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Mind the GAP: Tailoring the Form and Substance of Political Risk Insurance in Order to Bridge the 'Enforcement Gap' in Investment Arbitration

RAVI D. SOOPRAMANIEN*

I. Introduction

Bilateral Investment Treaties ("BITs") emerged from the shadows of the Bretton Woods negotiations. Theirs is a story linked in particular to the World Bank Group and its attempts to depoliticize investment. Prior attempts to conclude a multilateral agreement on investment have failed in the years following Bretton Woods.1 The earliest iterations of some of the core substantive investor protection provisions found in modern-day BITs, notably the obligation to treat foreign investments fairly and equitably, can be traced back to the 1948 Havana Charter.2 The Charter, however, ran counter to the Calvo Doctrine, espoused by an influential subset of developing countries at the time. This Doctrine provided that "international law should not grant more protection to foreigners than national treatment under domestic law."3 In the absence of tribunals, investment disputes in those days were resolved by gunboat diplomacy or, increasingly, through the good offices of Eugene Black, the World Bank

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President from 1949 to 1962. Black was called upon to arbitrate investment-related disputes relating to the sequestration of British property in the United Arab Republic, the rights of English and French shareholders in the Suez Canal Company, the payments due to French bondholders of 1912 Tokyo City bonds, and the contested trans-boundary water rights leading to the Indus Water Treaty.5

Black’s role as the world’s foremost investment arbitrator positioned the World Bank to push for the adoption of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“ICSID Convention”).6 The fact that the ICSID was artfully presented to the World Bank’s Member Countries in 1965 as an attempt to streamline the World Bank’s role in investment disputes7 should not detract from its focus on political risk.8 Unlike the failed investment-related conventions that preceded it, the ICSID Convention did not codify any substantive investor protections. Rather, it sought to provide a neutral forum for the adjudication of investor-state disputes.9 The World Bank expected that recourse by states and investors to the forum would, in time, lower political risk and promote foreign direct investment (“FDI”), particularly for large-scale projects vulnerable to expropriation.10

ICSID was designed to apply to investor-state disputes on a case-by-case basis. Ratification did not oblige Member Countries to use the ICSID. Rather, such obligation would only arise where a Member Country explicitly consented, in its capacity as host state, to ICSID arbitration.11 Such consent would typically be contained in contracts individually negotiated between the host state and an investor (hereafter, a “Contract Investor”). These contracts, generally lengthy,12 would contain a dispute settlement clause addressing the host state’s consent to ICSID arbitration, carefully list the host state’s counterparty obligations, and explicitly highlight those actions

8. As distinguished from commercial risks covering, inter alia, construction and operational risks, excessive maintenance costs, and insufficient sales to satisfy debt repayment obligations.
11. See, on this point, the analysis of ICSID Art. 25(1) in the dissenting opinion of Laurence Boisseon de Chazournes in Garanti Koza LLP v. Turkmenistan, ICSID Case No. ARB/11/20, available at http://www.italaw.com/cases/2176#stash.vfFSoNj.pdupf.
12. A typical water concession contract will run some 110 pages in length, excluding annexes.
and inactions by the host state amounting to a default. The proliferation of BITs, however, changed the nature of arbitration. The intended safety valve, of explicit government consent in contracts, was blown wide open through deemed consent in BITs. Any investor with a qualifying investment pursuant to a BIT (hereafter, a “BIT investor”), irrespective of any direct contractual relationship with the host state, could signal acceptance to the state’s consent to arbitration in a BIT, and initiate an investor-state dispute under the ICSID. As these disputes continue to grow in numbers and complexity, attention is now being paid to the difficulty of securing enforcement of arbitral awards (the so-called “enforcement gap”).

This paper will posit that there is no easy solution to the enforcement gap within the international investment legal framework. This framework functions smoothly insofar as Member Countries obey the rules. This is because the system is, normatively, predicated on state consent. Where a sovereign state refuses to honor an arbitral award, there are few legal remedies available to award-creditors. Indeed, the ICSID was never designed to be a self-contained system of recognition and enforcement replete with police powers allowing it to remedy the full range of political risks an investor could encounter abroad. Rather, it formed part of a suite of risk mitigation initiatives provided by each institution forming the World Bank Group, none more important than the Multilateral Investment Guarantee Agency (“MIGA”). The MIGA was established to encourage the flow of foreign investment to developing countries by providing a range of political risk insurance (“PRI”) products covering an investor’s equity and/or

13. For an example of the structure of such agreements, see World Bank, General conditions applicable to loan and guarantee agreements (World Bank, Washington DC 2012), available at http://siteresources.worldbank.org/INTLAWJUSTICE/Resources/IBRD_GC_English_12.pdf. The dispute settlement provisions are contained in Art. VIII. Note that project agreements are sometimes modeled after the World Bank GCs. The actual agreements contain specific conditions that add considerably to the length of the final product. These contracts, which tend to be confidential, are sometimes implemented by the Contracting State in domestic laws.

14. Subject, of course, to the BIT providing for ICSID arbitration.


17. The International Bank for Reconstruction and Development (“IBRD”), International Finance Corporation (“IFC”), and International Development Agency (“IDA”) all initially established with the goal of reconstructing post-war economies, now provide financing and advisory services with the aim of leveraging foreign infrastructure investment. Over the past two decades, the IFC, IBRD, and IDA have provided Partial Risk and Credit Guarantee products to Member Countries that cover political risks similar to the MIGA PRI instruments discussed in more detail throughout this paper.
debt exposure in a given project. A Contract investor could (and many would) insure a host state’s commitments through a MIGA PRI policy covering currency inconvertibility, political violence, and expropriation risks, in addition to arbitration agreement defaults (“AAD”) and denials of justice (“DOJ”).

BITs have upset the equilibrium between investment arbitration and the PRI market. As a consequence, the latter has grown at a comparatively slower pace: it is only recently, as states have transitioned away from outright expropriations and towards subtler regulatory “takings,” that the market has provided BIT investors with the types of affordable policies covering risks from currency inconvertibility, political violence, and expropriation available to Contract investors decades back. Accordingly, while some of these forms of coverage are now available to BIT investors, no PRI provider at present extends the relatively more recent AAD or DOJ products to BIT investors. AAD and DOJ coverage is only available to those Contract investors with a direct contractual relationship with the host state. This paper will argue that there is no good reason to narrow AAD and DOJ coverage in such a manner.

Rather than putting all their eggs in the BIT basket, this paper urges BIT investors to seek out PRI products selectively, to plug gaps in investment protections contained in a given BIT. Where such gaps relate to the “enforcement gap” problem discussed above, BIT investors should lobby PRI providers to extend AAD and DOJ product coverage to them, in exchange for fair remuneration. This paper will posit that the failure by the PRI market to provide coverage to close the enforcement gap has had, inter alia, the consequence of fueling a market for third party funding (“TPF”), and represents revenues foregone by PRI providers. Part II of this paper will describe the enforcement gap in more detail. Part III will present the PRI landscape. Part IV will outline possible risk mitigation strategies available to BIT investors. Part V will conclude with recommendations.

