors across the Middle East exemplifies the antiquated nature of statism and its inability to reconcile the requirements of a world dominated "not by one or two or even several states but rather by dozens of actors possessing and exercising various *kinds* of power."[26] As previously stated, the Arab Spring Revolution is a prime example of the transformation of state-centric models. Islamist actors of varying sizes and ideologies emerged across the region, taking on governing roles without traditional state branding.[27] With the rise of the Muslim Brotherhood following the demise of Hosni Mubarak in Egypt; the rise of militia groups in Libya following the fall of Muammar Gaddafi; the creation of the Islamic State (ISIS) in Syria and Iraq; the Houthi movement's seizure of the Yemeni capital; and the looming threat and territorial expansion of the Taliban in the Middle East, powerful and concrete nonstate actors have proliferated.[28] The dramatic territorial expansion of violent nonstate actors in the Middle East has been accompanied by levels of legitimacy that transcend even the states themselves.[29] It is often the case that nonstate actors fill a vacuum of power; specifically, "[w]here the state fails to provide security or other basic services, violent nonstate actors can move in to provide alternative governance, services, and collective goods thus increasing their own legitimacy in the process."[30]

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24. Stratton, *supra* note 12, at 2-3.
25. *Id.* at 4.
26. *Id.* at 5 (quoting Richard N. Haass, *The Age of Nonpolarity: What Will Follow U.S. Dominance?*, 87 FOREIGN AFFS. 44, 44 (2008)).
27. Durac, *supra* note 21.
28. *Id.* at 38-39.
29. *Id.* at 41.
30. *Id.*

Unlike the qualifications provided by the Montevideo Convention, the identity of the nonstate actor is expansive, complex, and often intertwined with the powers of the central government. In the Middle East, nonstate actors may include tribal or ethnic groups, war lords, terrorists, militias, insurgents and transnational terrorist organizations.[31] Their objectives need not necessarily be political or ideologically driven. The line distinguishing nonstate actors from the state is further muddled when these groups are supported by the local citizenry, and more shockingly, recognized by governmental entities within their respective territories. For example, at the end of 2016, the Lebanese parliament swore in a new cabinet dominated by the Shi'a militia group, Hezbollah.[32] Despite global condemnation of Hezbollah as a dangerous militant organization, it gained legitimacy in 2008 and remains enduringly popular with Lebanon's Shi'a population.[33] Hezbollah is an integral member of the Lebanese government and wields considerable political influence in the state.[34] The question then becomes, at what point does state sponsorship grant the nonstate entity the imprimatur of state action? In the context of investor-state dispute settlement, a model built on statism is fundamentally flawed given the nuanced political structures of the contemporary Middle East.

### C. *Nonstate Actors Today: Making and Shaping International Law*

More recently, starting in 2019, the Taliban,[35] a terrorist group considered a violent nonstate actor by most accounts, began to engage in peace negotiations with the United States.[36] Further blurring the line between state and nonstate actors, these negotiations centered around the withdrawal of the United States from Afghanistan and ensuring peace in

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31. *Id.* at 38.

32. David Daoud, *Hezbollah's Latest Conquest: Lebanon's Cabinet*, NEWSWEEK (Jan. 12, 2017, 6:26 AM), http://www.newsweek.com/hezbollahs-latest-conquest-lebanons-cabinet-541487.

33. *Profile: Lebanon's Hezbollah Movement*, BBC NEWS (Mar. 15, 2016), http://www.bbc.com/news/world-middle-east-10814698.

34. *Id.*

35. *See Who Are the Taliban?*, BBC NEWS (Feb. 27, 2020), https://tinyurl.com/y4xgmjxk (describing the history of the Taliban, who emerged "in the early 1990s in northern Pakistan following the withdrawal of Soviet troops from Afghanistan" and held power in Afghanistan from the mid-1990s until 2001).

36. *See, e.g.*, Mujib Mashal, *What Do the Taliban Want in Afghanistan? A Lost Constitution Offers Clues*, N.Y. TIMES (June 28, 2019), https://tinyurl.com/y3lzbq37 ("There was an air of expectation on both sides as the Taliban and American diplomats gathered to meet for the latest round of peace talks on Saturday. Afghan and Western officials say that if the Taliban express willingness to finally go to the negotiating table with the Afghan government, American diplomats might be willing to play their main negotiating card: offering some sort of provisional schedule for the withdrawal of United States troops from Afghanistan.").

Afghanistan.[37] The objective of these negotiations was to broker a peace framework, which would include a withdrawal timeline of U.S. troops and a guarantee that Afghan territory would no longer be used by terrorists.[38] In seeking to define the term terrorism, the Taliban have stated that "there [is] no universal definition."[39] The Taliban's efforts are significant as this is an example of a violent nonstate actor wielding the power to define themselves as something other than a terrorist organization—a power traditionally reserved to sovereign states. This negotiation serves as a modern example of the fall of statism and exemplifies the quasi-governmental role that violent nonstate actors have appropriated in the region. With the Taliban refusing to include the Afghan government in these negotiations,[40] discussions about the country's fate are proceeding without the involvement of the state.[41]

Under the framework of international law, the power to enter into a treaty, as a binding international agreement among sovereign states, is one traditionally reserved exclusively for governmental entities.[42] Under the traditional state-centered perspective, it is the role of the state to engage in diplomatic relations and to exercise its treaty-making power.[43] The negotiations with the Taliban indicate the failure of such traditional models in the Middle East. Throughout these negotiations, the United States' inclusion of the Taliban implicitly recognizes its authority and suggests its potential ability to bind Afghanistan and speak on behalf of the state, even without the government's active participation.