II. The Enforcement Gap

A. Key Elements of BITs

BITs were designed to resolve the problem of obsolescence bargaining in investment negotiations. Obsolescence bargaining describes a phenomenon whereby the negotiating leverage for private projects shifts during the project lifecycle. Prior to its investment, the investor is in a stronger position, as it has capital to spend, and can shop around to negotiate better

18. MIGA was also created with an eye towards plugging a gap in state-operated national insurance programs open only to nationals or exports. I included both MIGA and national insurance providers as “public PRI providers.”


20. Id.
concessions. The host state needs private investors, and offers attractive concessions. After its investment, however, the tables turn, and the investor becomes the weaker party: once operational, the investor requires a long amortization period to attain its expected return, whereas the host state has already secured all it needs. The original bargain has, thus, become obsolete. Theory predicts that the host state will force a change in terms, by terminating or unilaterally modifying its negotiated concessions over time.21

BITs typically reduce obsolescence bargaining risks by incorporating six core elements. First, they provide that covered investments receive “fair and equitable” treatment (“FET”) pursuant to at least the minimum standard of international customary law.22 Second, they address the host state’s obligation to compensate the investor for direct or indirect expropriation. Third, they incorporate National Treatment (“NT”) and Most Favored Nation (“MFN”) obligations binding the host state to treat BIT investors no less favorably than “like” foreign and local investors.23 Fourth, they guarantee the right by investors to transfer their investments and the returns therefrom into a freely convertible currency. Fifth, they incorporate so-called “umbrella” clauses seeking to extend the host state’s liability to “any dispute relating to [covered] investments.”24 Last, they provide for binding third-party arbitration of disputes between investor and home state, and home state and host state.25

It bears mentioning that more recent BITs sometimes contain an additional element that dilutes the value of these protections: so-called non-precluded measures (“NPM”) clauses allowing state parties to take otherwise non-BIT-conforming measures “necessary” to protect their environment and essential security interests.26

B. PROBLEMS WITH ENFORCEMENT OF ARBITRAL AWARDS

When things go wrong, access to justice under BITs can be slow and expensive. Recent estimates indicate that the mean length of time between


23. NT will entitle investors to treatment “not less favorable” than that accorded to like investors of the host state. MFN will require that investors from the home state be treated no less favorably than like investors from other states.


filing an ICSID claim and obtaining final judgment is 1325 days (three years and seven months).27 Annulment proceedings can add anywhere between one to two and a half years to this timetable.28 The average costs for a claimant in investment treaty arbitration is $4.5 million.29 As ICSID tribunals have broad discretion to apportion costs as they deem fit, these litigation costs do not necessarily follow the event.30 At least one study finds that the odds statistically do not favor the investor.31 These delays have at least as much to do with stalling tactics by respondent host states, looking to bleed investors, as they do with the open-ended character of BIT terms: to what extent can an investor argue that domestic regulation depriving its commercial operations of some measure of economic benefit amounts to an expropriation? Can an investor establish a violation of NT or MFN obligation in situations where there are no “like” host or third state investors? When are investors “unlike?” To what extent does a facially neutral regulation breach the FET obligation, and how is the relevant customary international law standard to be measured?32

Assuming an investor mobilizes a large enough war chest to fund its litigation before an ICSID tribunal—and possibly annulment chamber—and secures a favorable award (covering, inter alia, its litigation costs), it does not necessarily follow that this award is “final” in the strictest sense of the word. A growing number of host states have refused to honor arbitral awards. Known33 defaulting states include Argentina, Indonesia, Kazakhstan, Kyrgyzstan, the Russian Federation, Thailand, and Zimbabwe. Further, it is reported that Ecuador, Canada, Chile, South Africa, Lebanon, Latvia, Mexico, and Poland have previously honored awards or reached a settlement after first seeking to exhaust all remedies by seeking vacature of arbitral


29. Matthew Hodgson, Counting the Costs of Investment Treaty Arbitration, GLOB. ARB. REV. (Mar. 24, 2014), http://www.allenoverly.com/SiteCollectionDocuments/Counting_the_costs_of_investment_treaty.pdf. (Costs for respondents average $100,000 more than the figure for claimants. When including tribunal costs, the median is around $6 million. The average award is $76 million (with a median of around $10.7 million)).

30. ICSID, supra note 6, art. 61(2). (Indeed, an earlier draft of the ICSID Convention established a “pay your own way” approach.).

31. Susan D. Franck & Lindsey E. Wylie, Predicting Outcomes in Investment Treaty Arbitration, 65 DUKEL.J. 459, 467 (2016). (The authors find that sixty percent of investment treaty awards favor the state; further, the average damage award for investors was $10.9 million. These awards tend to be lower than the amounts initially claimed.).


33. Not all arbitrations and awards are publicly reported, although unpaid awards tend to reach the public record once award-creditors seek execution in domestic courts.
rulings in protracted litigation before the courts of the arbitral seat.\textsuperscript{34} Attention to the risks of arbitral defaults has grown to such an extent that the World Bank now incorporates countries' adherence to arbitration into its enforcing contracts indicators in its "Doing Business" Guide.\textsuperscript{35} One study, synthesizing the results of a survey completed by in-house counsels of corporations that participated in international arbitrations, found that nineteen percent of corporations surveyed had to go through enforcement proceedings against states in domestic courts. Of these corporations, forty-six percent encountered "serious" enforcement difficulties. As to the nature of these difficulties, sixty-eight percent indicated that they could not identify assets of the host state, whereas thirteen percent ran into immunity-related obstacles.\textsuperscript{36}

The ICSID Convention requires all Member Countries to:

recognize an award rendered pursuant to the Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a \textit{final judgment} of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through the federal courts and may provide that such courts shall treat the award is if it were a \textit{final judgment} of the courts of a constituent state.\textsuperscript{37}

Defenses to enforcement of a final judgment in national courts can include exceptional and extraordinary circumstances, such as fraud, due process flaws and deceptive or unfair conduct by an adverse party.\textsuperscript{38}

United States implementing legislation provides that "pecuniary obligations imposed by [an ICSID] award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States."\textsuperscript{39} Such judgments can be set aside, \textit{inter alia}, on grounds set out in Rule 60(b) of the Federal

\textsuperscript{34} In arbitral proceedings subject to UNCITRAL rules. See Luke Peterson, \textit{How Many States Are Not Paying Awards Under "Investment Treaties?} INV. ARB. REP. (May 7, 2010). (It bears mentioning that host states are more inclined to comply with ICSID awards.). See LUCY REED, JAN PAULSSON, \& NIGEL BLACKABY, \textit{GUIDE TO ICSID ARBITRATION} 186 – 87 (Kluwer Law International: Den Haag, 2nd ed. 2010) (listing Congo, Senegal, Liberia, and Kazakhstan as the only Member Countries against which award-creditors had to pursue execution proceedings).


\textsuperscript{36} Crina Baltag, \textit{Enforcement of Arbitral Awards Against States}, 19 REV. OF INT'L ARB. 391, 405 (2008) (The remaining sixty percent indicated that the subject matter of the dispute was deemed non-arbitrable. No further studies seem to have been performed on the subject.).

\textsuperscript{37} Emphasis added by author to ICSID, \textit{supra} note 6, art. 54(1).

\textsuperscript{38} See James W. Barratt \& Margarita N. Michael, \textit{The 'Automatic' Enforcement of ICSID Awards: The Elephant in the Room?}, 2 THE EUR., MIDDLE E. AND AFR. ARB. REV. (2014) (This part of the paper focuses on United States implementing legislation. The reader may find it instructive to compare with the largely analogous provisions of the United Kingdom Convention on the Settlement of Investment Disputes Act to this article.).

\textsuperscript{39} 22 U.S.C. § 1650(a) (2012).
Rules of Civil Procedure ("FRCP"). These grounds, which cover instances of mistake and fraud, residually allow a court to decline enforcement of an award on "any other reason justifying relief from the operation of the judgment." These grounds, further, are far broader in scope than the more limited grounds of appeal available in an appeal to an ICSID Annulment Committee. Federal Court practice under Rule 60(b) FRCP reveals that a very small number of judgments have been set aside. None to date has related to ICSID awards. Nevertheless, subject to the particular circumstances surrounding proceedings leading to a given ICSID award, analogous provisions to Rule 60(b) in other ICSID Member Countries may allow domestic courts the possibility to vacate ICSID judgments that offend principles of due process and natural justice. This is, unquestionably, an important check against arbitral abuses: indeed, as increasing attention is being paid to undisclosed conflicts of interests of serving arbitrators, the possibility that a national court may strike down an arbitral award on such grounds is more than just theoretical. Where such challenges have been raised by respondent host states in the past, however, it is fair to assert that quite a few have been influenced more by litigation tactics than good faith concerns about the fairness of arbitral proceedings.

Before turning to the issue of state immunities, it bears mentioning that, while United States courts have declined to extend the scope of Rule 60(b) FRCP beyond the bounds of due process, the public policy of other Member Countries can also frustrate an award-creditor's attempts to enforce arbitral awards. In the United Kingdom, for instance, the Debt Relief (Developing Countries) Act 2010 limits the amount that private creditors can recover against heavily indebted poor countries ("HIPCs") in actions initiated in

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40. Fed. R. Civ. P. 60 (b) reads: "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief."

41. ICSID, supra note 6, art. 52(1). (ISCID Art. 52(1) allows a party to seek annulment, exhaustively under grounds that: "(a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.").


43. Id.

44. Id. at 13-14. (The authors discuss equivalent provisions of the French Code of Civil Procedure, the Columbian Procedure Code, and the Chilean Procedure Code. This list of Member Countries is not exhaustive.).

45. See Peterson, supra note 34.
English courts.46 Such initiatives, well intentioned as they are, may present some moral hazard risks for HIPC countries in their capacity as host nations, particularly where the bulk of their assets abroad reside in a state that has adopted similar legislation similar to that of the United Kingdom Debt Relief Act of 2010.47

Leaving aside the possibility of vacature under provisions similar in scope and operation to Rule 60(b) FRCP, the ICSID Convention clarifies that nothing in its final judgment rule "shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign state from execution."48 This provision reveals an asymmetry in state immunities under ICSID: participation in ICSID arbitration waives sovereign immunity from suit, but not from execution. The ICSID Model Clauses contemplate the possibility of an explicit waiver by the host state of immunity from execution.49 In practice, very few states issue waivers, ex ante or ex post. Further, national courts, deferring to the executive’s prerogative in matters of foreign relations or for reasons of comity, are sometimes recalcitrant to acknowledge these waivers.50 In practice, this can require an awardee to “scour the globe in search of assets in an ICSID Contracting State and determine if that state’s laws on sovereign immunity do not shield the assets from attachment in aid of execution.”51 Even if such awardee ultimately finds qualifying assets, the litigation fees expended in domestic courts throughout the globe following challenges raised either by the respondent or court, sua sponte, may not, practically or in principle, be recoverable.

In the United States, only Federal Courts can execute judgments against sovereign assets. The Foreign Sovereign Immunities Act (“FSIA”) codified a shift in the treatment of sovereign assets from absolute immunity to restrictive immunity. Under the FSIA, any property belonging to a state that is used for commercial activity can, in principle, be attached in aid of execution of an ICSID judgment.52 The burden lies with the award-creditor

47. Although such risks should not be overblown, given that the UK is one of only a few jurisdictions to have such laws in force. Award-creditors are free to seek enforcement in other jurisdictions—albeit in relation to non-UK based assets.
48. ICSID, supra note 6, art. 55.
51. Id. at 128. (One wonders whether the recently leaked “Panama Papers” will provide additional fodder for award-creditors. The Economist has noted, in this respect, that “Governments are not alone in taking an interest. The [leaked] files will be a boon for corporate investigators looking, say, to revive asset-search cases related to disputes.”). See The Panama Papers: A Torrential Leak, THE ECONOMIST, Apr. 9, 2016.
52. 28 U.S.C. § 1610(a) (2012) (establishes the following exceptions from immunity: "(1) the foreign state has waived its immunity from attachment in aid of execution or from execution
to identify property used for "commercial activity," defined "by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." In practice, securing attachment of assets before Federal Courts is difficult, with courts sometimes going so far as to sympathize with the plight of plaintiffs in having to conduct a "nationwide search for attachable [assets]" before dismissing their motion for reasons of political deference and international comity.

Reportedly, reward-creditors fare slightly better in Europe, where some home states are more inclined to pursue diplomatic remedies against the respondent host state. Although, the travails of Franz Sedelmayer serve as a cautionary tale: since obtaining an award of $2.3 million against Russia pursuant to a BIT between Germany and Russia for an unlawful expropriation in 1998, Mr. Sedelmayer to date has only managed to recover $1.6 million after spending in excess of $5 million to seek attachment of assets in domestic courts throughout Europe.