As of 2020, Afghanistan is party to BITs with Germany, the Islamic Republic of Iran, and Turkey, as well as a multitude of investment-related

37. *See* Alexander Bolton, *Taliban Pushing to 'Rewrite' Draft Agreement for US Withdrawal from Afghanistan: Report*, HILL (June 30, 2019), https://tinyurl.com/yygu8lqj ("The Taliban is pushing to 'rewrite' a draft agreement under which the U.S. would withdraw from Afghanistan in exchange for pledges that Taliban leaders would help to combat terrorism . . . .").

38. Tara Copp, *Plan for a US Withdrawal from Afghanistan Takes Shape – But Will It Stick?*, MILITARYTIMES (Feb. 8, 2019), https://tinyurl.com/y3q4js4s ("[O]ngoing discussions with the Taliban have so far focused on the top two priorities of both parties, and have led to an agreement 'in principle' on those issues.").

39. Mujib Mashal, *U.S. Peace Talks With Taliban Trip Over a Big Question: What Is Terrorism?*, N.Y. TIMES (Mar. 7, 2019), https://tinyurl.com/yyjlv7q8.

40. *See* Johnny Walsh, *The State of Play in U.S.-Taliban Talks and the Afghan Peace Process*, U.S. INST. PEACE (Apr. 11, 2019), https://tinyurl.com/y5jend6x ("Washington's primary objective in essentially every Afghan peace initiative this decade has nonetheless been for the Taliban to agree to meet with the Afghan government. After years of Taliban refusal to budge on this point, Washington determined that the choice was between an imperfect peace process that starts with U.S-Taliban talks or no peace process at all.").

41. *See id.*

42. *See* Christoph Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm for International Law?*, 4 EUR. J. INT'L L. 447, 448 (1993).

43. *See id.* at 456.

instruments and treaties with investment provisions.[44] The implications of the Taliban's involvement in governmental and state affairs demonstrates the difficulty of discerning state action from that of nonstate actors. In the context of BITs and foreign investment, this may have grave ramifications for both the state and its foreign investors. The Taliban's resistance to defining terrorism is symbolic of the issues underlying the statist model. Sovereign states in the region, such as Afghanistan, Syria, Lebanon, and Iraq, may govern independently, alongside, or at a crossroads with these emergent non-governmental systems. As nonstate actors begin to mirror the nation state and their governmental structure, they increasingly assume roles and responsibilities previously reserved to states. If the IIA regime fails to adapt to these changing political and economic structures, violent nonstate actors, such as the Taliban, threaten the sustainability of BITs and foreign investment in the region.

## III. RISK MITIGATION TOOLS: POLITICAL RISK INSURANCE

### *A. Background*

Political risk insurance, similar to the BIT, serves as a "risk mitigation tool" for foreign investors.[45] In the context of foreign investment, risk and uncertainty are often conflated.[46] While uncertainty is driven by a lack of knowledge, risk may be mathematically determined, accounting for foreseeable costs of doing business.[47] Political risk insurance is typically intended to fulfill three primary purposes: currency inconvertibility, expropriation, and political violence.[48] Investors have the ability to tailor insurance plans to adjust to the risk of investment in specific countries and industries.[49] Many public and private political risk insurers have developed advanced evaluation mechanisms for risks unique to the host states.[50] Despite the availability of systematic risk assessment and protection through political risk insurance, data by Export Development Canada (EDC), a government provider of political risk insurance, shows that eighty-four percent of its surveyed companies did not formally integrate social and

44. *See International Investment Agreements Navigator: Afghanistan*, INV. POL'Y HUB, https://tinyurl.com/y49qhb49 (last visited Aug. 29, 2020).

45. Bekker & Ogawa, *supra* note 1, at 315.

46. Magdalena Kozłowska, *Problems Connected with Measuring Risks of Foreign Direct Investments*, 20 J. ECON. & MGMT. 93, 94 (2015).

47. *Id.* at 94.

48. Bekker & Ogawa, *supra* note 1, at 318.

49. *Id.* at 318-25.

50. Jason Webb Yackee, *Political Risk and International Investment Law*, 24 DUKE J. COMPAR. & INT'L L. 477, 477-88 (2014).

political risks into their investment decisions.[51] In other words, while businesses indicate that political unrest is a significant concern, they often fail to implement risk mitigation measures afforded to them by the insurance system. Although these insurance policies are robust, the rapidly changing domestic and political environment of developing countries challenges the precision of sophisticated risk assessments, meaning there are limitations to exclusive reliance on political risk insurance. Fortunately, insurance premiums provide the possibility of blanket protections up to a maximum dollar of coverage per project.[52]

The scope of protection under political risk insurance policies is determined by the investor.[53] The three types of risk—currency inconvertibility, expropriation, and political violence—have customary definitions within the insurance agreement, increasing the transparency of such protection. Currency inconvertibility, defined as risk of loss "arising from an investor's inability to convert local currency into foreign exchange," includes coverage of earnings, return on investment, loan principal and interest, and royalties.[54] Commercial risks, such as devaluation of currency or inflation, are not, however, covered.[55]

Expropriation, if included under the insurance policy, may additionally protect against a continuous, rather than a one-off, interference with foreign investment. Political risk insurance policies have largely refrained from providing a standard definition of expropriation, allowing for flexibility and broad protections under direct and indirect seizures of property. Determining the legality of governmental expropriations has proven difficult given the fine line distinguishing legitimate government regulation from impermissible "creeping expropriations."[56] Creeping expropriations

51. *Id.* at 482 ("Perhaps the lack of systematic political risk assessment is not surprising. The theoretical literature on decision-making suggests that rational risk assessment of 'low-probability/high-consequence events'—which undoubtedly include adverse political risk events like expropriation—is particularly 'troublesome' because of such things as the 'ambiguities associated with the chances of an event and/or its consequences,' the disjuncture between expert and non-expert perceptions of risk, and the individuals (who, of course, make up the corporation) who 'do not have clear, stable preferences with respect to . . . risk.'") (quoting Howard Kunreuther, *A Conceptual Framework for Managing Low-Probability Events*, *in* SOCIAL THEORIES OF RISK 301, 308-09 (Sheldon Krimsky & Dominic Golding eds., 1992).

52. Bekker & Ogawa, *supra* note 1, at 318-23.

53. *Id.*

54. *Id.* at 318-19.

55. *Id.* at 320-21.

56. For a definition of "creeping," see *Creeping Expropriation*, WESTLAW PRAC. L. GLOSSARY, https://tinyurl.com/yyd8jbh3 (last visited Sept. 12, 2020) ("The gradual removal of property rights from a foreign investor through a series of government initiatives, including new legislation, increases in tax rates or royalty payments, the cumulative effect of which is to reduce the economic value of the project to the investor. Foreign investors can protect themselves from the effects of these initiatives by, among other things: taking advantage of any applicable of bilateral investment treaties. Negotiating stabilization clauses with the government. Obtaining political risk insurance.").

have increased in the modern era, transitioning into a major source of risk for foreign investors.[57]

The third risk category, political violence, is of unique interest when looking at nonstate actors. Political risk insurance coverage may provide for financial protections against "any form of civil strife," including rioting or revolutions that have resulted in investment harm.[58] For example, in Yemen, the political and religious conflict has resulted in a power vacuum, allowing Jihadist militants from Al-Qaeda and ISIS to exploit the country's lack of central authority, and thereby acquire territory and exacerbate violence in the region.[59] As the state of political affairs in Yemen exemplifies, when assessing such security risks, the complexity of the conflict and lack of a strong central government makes it exceptionally difficult to attribute actions to the nation state. In such an instance, political risk insurance, as a form of risk management, protects policyholders from financial loss. The complications of distinguishing the state from nonstate actions becomes a nonissue for the investor seeking immediate relief.

### B. *The Structure of the Political Risk Insurance Industry*

There are two variations of political risk insurance providers: public, state-backed investment guarantee firms, and private insurance companies.[60] The first—public political risk insurance entities—can be either state-run actors or multilateral agencies.[61] Examples include the Nippon Export and Investment Insurance Agency (NEXI) backed by the Japanese government, offering political risk insurance to Japanese businesses, and the Overseas Private Investment Corporation (OPIC), established by the United States under the 1971 Amendment to the Foreign Assistance Act, offering risk protection for U.S. businesses and individuals.[62] As of January 2, 2020, OPIC was officially replaced by the United States' International Development Finance Corporation (DFC). After this transition, the DFC's endowment nearly doubled in size, from twenty-nine billion dollars to sixty billion dollars.[63] Built upon the founding

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57. Shain Corey, *But Is It Just? The Inability for Current Adjudicatory Standards to Provide "Just Compensation" for Creeping Expropriations*, 81 FORDHAM L. REV. 973, 976 (2013).

58. Bekker & Ogawa, *supra* note 1, at 320.

59. *Global Conflict Tracker: War in Yemen*, COUNCIL ON FOREIGN RELS., https://www.cfr.org/global-conflict-tracker/conflict/war-yemen (last updated Sept. 11, 2020).

60. David Wille, *A Primer on Political Risk Insurance*, GLOB. RISK INSIGHTS (Feb. 12, 2016), http://globalriskinsights.com/2016/02/a-primer-on-political-risk-insurance/.

61. James J. Waters, *A Comparative Analysis of Public and Private Political Risk Insurance Policies with Strategic Applications for Risk Mitigation*, 25 DUKE J. COMPAR. & INT'L L. 361, 363 (2015).

62. *Id.*

63. Kenneth W. Hansen & Rachel Rosenfeld, *DFC Replaces OPIC*, PROJECT FIN. NEWSWIRE (Norton Rose Fulbright), Feb. 2020, at 44.

principles of OPIC, the DFC aims to fill the financing gap within the realm of FDI.[64] In contrast to OPIC, the DFC, among other innovations, has relaxed the requirement to work with U.S.-connected companies and provides expanded PRI coverages.[65] In addition to OPIC, and most recently the DFC, "multilateral agencies, such as the World Bank's Multilateral Investment Guarantee Agency (MIGA), offer PRI policies to investors of member countries investing in other developing member countries."[66] The second variation of insurers—private insurers—operate in the commercial market and play a "vital role in supplementing the capacity of public insurers to offer political risk insurance to clients."[67] Private insurers, relative to their public counterparts, restrict coverage to shorter terms and smaller monetary sums, but have been found to provide higher payout rates.[68]

Beginning with the structure of public providers, national and multilateral entities have traditionally dominated the political risk insurance industry.[69] By restricting coverage to constituent investors, public providers have distinct eligibility requirements and provide specific forms of protection.[70] In the United States, OPIC, now succeeded by the DFC, dominated the public sphere as a self-sustaining government agency.[71] OPIC historically provided political risk insurance and project financing through direct loans, loan guarantees, and investor services for American businesses.[72] Coverage was and continues to be secured by the "full faith and credit of the United States" and the agency's "own substantial reserves."[73] With services available in over 139 developing countries,[74] coverage under OPIC was formerly restricted to "U.S. investors, contractors, exporters, and financial institutions involved in international transactions" for a maximum term of twenty years.[75] Its purpose, as set out by Congress, was facilitating foreign direct investment in developing countries, whereby overseas investments improve the United States' global