The punch line is that, absent a host state's waiver of immunities, award-creditors may struggle to cash in on awards. For the avoidance of any doubt, award-creditors may face the same struggle to execute an ICSID award whether or not such award arose from a breach of an investment contract or a BIT violation. In practice, however, respondent states seem far more hesitant to flout awards issued for a breach of contract—as such violations are more difficult to justify: there are few credible defenses, for instance, to

either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or (2) the property is or was used for the commercial activity upon which the claim is based, or (3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or (4) the execution relates to a judgment establishing rights in property—(A) which is acquired by succession or gift, or (B) which is immovable and situated in the United States: Provided, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or (5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or (6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or (7) the judgment relates to a claim for which the foreign state is not immune under § 1605A or § 1605(a)(7) (as such section was in effect on Jan. 27, 2008), regardless of whether the property is or was involved with the act upon which the claim is based.

53. 28 U.S.C. § 1603(d) (2012). (establishing the rule of thumb, reportedly, is that if the activity is one in which a private person could engage, it is not in principle entitled to immunity). See Cardosi, supra note 50, at 133.
54. Rubin v. The Islamic Republic of Iran, 637 F.3d 783, 786-87 (7th Cir. 2011).
55. See Cardosi, supra note 50, at 1, 38-44.
56. See Peterson, supra note 34.
justify a breach of a government offtaker's payment obligations in a twenty-year power and purchase agreement, where the offtaker agrees to remunerate the project company on a “take or pay” basis and the claimant establishes that it complied with all material terms of the PPA, and the public offtaker nevertheless failed to pay up. Failure to live up to contractual obligations in such circumstances can be justified by nary compelling sovereignty considerations.

Awards pursuant to a BIT are easier targets: after all, the respondent host state may ask, what qualifies [the same] trio of unelected, unrepresentative arbitrators to pass judgment on whether or to what extent a pro-environmental government regulation violates a FET provision? In other words, states are more inclined to deem awards issued for BIT violations an affront to their sovereignty. That host states eventually come around to honor arbitral awards is not a given. Indeed, some states have doubled down to renounce BIT obligations and withdraw from the ICSID Convention. Over the past decade, these include Venezuela, Bolivia, and Ecuador. Notwithstanding the existence of so-called “sunset” provisions contained in BITs, providing that BITs will remain in force for a number of years following denunciation, the practical effect of a host state withdrawing from BITs and the ICSID is to pull the rug out from under nervous BIT investors.

III. The PRI Landscape

A. The PRI Market

PRI policies can be obtained from the public and private sectors. Providers across both sectors coexist with each other, not least of which on account of the importance of reinsurance. PRI policies are priced before the event. The pricing of PRI policies, moreover, is not an exact science. Political risk factors, distinct from other fields of insurance, are difficult to


59. Contra Frederic G. Sourgens, Keep the Faith: Investment Protection Following the Denunciation of International Investment Agreements, 11 SANTA CLARA J. INT’L L. 335, 363-96 (2013) (Sourgens argues the Westphalian “offer and acceptance” paradigm in international relations, whereby a state is free to withdraw from a treaty, is inapposite to investor-state treaties, particularly where rights have vested to investors. Sourgens challenges the notion that a state can withdraw from such treaties at will, if the rights they confer to investors can be viewed as unilateral acts to which they must be bound absent exigent circumstances. Sourgens may very well be right that principles of good faith require a state to observe the modalities for denunciation contained in specific treaty commitments. However, this will do little to ease burdens on award-creditors to secure execution of assets, particularly where they would (presumably) be reliant on their home state to enforce the host state’s international law obligations.).

gauge and do not lend themselves easily to actuarial models. 61 PRI product suites will generally cover currency inconvertibility, political violence, and expropriation. In addition to offering variations of these three policies, private PRI providers tend to be more flexible with the scope and terms of their offerings, although it is difficult to say more about terms concretely, as private PRI providers often keep their contracts confidential. 62 After disbursing monies pursuant to a PRI policy claim, PRI providers are typically subrogated to investors' claims against the host state. Public PRI providers tend to do so pursuant to pre-existing treaties. 63

As touched upon in the Introduction to this paper, national governments have established agencies providing PRI products to their constituents. The United States, after spinning off the Overseas Private Investment Corporation ("OPIC") from the United States Agency for International Development ("USAID") in 1971, backed by the full faith and credit of the United States government, pioneered the development of this market. Other countries followed suit, with Export Development Canada, the United Kingdom Export Finance, Australia's Export Finance and Insurance Corporation ("EFIC"), and Japan's Nippon Export and Investment Insurance ("NEXI") providing equivalent PRI products to qualifying nationals and/or exports in developing country markets. 64 Further, MIGA's entry into the market in 1988, to close the eligibility gaps caused by the patchwork of national PRI providers, was followed, in due course, by the growth of private insurer groups. The largest of these include the American Insurance Group ("AIG"), Lloyd's London syndicate, and the Zurich Financial Services Group.

Private PRI providers tend to offer products at shorter durations—ranging from one to three years with the possibility of renewal, although a number of insurers, led by AIG, have reportedly begun to offer terms of up to fifteen years. 65 Compared to public PRI providers, the process to obtain coverage is speedier, and payouts are executed faster. 66 In addition, over the

64. France and Germany, respectively COFACE and HERMES, delegated equivalent functions to private entities.
66. Bekker & Ogawa, supra note 27, at 323, 327 (indicating that the length of time between filing a claim and receiving a claim determination was 4.75 months). Further, while PRI
past few years, insurance claims have tended to be paid out more by private than by public providers.67 By some estimates, a full forty-eight percent of investors purchase PRI coverage from the private sector.68 Perhaps driven by chronically low interest rates, these providers continue to increase the size and breadth of their offerings.69 The flip side, however, is that private policies can be quite expensive—so much so that some energy companies, whose infrastructure projects abroad are particularly prone to adverse government actions, deem such coverage not worth the threat of severe loss.70

Public PRI providers tend to operate on a break-even basis. On balance, they provide better financial terms to investors and on longer tenors than private PRI providers. But public PRI products have at least six major limitations from a prospective investor’s standpoint. First, as mentioned above, they are subject to strict nationality limits. Second, they generally require all applicants to prove developmental or patriotic “additionalities.”71 Third, they require investors at all times to comply with environmental and social safeguards, failing which they risk forfeiting their coverage.72 Compliance with these safeguards can add substantially to project costs. Fourth, they generally protect equity investments against their book value, calculated on the basis of assets less liabilities, and debt obligations against the unpaid amount of principal and interest otherwise due.73 This is worse than the discounted cash flow (“DCF”) method of valuation employed by