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64. *Id.*
65. *Id.* at 44-48.
66. Waters, *supra* note 61, at 363.
67. *Id.* at 372.
68. *Id.* at 373-74.
69. *Id.* at 368.
70. *Id.* at 368-69.
71. *See Who We Are*, OVERSEAS PRIV. INV. CORP., https://tinyurl.com/y3srk9wp (last visited Dec. 17, 2017); *see also* Waters, *supra* note 61, at 368.
72. Paul E. Comeaux & N. Stephen Kinsella, *Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilization Clauses, and MIGA & OPIC Investment Insurance*, 15 N.Y. L. SCH. J. INT'L & COMPAR. L. 1, 33 (1994).
73. *Id.*; *see also* OECD, EXPORT CREDIT FINANCING SYSTEMS IN OECD MEMBER COUNTRIES AND NON-MEMBER ECONOMIES 12 (2001).
74. Comeaux & Kinsella, *supra* note 72, at 33.
75. Waters, *supra* note 61, at 369.

competitiveness through the creation of jobs and the increase of U.S. exports.[76] OPIC mirrored the practices of traditional insurers by providing policy coverage against the three types of risk typically afforded by political risk insurance.[77] For purposes of this Essay, mitigating the risk of political violence continues to be of unique importance given the significance of violent nonstate actors in the Middle East. With the inception of the DFC in January 2020, the DFC expanded OPIC's charge, with newfound authority to provide coverage for "any or all political risk," and relaxed its eligibility requirements.[78] Despite its renaming and grant of expanded authority, the DFC, as a public entity, continues to be subject to significant restrictions and requirements.[79] Among others, the DFC has a duty to investigate whether the funded project is connected with a person who has "demonstrated an intention to support a boycott against a government friendly to the United States," projects within certain categories set by the United States are granted preferences, and the DFC must give "preferential consideration to projects sponsored by or involving private sector entities that are United States citizens or entities owned or controlled by United States citizens."[80]

While less flexible then private insurers, OPIC, and now the DFC, afforded investors the ability to customize the scope of their coverage, including protections against both business income losses and damages to property.[81] OPIC limited its insurance coverage to a maximum of $250 million, with a special exception for oil and gas projects, which may receive a maximum of $400 million in protection.[82] While no minimum investment was necessitated for coverage to be permitted, OPIC would cover up to ninety percent of the investment loss, encouraging investors to be proactive in taking precautions to protect their investments.[83] DFC has expanded these protections by providing coverage of up to one billion dollars for losses involving "currency inconvertibility, government interference, and political violence including terrorism."[84]

Multilateral agencies, such as MIGA, provide political coverage similar to national agencies such as OPIC and the DFC, but open coverage to all

76. *See id.* at 369; *see also* Comeaux & Kinsella, *supra* note 72, at 33.
77. Comeaux & Kinsella, *supra* note 72, at 34.
78. Hansen & Rosenfeld, *supra* note 63, at 45.
79. *Id.* at 47.
80. *Id.* at 47.
81. *Id.* at 35, 47.
82. Waters, *supra* note 61, at 370.
83. *Id.*
84. *Political Risk Insurance*, U.S. INT'L DEV. FIN. CORP., https://www.dfc.gov/what-we-offer-our-products/political-risk-insurance (last visited Aug. 7, 2020).

member countries.[85] MIGA is currently comprised of 179 World Bank members, insuring up to $220 million per project and up to $720 million per country, thereby limiting its risk exposure on a country-by-country basis.[86] MIGA's objective differs from national agencies in that it aims to supplement government-sponsored and private investment insurance programs.[87] National insurance programs are limited to national interests, have strict eligibility requirements, and place a cap on available financial resources.[88] MIGA, on the other hand, is able to insure U.S. and non-U.S. investors, so long as the investor is from a member country other than the host state, the investment is made in the territory of a developing member country, and the project is approved by the host government.[89] MIGA's duration of coverage is limited to a maximum of fifteen years, however, the term can be extended to twenty years if the nature of the project is found to require it.[90]

Although public political risk insurers generally offer longer and larger policies, the second type of coverage—private political risk insurance—has gained popularity in supplementing the capacity of public insurers.[91] Private political risk insurers typically limit policies to a period of three to five years, and provide less monetary protection, often offering a maximum of $100 million in coverage.[92] Nevertheless, claims submitted to private insurers tend to result in higher payout rates relative to their public counterparts.[93] While the ability to recover money from host governments has been relatively unpredictable for both public and private political risk insurers, private entities are likely to be more willing to underwrite riskier investments and provide for immediate investment relief as a result of their restrictive monetary and temporal policies.[94] Private insurers include global insurance corporations such as American International Group (AIG), Euler Hermes, XL Caitlin, and Atradius.[95] The risks covered by private insurers are similar to those provided by national and multilateral entities, but private market fees are significantly higher.[96] Premiums are based off a multitude of factors, including but not limited to, "the size of the investment, nationality of the

85. *Id.*
86. *Id.*
87. Comeaux & Kinsella, *supra* note 72, at 40-43.
88. Waters, *supra* note 61, at 368-70.
89. Comeaux & Kinsella, *supra* note 72, at 40.
90. *Id.* at. 44.
91. *See* Wille, *supra* note 60 (noting that in 2010 public privates made up about two-thirds of the PRI market).
92. Waters, *supra* note 61, at 373.
93. *Id.*
94. *Id.* at 373-74.
95. Wille, *supra* note 60.
96. Comeaux & Kinsella, *supra* note 72, at 47.

investor, risks associated with the host country, risks covered by the insurance, and the structure of the investment."[97] While premiums on private policies may cost substantially more than their government subsidized counterparts, they are not governed by strict eligibility requirements, which allows for greater flexibility in premium coverage.[98]

### *C. Political Risk Insurance in the Middle East*

By capturing substantial operational risks, political risk insurance can assist investors in obtaining access to necessary loans and favorable financing terms from underwriters.[99] Multilateral and national entities possess information gathering powers and expertise on investment conditions.[100] These public insurers are guided by agencies such as the State Department of the United States, and have access to professional insights by renowned political and economic analysts.[101] National and multilateral agencies have spent considerable time furthering relations with developing countries.[102] When conflicts do arise, the support and pressure of these agencies incentivize host countries to protect investments and investors.[103] Private sector insurers, on the other hand, serve as an effective gap-filler in instances where the eligibility and compliance requirements of public insurers are unattainable.[104] Private insurers are able to "bundle riskier underwriting" as a result of worldwide or multi-country insurance policies.[105] Both public and private entities serve as complementary mitigating tools in reducing investment loss.

The volatility and turmoil in the Middle East present a precarious investment risk. Although political risk insurance may at times require exorbitant premiums based on a region's risk rating data, the insurance coverage has the unique ability to mitigate the risk of political violence.[106] The rise and entrenchment of violent nonstate actors in the Middle East pose a substantial threat to the sustainability of foreign investments. Risk management tools such as political risk insurance policies can minimize exposure to financial losses and are customizable to the idiosyncrasies of the

97. *Id.*
98. Waters, *supra* note 61, at 378-79.
99. MULTILATERAL INV. GUARANTEE AGENCY, WORLD BANK GRP., 2010 WORLD INVESTMENT POLITICAL RISK 56 (2011) [hereinafter WIPR REPORT].
100. Waters, *supra* note 61, at 374-75.
101. *Id.* at 375-76.
102. *Id.* at 363.
103. *Id.* at 376-77.
104. *Id.* at 379.
105. WIPR REPORT, *supra* note 99, at 63.
106. Nathan Jenson, *Political Risk, Democratic Institutions, and Foreign Direct Investment*, 70 J. POL. 1040, 1043 (2008).

region. Protections afforded to investors by political risk insurance have the ability to protect the continuance of foreign direct investment in developing countries as a result of its lack of reliance on the statist approach. Since the Arab Spring Revolution in 2011, nonstate actors are an increasing reality in the Middle East.[107] Conducting business in conflict-ridden states requires a case-by-case analysis—an assessment that political risk insurance is structured to conduct.

The uncertainty of geopolitical risk is exacerbated by the lack of central authority in the region. In Libya, for example, coalitions of militias have become increasingly intertwined with major political parties in the state, while simultaneously pursuing independent agendas and possessing autonomous governing power.[108] In Yemen, the Houthi movement has seized control of the capital and displaced the central government.[109] In nearby Iraq and Syria, ISIS has deprived the central authorities in the region of governing power and legitimacy in significant territories.[110] Unlike the restrictions imposed by treaties in times of armed conflict, political risk insurance premiums calculate political violence as an independent factor, understanding the difficulties in constructing a bright line policy to distinguish state from nonstate inflictions of harm.[111] As the statist approach loses its applicability in the Middle East, the rise of the nonstate actor has diluted the meaning of statehood in the region and has made it unreasonable to attribute acts of violence to the central lawmaking authority. Political risk insurance remains unrestrained by such formalities, protecting the investment from harm, regardless of the whether the culprit is a state or nonstate actor.

## IV. RISK MITIGATION TOOL: BILATERAL INVESTMENT TREATIES

### *A. Background*

BITs came to dominate the sphere of international law with the hopes of spreading foreign investments between developed and developing states.[112] Despite the protections afforded by political risk insurance policies, the uncertainty and risk of entering into a foreign country often prevented investors from pursuing investments. While investors claimed to be interested in political risk insurance as a risk mitigation tool, in practice, a

107. Durac, *supra* note 21, at 37.
108. *Id.* at 38.
109. *Id.* at 39.
110. *Id.*
111. Jenson, *supra* note 106, at 1043.
112. *See supra* Part I.A.

significant portion of foreign investment remained unprotected, with only eighteen percent of the firms worldwide relying on political risk insurance as of 2012.[113] BITs revolutionized the international investment landscape, creating a body of international law governed by treaties between two nation states.[114] The proliferation of the BITs in the 1990s provided investors with a package of substantive rights including fair and equitable treatment, protection from expropriation, free transfer of means, and full protection and security.[115] Substantive rights, under the BIT regime, are structured to be enforced through the procedural right of "guaranteed investor access to [binding] international arbitration in cases in which the investor believes the host state had violated the terms of the treaty."[116] Unlike political risk insurance, BITs did not require companies to independently negotiate with insurers for specific terms in exchange for high premiums. Instead, BITs are agreements between "two countries protecting investments made by investors from one contracting state in the territory of the other contracting state."[117] The substantive and procedural guarantees, granting the investor the ability to bring a direct and enforceable action against a host state, transformed the role of the investor into a right holder.[118] While the protection of investments and flow of FDI were the driving forces behind the entrenchment of the BIT regime, some nation states, including the United States, sought to "facilitate the entry and operation of these investments by inducing host countries to remove various impediments in their regulatory systems."[119] In other words, BITs were relied upon as vehicles to encourage "market liberalization" in host states.[120]

By the end of 2011, 2,833 BITs had been signed between nation states, creating a new form of state responsibility to the investor.[121] This modern approach to dispute resolution, through arbitral tribunals, was viewed as a necessary concession "align[ing] to the needs of international business stakeholders."[122] While the general principles of BITs remained consistent

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113. Bekker & Ogawa, *supra* note 1, at 315 n.6 (citing MULTILATERAL INV. GUARANTEE AGENCY, WORLD BANK GRP., 2012 WORLD INVESTMENT AND POLITICAL RISK (2013), https://www.miga.org/sites/default/files/archive/Documents/WIPR12.pdf).