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67. MIGA, supra note 65, at 40.
68. Bekker & Ogawa, supra note 27, at 337.
69. MIGA, supra note 65, at 30.
71. Frequently Asked Questions, MIGA, https://www.miga.org/Pages/Who%20We%20Are/Frequently-Asked-Questions.aspx#con4 (last visited Sept. 16, 2016) (MIGA requires applicants to show proof of “development benefits of, and a long-term commitment to, the project.” OPIC gives priority to those projects that are responsive to the development needs of the host states, respect workers’ rights and avoids any tangible negative impact on the US economy. “Additionally” also appears in a different context for OPIC insurance. OPIC typically requires applicants to show that the insurance they seek is “additional,” in the sense that the investment would not proceed but for the insurance.). See Congressional Statement of Purpose; Creation and Functions of Corporation, 21 U.S.C. § 2191 (1994).
most arbitral tribunals.\textsuperscript{74} Fifth, they are subject to relatively strict caps. MIGA, for instance, has a yearly country coverage limit of $720 million (on a net basis) with standard durations of between fifteen to twenty years, although it can engage treaty and facultative reinsurance as well as coinsurance to augment these capacity limits as needed.\textsuperscript{75} OPIC insures investments up to $250 million for a maximum duration of twenty years, although this cap can be increased to $400 million for oil and gas projects.\textsuperscript{76} Sixth, to minimize moral hazard risks, they tend not to cover the total amount of the investment. MIGA insures a maximum of ninety percent of equity investments, and ninety-five percent of debt investments.\textsuperscript{77} OPIC caps investments at up to ninety percent\textsuperscript{78} of loss.

B. PRI COVERAGE: CONVENTIONAL POLICIES

In the following two sub-sections, I will discuss PRI policies, drawing from OPIC determinations to illustrate how some of these policies have been interpreted over time. It should be noted that OPIC is one of the more transparent public PRI providers in this regard: MIGA, for instance, does not make its claims determinations publicly available. This is in part to avoid impliedly criticizing Member Countries in such determinations, and because it has an excellent track record—disbursing only six claims since 1988, four of which resulted from war and civil disturbance.\textsuperscript{79}

Currency inconvertibility coverage will typically require an investor to show that it took all reasonable steps to transfer currency; the investor could not complete the transfer owing to host state regulations; and the host state issued these regulations after issuance of the PRI policy.\textsuperscript{80} Once these conditions are met, public PRI providers such as MIGA\textsuperscript{81} and OPIC\textsuperscript{82} will at

\begin{itemize}
\item \textsuperscript{75} See MIGA, supra note 65.
\item \textsuperscript{76} OPIC, \textit{supra} note 73, at 16.
\item \textsuperscript{77} MIGA, \textit{supra} note 65; see OPIC, \textit{supra} note 73.
\item \textsuperscript{78} See OPIC, \textit{supra} note 73, at 28.
\item \textsuperscript{80} See Waters, \textit{supra} note 74, at 366.
\item \textsuperscript{81} Ibrahim F.I. Shihata, \textit{Towards a Greater Depolitization of Investment Disputes: The Roles of ICSID and MIGA}, ICSID \textit{REV.- FOREIGN INVESTMENT L. J.}, 23-24 (1986) (MIGA, in its Investment Guarantee Guide, describes its currency inconvertibility product as: "[p]rotect[ing] against losses arising from an investor's inability to legally convert local currency (capital, interest, principal, profits, royalties, and other remittances) into foreign exchange and/or to transfer local currency or foreign exchange outside the country where such a situation results from a government action or failure to act. Currency depreciation is not covered. In the event of a claim, MIGA pays compensation in the currency specified in the contract of guarantee."). See MIGA, \textit{Investment Guarantee Guide 2} (July 2015), \texttt{https://www.miga.org/documents/IGGenglish.pdf}.
\item \textsuperscript{82} Sidney Linn Williams, \textit{Political and Other Risk Insurance: OPIC, MIGA, EXIMBANK and Other Providers}, 5 \textit{PACE INT'L L. REV.} 59, 78-79 (1993).
\end{itemize}
times simply buy up local currency and transfer a corresponding amount in freely convertible currency to the insured investor, subject to the exchange rate rules specified in the underlying policy. Investors should be mindful that OPIC does not automatically approve currency inconvertibility claims based on a host state’s promulgation of restrictive regulation. Rather, the policy holder, “using reasonable efforts, must not have been able to convert Local Currency into U.S. dollars or to transfer U.S. dollars out of” the host state.83

Political violence coverage, in turn, insures against losses from civil wars, domestic unrests, revolutions, and “civil strife.”84 PRI product purchasers will typically purchase coverage for business income loss, covering an investor until productive capacity is restored for up to a maximum duration, normally of one year, and/or asset damage, with compensation based either on the original cost of the asset, the fair market value at the time of loss, or the cost of repair. When underwriting a political violence policy, OPIC will generally look both to the general conditions in the host country, and the specific conditions likely to affect the proposed project in particular.85 It bears mentioning that OPIC has previously taken a permissive view of causation, even in relation to civil strife, which OPIC defines as unrest that does not rise to the level of an active civil war.86

Last, expropriation coverage will typically cover the risk of direct seizure or nationalization of assets by the host state in breach of international or municipal law, which has the effect of confiscation by directly depriving the insured of the use, control, or disposal of covered assets; although a growing subset of such policies are increasingly addressing indirect expropriation through adverse regulation that “deprive[s] the owner of its ability to manage, use, or control its property in a meaningful way.”87 These latter policies may be better labeled as covering “creeping expropriation.”88

84. See Waters, supra note 74, at 367. (Interestingly, MIGA’s political violence policy extends beyond acts imputable to the host state, and covers “not only violence in the host country directed against a host country government, but also against foreign governments or foreign investments, including the investor’s government or nationality.”). See MIGA, supra note 65, at 2.
85. See Rubins and Kinsella, supra note 62, at 78-79.
88. See MIGA, supra note 65, at 2. (“[I]n addition to outright nationalization and confiscation, “creeping” expropriation—a series of acts that, over time, have an expropriatory effect—is also
expropriation must go beyond bad faith or violation of contractual commitments, and rise to the level of a violation of the host state’s international legal obligations.\textsuperscript{89} Accordingly, mere harassment by local government employees or the charging of excessive rates by such employees, absent a confiscatory effect on the insured’s property, will not usually suffice.\textsuperscript{90} Moreover, OPIC will require an insured to exhaust all domestic remedies before filing claims for expropriation, unless the host state acts in a clearly arbitrary manner, or the insured is denied access to a judicial or appellate body.\textsuperscript{91}

C. PRI COVERAGE: AAD AND DOJ

PRI providers, public and private, generally consider certain risks inherently uninsurable. Such risks include those relating to currency devaluation\textsuperscript{92} inflation and non-discriminatory regulation.\textsuperscript{93} An intermediate category of risks that PRI providers cover, depending on whether they are requested by an investor with a direct contractual relationship with the host state, includes AAD and DOJ. I will address each in turn.