114. *See supra* Part I.A.

115. *Bilateral Investment Treaty*, LEGAL INFO. INST., https://tinyurl.com/zrpwee3 (last visited Aug. 26, 2020).

116. Yackee, *supra* note 50, at 491.

117. Helena Sprenger & Bouke Boersma, *The Importance of Bilateral Investment Treaties (BITs) When Investing in Emerging Markets*, A.B.A. (Mar. 19, 2014), https://tinyurl.com/yxnj9s7q.

118. Bekker & Ogawa, *supra* note 1, at 316.

119. Salacuse & Sullivan, *supra* note 1, at 76.

120. *Id.*

121. Bekker & Ogawa, *supra* note 1, at 315.

122. Claire Morel de Westgaver, *International Investment Arbitration in the Middle East: Year in Review 2016*, BRYAN CAVE LEIGHTON PAISNER (Feb. 1, 2017), https://tinyurl.com/y3bswbah.

from country to country, the specifics of the treaties varied significantly, providing greater advantages to some signatories over others.[123] Nonetheless, the motivation to use BITs as a vehicle to attract investors permeated the developing world. As a result, the "legally binding promise to treat each other's foreign investors favorably" and reliance on an arbitral process provided the investor with a sense of security.[124] Despite the protections afforded to the investor, in the context of the Middle East, BITs are outdated, failing to account for the political realities of the region. The BIT was established as an agreement between states, however, with the rise of the nonstate actor, the BIT may provide blanket coverage for risks outside the scope of national authority, attributing the acts of the nonstate actor to the state.[125] As will be further explained in the sections to come, if this is taken to the extreme, it essentially imposes a standard of strict liability on Middle Eastern nation states. Under a BIT, the agreement "between a developed and developing country is founded on a grand bargain: a promise of protection and capital in return for the prospect of more capital in the future," but that system must adapt to the changing political and economic structure of the regime in order to remain effective, true to the theory that supports it, and fair to its signatories and benefiting parties.

### B. *The Structure of Bilateral Investment Treaties*

The specific protections afforded by the BIT may vary greatly depending on the signatory states, but the basic tenets remain the same. The U.S. 2012 Model BIT provides for "five substantive provisions generally found in most BITs: national treatment, most favored nation status, fair and equitable treatment, full protection and security, and protection from expropriation without compensation."[126] The national treatment provision requires that the host state not treat "a foreign investor less favorably than it would a domestic investor in like circumstances."[127] Similarly, the "most favored nation provision" necessitates that no other state be treated better than the signatory state.[128] The provisions requiring "fair and equitable treatment, and full protection and security"[129] present difficulties given the possibility of broad impositions of liability on the host state. Signatory states

123. Swenson, *supra* note 7, at 133.

124. Jason Webb Yackee, *Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties*, 33 BROOK. J. INT'L L. 405, 405 (2008).

125. *See* Ampal-Am. Isr. Corp. v. Arab Republic of Egypt, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, ¶¶ 30, 132-35, 137-40, 290 (Feb. 21, 2017).

126. Corey, *supra* note 57, at 979.

127. *Id.*

128. *Id.*

129. *Id.* at 979-80.

are to "provide justice in criminal, civil, and administrative adjudicatory proceedings that satisf[ies] due process, and guarantee[s] the same degree of police protection and security as is required by international law."[130] The actual enforcement of this provision is of great significance when looking at regions wracked by political turmoil and unrest. The last provision provides for protections against expropriations without just compensation, and covers both direct and indirect expropriations.[131] Signatory states are additionally provided the opportunity to select which arbitral forum will mediate and settle future disputes between the host state and the investor if a breach of the listed provisions ensues.[132]

### *C. Bilateral Investment Treaties in the Middle East*

Since the inception of the first BIT between Germany and Pakistan in 1959, these treaties have evolved into a common practice in the Middle East.[133] Constituting eighteen percent of the 3,500 active global investment treaties, BITs in the Middle East are presented with a precarious dilemma under traditional treaty provisions requiring full protection and security, as well as protections against expropriations.[134] The package of benefits afforded to investors was initially intended to attract FDI, but drafters failed to foresee the surge of violent nonstate actors, which would subject many nation states to a perhaps unfairly strict standard of liability.[135] These changing circumstances have allowed parties to attribute the acts of the nonstate actor to the state under protections afforded against improper expropriation, and to seek relief under the protection and security provision against the state for violent acts by nonstate actors, such as the Muslim Brotherhood, Al Qaeda, Hamas, Hezbollah, and ISIS.[136]

While the full protection and security standard is intended to demand reasonable police protections by the host state and has "maintained a low profile in international investment law," the surge of the Arab Spring transformed this basic provision into an unforeseeable and unattainable standard.[137] The BIT is only as strong as its language, and as written, these

130. *Id.* at 980.
131. *Id.*
132. *Id.*
133. Ginsburg, *supra* note 2, at 111.
134. Westgaver, *supra* note 122.
135. MAHNAZ MALIK, INT'L INST. FOR SUSTAINABLE DEV., THE FULL PROTECTION AND SECURITY STANDARD COMES OF AGE: YET ANOTHER CHALLENGE FOR STATES IN INVESTMENT TREATY ARBITRATION? 1 (2011).
136. *See, e.g.*, Rob Howse, *ICSID Arbitrators Turn Investment Treaty into Insurance Policy Against Terrorism*, INT'L ECON. & POL'Y BLOG (Mar. 7, 2017, 9:36 AM), https://tinyurl.com/yyg3rx7q.
137. MALIK, *supra* note 135.

treaties do not account for modern geopolitical dynamics, and therefore impose an impossible duty on states.