AAD coverage covers a host state’s failure, \textit{ex post}, to honor an arbitral award. It is related to, but distinct from, expropriation coverage in that AAD applies to any underlying commercial dispute between the investor and host state that has been arbitrated, leading to an award for the investor that the host state has refused to honor following “reasonable efforts” by the award-

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\textsuperscript{89} See Rubins & Kinsella, \textit{supra} note 62, at 77 (In this respect, a denial of justice at the municipal level, or arbitration award default would amount, would rise to the level of a violation of international law.).


\textsuperscript{92} See Kenneth Hansen, \textit{New Product For Devaluation Risk}, \textit{Project Finance NewsWire} (Chadbourne & Parke LLP), June 2001, at 9-12. (The first (and it seems only) project to be guaranteed against devaluation risk, provided by OPIC for the Tiete hydroelectric generating stations in Brazil, closed successfully in May 2001. Unfortunately, its timing coincided with the September 11 attacks, which led to a period of relative divestment by U.S. investors abroad. Demand for the product accordingly dropped, and it seems that OPIC has no plans to reintroduce it in the near future.).

\textsuperscript{93} See Bekker & Ogawa, \textit{supra} note 27, at 323.
creditor to seek enforcement. OPIC will typically require that the award remains unpaid for ninety days.

The importance of arbitration in this context is that the PRI provider is poorly placed to distinguish between actions by a host state justified by a legitimate reason and impermissible political actions by the host state. By way of an illustration, returning to the above example of the public off-taker in the previous part of this paper, if the respondent host state can establish in proceedings that the investor was at fault, for instance, by failing to meet contractual capacity generation requirements, its subsequent refusal to honor its PPA take or pay obligations will likely be accepted as a valid defense by an arbitral tribunal. If the host state fails to establish a breach by the investor, in contrast, a tribunal will be more likely to find for the investor. Where an insured alleges both expropriation and AAD, OPIC will cap liability at the lesser of the sum of the unrecovered amounts covered by all relevant policies or the insured's share of the arbitral award.

DOJ covers a host state's failure, ex ante, to participate in arbitral proceedings. DOJ coverage, which is offered as a stand-alone product or in combination with AAD, applies to situations where an investor has submitted a dispute for adjudication in a timely manner, following which the host state committed a "wrongful act" in either failing or refusing to participate in the adjudicatory proceedings with the result that adjudication has been rendered "impossible." To prove impossibility, insurers will have to be satisfied that the adjudicatory process has been rendered futile, been obstructed, frustrated, or thwarted by the government, or been rendered otherwise impractical or ineffective. There is more subjectivity at play with DOJ claims, given that a cut off point for the insured's reasonable efforts to seek justice has to be determined. Further, DOJ claims, more
than AAD claims, expose the insurer to greater salvage risk: inasmuch as a host state may be unable to honor an AAD claim, the insurer's place as a creditor is more readily defined than in relation to a DOJ claim, where its salvage position may fall along a large pool of creditors whose debts will surely be restructured after a considerable haircut. Last, it is unclear whether or to what extent DOJ applies to actions of host state agencies, as opposed to the host state itself, let alone whether such agencies may include domestic courts.

In one of the rare instances in which OPIC approved a DOJ claim, it drew a distinction between actions of a host state to stall litigation adopted in a commercial capacity, which would normally fall outside the scope of DOJ coverage (but remediable through sanctions obtainable in local courts), and actions of the host state taken in its official capacity in contravention of international law, which could validly form the subject of a DOJ claim.

That particular OPIC determination featured judicial determinations, imputed to the Indian government, which applied Chevron-type deference to the relevant administrative agency to defeat local relief against breach of contract, and enjoined the insured from pursuing arbitral relief pursuant to UNCITRAL rules.

To summarize, PRI providers offer BIT and Contract investors a range of products to better insure their investments against the vagaries of host states. Some of these, particularly policies covering against the risks of currency inconvertibility and expropriation, address risks that are sometimes already addressed in a BIT. No provider, however, is willing to offer AAD or DOJ coverage to investors lacking a direct contractual relationship with the host state. This excludes most BIT investors.

This exclusion seems odd, given that PRI risk evaluation is not an exact science in the first place. It is noted in the literature that PRI providers struggle to adequately price risks, *ex ante*, for BIT violations: whereas government to frustrate international arbitration (including the kidnapping of an Indonesian arbitrator from Amsterdam's Schipol Airport), which led to an OPIC payment of $217.5 million to MidAmerican Energy Holdings Company, in December 1999, pursuant to a combined AAD/DOJ policy.; see also, Memo of Determinations . . . MidAmerican Energy Holdings Co., supra note 95.

100. See Johnson & Wray, *supra* note 94.


Contract investors, through liquidated damage clauses, will typically “anchor” a host state’s liability for default in underlying contracts. BIT investors, in contrast, will not have agreed on any liability caps with the host state. The literature further notes that DOJ providers, in particular, in addition to facing salvage risks, are exceptionally hesitant to insure foreign court proceedings that are less clearly delineated in the first place, or that are clearly delineated but capable of being subverted at will by the host state. Where a Contract investor is required to first adjudicate in local courts, the nature of these foreign proceedings does not change. Nevertheless, a DOJ provider may be more confident of characterizing a court’s refusal to award damages pursuant to a contract with the host state as a denial of justice in such proceedings than it is in relation to a BIT investor’s claim that the host state’s actions in analogous proceedings have breached, for instance, the state’s FET obligation. This may well be true. Nevertheless, it ignores the possibility that PRI providers can limit their overall exposure through policy limits and charge risk premia to reflect the uncertainties.

IV. Risk Mitigation Strategies for BIT Investors

A. BITs and PRIs Need Not Operate in Silos

There are some striking similarities between the protections an investor can derive from BITs and PRI products, particularly in relation to risks from currency inconvertibility and expropriation. This has led some commentators to suggest that BITs and PRI products are substitutes. I would contend that this presents a false dichotomy. There are important situations in which BITs and PRI products reinforce each other. For one, skittish investors may not make investments in a host country at all in the absence of some form of PRI coverage. Conversely, one can fathom of a situation where the absence of a provision on subrogation in a BIT might dissuade a particularly risk-averse private insurer from granting any such coverage where there is a strong possibility that the insured’s financial health may not survive adverse host state action long enough to pursue BIT arbitration.

The claim that BITs and PRI products are substitutes ignores some important differences. To highlight just a few: on eligibility, investors can claim the protection of a BIT if their investment is a covered investment...
within the meaning of the underlying BIT; whereas public PRI providers limit eligibility to nationals and/or exports.107 Further, investors may forfeit coverage under public PRI policies if they fail to abide by environmental and social safeguard obligations.108 On remedies, damages for breach of a BIT are calculated, \textit{ex post}, by an arbitral tribunal; whereas the maximum coverage of a PRI product is negotiated \textit{ex ante}. On calculation methods, BIT damages are generally based on the DCF method; whereas the more affordable PRI products cover ninety percent or less of an investment’s net book value. On sequencing, BIT damages are, in principle, due upon issuance of an award, or following execution in domestic courts; whereas payments pursuant to a PRI policy, depending on the risk insured, are either due immediately, following certain “cooling off” periods, or at the close of arbitral proceedings.109 On substantive coverage, although the protection offered by BITs can change over time,110 such changes are unlikely to affect the narrow definition of expropriation, and add much specificity to circumstances amounting to FET violations; whereas PRI products, whose terms can only change over time if amended by both the insurer and insured, adopt a wider definition of expropriation, but do not insure for alleged breaches of FET, MFN or NT violations. On scope, arbitral tribunals are slow to accept that BIT umbrella clauses render mere contractual breaches justiciable;111 whereas AAD and DOJ coverage will insure against such breaches where the state refuses either to participate in related adjudicative proceedings or honor an arbitral award. On confidentiality, investment arbitration proceedings are increasingly public; whereas the settlement of a PRI claim is confidential.112 On counterparty obligations, investors are not under any strict obligation to mitigate their losses; whereas PRI products generally oblige insureds to give immediate notice of loss (or even anticipated loss), and take all reasonable steps to avert further loss. Last, on terms, where BITs and PRI products seem to overlap, they may do so under very different circumstances. A dispute concerning a breach of a currency inconvertibility provision in a BIT, for instance, will normally fix the exchange rate on the day upon which the host state failed to honor the transfer; whereas under a PRI policy, the prevailing exchange rate may be that which applies at the end of the “cooling

107. Private PRI providers will, if anything, premise eligibility around the minimum value of the investment to be protected.
108. \textit{See} IAN LAIRD ET AL., \textit{INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW} p. 345 (JurisNet, LLC; Huntington, 2015) (showing that the contours of comparative fault in investment arbitration, in contrast, is unsettled).
109. \textit{See} Williams, \textit{supra} note 82, at 79. (asserting that currency inconvertibility products offered by public PRI providers typically requires an insured to wait a number of days before being paid, as the PRI provider seeks to negotiate a resolution with the host state).
110. By virtue of the MFN clause.
112. Subject, however, to the statutory reporting requirements of public PRI providers.
period, which could be as long as 240 days. For investors in Argentina, whether the amounts were to be disbursed on day zero or day 240 made a significant difference.113

What these differences illustrate is that BIT investors, by availing themselves of PRI products tailored to the specificities of the underlying BIT, can minimize their risks. Specifically, such investors can purchase PRI products that plug important gaps in BIT coverage. If an investor is concerned about the absence of a provision on currency inconvertibility in a BIT, for instance, but reassured by the politically stable situation in a host state, and thus, unconcerned by the risk of expropriation, it can purchase a currency inconvertibility product without having to pay anywhere between 500 to 1000 basis points more for a comprehensive “all risk” product that adds these other two products.114

Conversely, if the host nation’s currency is stable, but the BIT contains an NPM clause, this would arguably allow a host state to expropriate an investor’s plant downstream for an infinitely wide panoply of “essential security interests.”115 In such circumstances, a prudent investor may want to ignore currency inconvertibility coverage altogether, and pay more for an elaborate expropriation policy from a private PRI provider that covers its investment against a DCF valuation, thereby insulating it from the risk that it incur considerable litigation expenses for a period of years without any clear prospects of ultimately succeeding before an arbitral tribunal. Were the investor to have ignored a careful review of the BIT (and its NPM clause), and either obtained no PRI coverage at all, or obtained a basic PRI product suite securing its investment against a portion of the net book value of its equity investment, it will have been much worse off.

It is surprising, then, that empirical evidence suggests that neither investors nor PRI providers review BITs in the underwriting process.116 This evidence highlights instead that double taxation treaties rank higher in importance for prospective investors.117 For those PRI providers surveyed,

114. For energy infrastructure projects, “all risks” products are more frequently termed “Comprehensive Contractors Plant & Equipment” coverage. Examples of these can be found at the following links: http://www.beazley.com/documents/Political%20Risks%20and%20Trade%20Credit/Comprehensive%20Contractors%20Plant%20Equipment%20Coverage%20%20Wording.pdf (Beazley); http://www.aicg.co.uk/CMDownload.aspx?ContentKey=f338e84d-8c04-40db-a17c-51e06984ca98&ContentItemKey=dcb27286-dda3-4b21-ae82-214226886f88 (AICG).
115. Assuming such NPM clause is “self-judging,” in the sense of allowing the host state to determine what constitutes such interests.
117. Poulsen, supra note 116, at 549.
most indicated either that they did not take BITs into account at all in their underwriting process, or noted their existence as a general indicator that the country in question was open, in principle, to foreign investment. One study found, using regression analyses, that the most important political risk variable for PRI providers was a country's lagged value of the political risk—in other words, a country's perceived level of risk over the most recent years. None of the studies revealed a principled or doctrinal reason for disregarding BITs in investment or underwriting decisions. Rather, it seems that survey respondents across-the-board were simply unaware of their existence.

Once apprised of their purpose, moreover, the majority of respondents were doubtful that they would amend their underwriting process to take BITs into account. Yet, the above analysis shows that a review of a BIT prior to issuing PRI coverage can give a PRI provider a better understanding of the types of protections an insured might benefit from under the BIT that overlaps with PRI product coverage. To be sure, this will not systematically be the case—and such reviews can take time and cost money. Nevertheless, in those situations where a BIT provides protections that are similar to the types of risks that the insurer is covering, and the host state has a good compliance record, prospective PRI product purchasers would be well advised to seek lower premia from PRI providers to account for the reduced risks provided by the BIT. PRI providers ready and willing to oblige, let alone those inclined to proactively offer reduced premia, moreover, could stand to be rewarded with more business.

One author claims that the disconnect between BITs and PRI runs deeper: investor-state practitioners are also generally unaware of the dual role PRI products can play to reduce investment risks and insurance premiums. The result is that those prospective investors being advised by lawyers or insurers are likely being given incomplete risk analyses. It is hoped that this collective ignorance will dissipate as a growing number of BITs continue to be signed and investment awards publicized and critically reviewed.