In the context of international law, sovereigns are equals, and must be treated as such.[138] However, sovereign equality, much like statism, is an illusion, failing to take into account evident inequality of influence within international politics. The capacity of signatory states of a BIT differs significantly by the sheer existence of the recognized asymmetry in power between developed and developing states. The security provision is correct by requiring that host states, regardless of their capacity, diligently protect foreign investments.[139] However, in the context of the Arab Spring, the rise of the nonstate actor should not constitute a conflict triggering the traditional police protections of the BIT. In such situations, the monitoring and enforcement capacity of the state needs to be considered, realistically determining what the broad measures of "full protection and security" should afford. An impactful decision by the International Centre for Settlement of Investment Disputes (ICSID) under the BIT between the United States and Egypt held Egypt liable for failing to protect against terrorist attacks during the Arab Spring, during which pipelines were destroyed along the Sinai Peninsula.[140] The arbitral tribunal essentially concluded that the state of war and extreme security challenges were secondary to the protections covered by a vague and largely undefined provision of the BIT.[141] Indemnification to investors for terrorism by nonstate actors imposes an impractical and often impossible duty on the host. Diligence should be limited to the extent by which "the reasonable use of the host State's capabilities" can provide investment protections.[142] Investor protection in non-transitory armed conflicts due to actions by nonstate actors surpasses the obligations of any signatory state.

Contrary to the overbroad security and protection provision, expropriation protections under the BIT regime typically require that the taking be done by a state actor for the investor to be awarded just compensation.[143] As explained in this Essay, however, in the Middle East, the distinctive identity of the state actor is a memory of the past.[144] Nonstate

138. Alex Ansong, *The Concept of Sovereign Equality of States in International Law*, 2 GIMPA L. REV. 13, 13 (2016).

139. Howse, *supra* note 136.

140. Ampal-Am. Isr. Corp. v. Arab Republic of Egypt, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss (Feb. 21, 2017).

141. *Id.*

142. CHRISTOPH SCHREUER, THE PROTECTION OF INVESTMENTS IN ARMED CONFLICTS 9 (Freya Baetens ed., 2013).

143. U.N. Conf. on Trade & Dev., Expropriation: UNCTAD Series on Issues in International Investment Agreements II, UNCTAD/DIAE/IA/2011/7, at xi (Nov. 29, 2011).

144. *See supra* Part II.B.

actors assume "increasing significance in social and political life across the Middle East," taking on various identities, including but not limited to insurgents, transnational terrorist organizations, and militias.[145] In Libya, a state which currently has twenty-five BITs in force,[146] the crumbling of the Gaddafi regime gave birth to nearly 1,600 militia groups by 2014.[147] The Ministry of Defense and Ministry of the Interior recognized "two larger coalitions – the Libya Shield Force and the Supreme Security Committee" as official transitional security forces.[148] The line separating the nonstate from the state actor is further muddled in Yemen. Armed conflict has taken over the state, with power shifting from Al Qaeda to the Houthi movement. The nonstate actors effectively seized control of the capital in September 2014.[149] Despite this state of disarray, Yemen maintains twenty-two active BITs.[150] In Iraq, the state of conflict has resulted in 9,000 to 11,000 civilian deaths as a result of efforts to drive ISIS out of Mosul.[151] The weakness of these nation states and their central governments has contributed to the legitimacy of the nonstate actors. If expropriations do take place, who are these acts to be attributed to? The state is either intertwined with the nonstate entity, as is the case with Hezbollah in Lebanon, or the "nonstate actor[] [has] take[n] up arms against [the] regime[]," diluting the "nonstate components of those actors."[152]

## V. POLICY PROPOSAL

The transformation of BITs into an insurance policy against terrorism in the Middle East is unsustainable and unreasonable. As a matter of policy, the objective of the BIT was to provide *reasonable protections* for investors and their investments with the hopes of facilitating FDI for the host state. As it currently stands, the host state is often held to an unrealistic standard of absolute liability, in which they are expected to exceed reasonable demands and prioritize the foreign investor beyond their capacity. As previously stated, the most basic tenet of international law is that all sovereigns are equal and are to be treated as such. While the principle of equality between

145. Durac, *supra* note 21, at 38.

146. *International Investment Agreements Navigator: Libya*, INV. POL'Y HUB, https://tinyurl.com/y597opoz (last visited Aug. 20, 2020).

147. Durac, *supra* note 21, at 38.

148. *Id.* at 38.

149. *Id.* at 39.

150. *International Investment Agreements Navigator: Yemen*, INV. POL'Y HUB, https://tinyurl.com/y3j7d5s5 (last visited Aug. 20, 2020).

151. Susannah George, *Mosul is a Graveyard: Final IS Battle Kills 9,000 Civilians*, AP NEWS (Dec. 20, 2017), https://tinyurl.com/y9jtugd3.

152. Durac, *supra* note 21, at 41.

nation states may be easily challenged, this Essay does not suggest that this foundational principle of international law be changed. Rather, in order to avoid the withdrawal of Middle Eastern countries from the IIA regime and promote further investment, threats of terrorism and the potential state of conflict must be considered when determining what *reasonable protections* are. Nonetheless, such a consideration may put the investor in harm's way, therefore, I propose that political risk insurance be a mandatory condition of and supplement to the BIT.

The reliance on political risk insurance dwindled with the introduction of the BIT.[153] The driving force behind the "rapid expansion of BITs rest[ed] in the desire of companies of industrialized states to invest safely and securely in developing countries, as well as the consequent need to create a stable international legal framework to facilitate protect those investments."[154] Unfortunately, the uncertainty, violence, and transformation of the nonstate entities into quasi-state actors have resulted in lack of predictability within the IIA regime. The future of the BIT depends on the re-introduction of political risk insurance to mitigate costs in uncertain circumstances where neither the host state nor the investor is at fault. Traditionally, political risk insurance demanded exorbitant fees and costly negotiations to determine the scope of coverage. Additionally, despite the availability of risk assessment measurements, companies often chose to avoid the integration of "social and political risks in their investment decisions."[155] The joining of political risk insurance with the BIT will remedy investors' need for protections, while alleviating the imposition of strict liability on the host state. This tool would ensure the sustainability of BITs, expand investment opportunity, and encourage companies to take advantage of the potential rewards of investment in emerging markets without the risk of insolvency.

It has become clear that "just as political risk insurers do not review BITs in the underwriting process, most BIT experts do not consider ways in which PRI can supplement a client's protections under a treaty."[156] Dispute resolution experts are experienced in dealing with the aftermath of a breach, rather than the "non-contentious pre-investment stage."[157] Political risk insurers, on the other hand, are experienced in the pre-investment stage, while "lack[ing] a general understanding of the BIT."[158] This disconnect has resulted in the system preferring one over the other,

153. Bekker & Ogawa, *supra* note 1, at 316.

154. Salacuse & Sullivan, *supra* note 1, at 75.

155. Yackee, *supra* note 50, at 482 (quoting Derek Baas, *Approaches and Challenges to Political Risk Assessment: The View from Export Development Canada*, 12 RISK MGMT. 135 (2010)).

156. Robert B. Ginsburg, *Political Risk Insurance and Bilateral Investment Treaties: Making the Connection*, 14 J. WORLD INV. & TRADE 943, 944 (2013).

157. *Id.*

158. *Id.*

when in reality, their strengths and weaknesses align to counter the risks to the investor from both state and nonstate actors. Political risk insurance, by focusing on the pre-investment stage, provides for advanced risk assessments and greater flexibility in eligibility. However, it is limited in temporal and monetary coverage, and insurers are often hesitant to provide coverage for projects in regions experiencing political turmoil. In contrast, BITs, by focusing on the post-investment stage, provide for broad temporal and monetary coverage, triggering immediate protection as a result of the investor being of a nationality that serves as a signatory state. These positives aside, BITs often fail to offer an accurate risk assessment, limit protection to signatory states, and rely on an extended arbitral process. Awards by tribunals may take years to materialize and involve an adversarial process which has the potential to damage future investment relations.[159]

Rather than favoring one risk mitigation tool over the other, the two approaches can supplement one another. How this will be done depends on which party is at fault in the event of a BIT breach by the signatory state. In the event that the liability can clearly be attributed to the host state, dispute resolution should establish this through the arbitral tribunal. Such instances may include a host state's collusion with the nonstate actor or the formal integration of nonstate actors in the host state's governmental structure. If fault is unclear, and the host state has exercised its due diligence in protecting investment assets and is free of blame in the takings of land by the nonstate actors, then the security and expropriation provisions should not be triggered. Rather, political risk insurance is to intervene and provide for immediate compensation of the investor. It is possible to argue that such a structure may disincentive the host state from exerting its fullest capabilities to protect investments, however, the scrutiny imposed by the arbitral tribunals in conjunction with political risk insurers will provide oversight in the imposition of liability. Both public and private political risk insurers seek to minimize their liability, and as such, it will also be in their interest to scrutinize the course of events.

The risks and opportunities of conducting business in the Middle East present a unique dilemma. The region faces threats of physical insecurity, uncertain regulatory environments, and escalating violence and unrest. Despite these hazards, "the rewards of doing business [in the region] cannot be ignored."[160] Studies by the International Monetary Fund "put the export value of the Middle East at $1.13 trillion at the end of 2012, a figure that represents 6.2% of total global exports, and the combined GDP of all

159. *Id.* at 975.

160. Russ Banham, *The Risks and Opportunities of Doing Business in the Middle East*, RISK MGMT. (Mar. 1, 2016), https://tinyurl.com/y35ylug4.

Middle Eastern nations was $3.96 trillion."[161] The comprehensive risk assessment and protection afforded by the combination of political risk insurance and the BIT will encourage companies to take advantage of the potential rewards of conducting business in the region. While the benefits of FDI are disputed, investments under the shield of a fair treaty will likely exceed the projected benefits. Simultaneously, states suffering from violent nonstate actors may counter their influence and attain legitimacy by better providing for their citizenry. Risk management is crucial not only to the short-term encouragement of investment, but the long-term objective of sustainable investments for both the investors and the host state. In volatile markets, where the unpredictable nonstate actor stands to threaten security and stability, the joint efforts of expert risk assessors and the binding state obligations of the BIT are required to effectively move forward. Insulating the host state from damages caused by the nonstate actor is an issue of both fairness *and* utility—if BITs are to exist in the Middle East, they must include mandatory enrollment in political risk insurance. In the investment context, these two essential risk mitigation tools are "complementary, rather than competing, tools."[162]

161. *Id.*

162. *Political Risk Insurance vs Bilateral Investment Treaties*, ASIA INS. REV. (June 2014), http://www.asiainsurancereview.com/Magazine/ReadMagazineArticle?aid=35131.

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