B. THE IMPORTANCE OF AAD AND DOJ MOVING FORWARD

The possibility of creating a more comprehensive political risk management program outlined immediately above may go a long way

118. Yackee, supra note 116, at 400.
119. Id. at 421 (referencing risk rating agency data).
120. Id. at 424; Poulsen, supra note 116, at 552. (The one anomaly, referred by Poulsen, strangely enough, related to the Brazilian PRI industry. Six Brazilian PRI providers surveyed in the course of UNCTAD's Policy Review of Brazil displayed a knowledge of BITs, and indicated that these were sometimes factored into underwriting decisions. Brazil is the largest economy not to have signed a BIT with any trading partner. Further, it is not an ICSID Member Country.).
121. Particularly when consulting an investment arbitration law firm.
122. See Ginsburg, supra note 60, at 970, n.78.
123. Id. at 944.
towards offering some measure of compensation to the BIT investor. There are situations, however, in which investors will want to be covered for more than ninety percent the net book value of its investment. Yet, such investors may balk at paying the fees that a private PRI provider will charge for more comprehensive coverage.124 Faced with the prospects of paying large fees, they may decide to play the odds and fall back on the protections afforded by a BIT. If the economic value of an investor’s assets is later reduced by adverse host state action (or inaction), the investor will have to either internalize its losses or seek out funding in any way that it can to pursue BIT litigation. In the absence of AAD and DOJ coverage, one such funding avenue has proven to be TPF, which can be problematic for reasons I will discuss further below.

Sometimes, TPF may present the only possible avenue, ex post adverse host state action, for BIT investors in dire financial straits. One such investor, Crystallex, reportedly issued five-year senior secured notes accompanied by a contingent value right entitling the bearer to a percentage (thirty percent) of any BIT award recovered by the company in an action against Venezuela for nationalizing an untapped mineral deposit that it had received the right to exploit.125 Its issuance attracted little interest, however, and it filed for bankruptcy protection from the Ontario Supreme Court a few months after issuance. The court approved debtor-in-possession financing of $36 million, provided by a United States hedge fund run by Tenor Capital Management, to allow the company “to fund its operations, including the prosecution of its arbitration claim against the government of Venezuela.”126 Crystallex received a $1.4 billion ICSID award, likely earning Tenor Capital Management a healthy return on its investment.127

Investors like Crystallex will typically consult TPF brokers to seek out funders willing to provide non-recourse financing to cover all or parts of the costs and disbursements needed to pursue a claim. Not much is known about these funders or their underlying motivations. Funders may offer financing in return for full recovery of their costs plus a reasonable share of any award issued, or be motivated by the “test” aspects and precedential prospects of a given dispute. Rules for such arrangements vary per jurisdiction.128 Concerns across virtually all these jurisdiction are linked to public policy considerations, dating back to the Medieval-era prohibitions on champerty and maintenance; conflicts of interests, between funder and

125. Sebastian Perry, Claimant Sells Securities Linked to ICSID Award, GLOB. ARB. REV. (Oct. 28, 2011) (stating that the offering was for $120 million).
128. See Aren Goldsmith & Lorenzo Melchionda, Third Party Funding in International Arbitration: Everything you Ever Wanted to Know (but were Afraid to Ask) – Part I, 2012 INT’L BUS. L. J. 53, 56-63 (such rules may be relevant insofar as the law of the relevant country applies, or when the investor seeks execution of an award in relevant domestic courts).
investor, particularly on the issue possible settlements, funder and counsel, where counsel provided by the funder has agreed to discounted fee rates and caps,129 and, possibly, arbitrator and funder; in addition to questions of admissibility relating to who "owns" the claim in the absence of any treaty provisions addressing assignment or subrogation.130

TPF will do little to ease concerns over the optics of the “fairness” of investment arbitration, particularly if pre-existing ties between funders and arbitrators, however remote, begin to surface downstream. TPF is unnecessary to provide bridge funding to BIT investors, given the constant and high growth in the PRI market.131 Cateris paribus, TPF money accepted by BIT investors may represent lost sales of AAD and DOJ products for PRI providers.

I have demonstrated in the previous Part that DOJ providers can adequately limit their exposure when insuring a BIT investor. Nevertheless, if we choose to express some sympathy, however irrational, for the difficulties of pricing DOJ meaningfully in the absence of detailed contracts with the host state, these sympathies cannot possibly extend to the refusal, by PRI providers, to offer AAD coverage to BIT investors. Inasmuch as insurers fear that such products will be oversubscribed, this is unlikely to occur for an important reason: for many investors, the prospects of litigating before an international tribunal for little under four years on average will not protect their bottom line. But, it presents a more transparent alternative to TPF.

It would seem that extending the scope of AAD coverage is not a priority issue for PRI providers. Yet, some precedent exists: one author describes his successful structuring of what, in essence, was a dispute settlement swap with MIGA, which enabled MIGA to pursue a claim for expropriation under the more favorable definition of expropriation in the underlying BIT relative to the MIGA Convention.132 Rather than pursue such complex structures, PRI providers could initially market AAD coverage to BIT investors at a conservative margin of 1000 basis points or so. Should PRI providers balk at doing so for whatever reason, MIGA should take the lead and pilot an expanded AAD product, accounting for it either in its yearly country limits or, initially, through a set-aside fund.134

The problem of the enforcement gap is not going away anytime soon: MIGA’s most recent investment report notes an uptick in demand for PRI

130. Id. at 10-14. See also, Aren Goldsmith & Lorenzo Melchionda, Third Party Funding in International Arbitration: Everything you Ever Wanted to Know (but were Afraid to Ask) – Part II, 2012 INT’L BUS. L. J. 221, 221-30 (2012).
131. MIGA, supra note 56.
132. See Hansen, supra, note 19, at pp. 10-12.
133. Id. at 9.
134. See Cardosi, supra note 4, at 147-55 (for proposals on how the World Bank Group can each play a part to bolster BIT compliance). See also Kantor, supra note 43, at 22.
products for investments in the Middle East and North Africa, coinciding with an increase in breach of contract disputes in global and regional arbitration centers. As more and more investors seek high returns in frontier markets, the enforcement gap will continue to grow wider.

V. Conclusion

State consent is the *sine qua non* for international investment arbitration. When ICSID was designed in 1965, its drafters anticipated that host state consent would be granted on a case-by-case basis, and operate as the jurisdictional bottleneck. BITs altered this, and the ICSID Secretariat has been playing catch-up since: ICSID’s Caseload Statistics report for 2016, for instance, indicates a dramatic spike in annual cases registered after 1996. Prior to that point, cases registered barely exceeded a maximum of three a year. From 1997 to 2015, as BITs proliferated, no less than twenty-seven cases were registered per year, with a historic high of fifty-two cases registered in 2015 alone. As of December 31, 2015, ICSID has registered 549 cases under its Convention and Additional Facility. The basis of consent invoked in these cases, sixty point three percent of the time, was contained in a BIT provision.

ICSID arbitration is growing increasingly lengthy and costly. Winning before an ICSID tribunal, further, is no guarantee of satisfaction. The constitutional laws of many Member Countries contemplate the possibility of vacating or reducing final awards on a number of grounds, encompassing due process considerations in addition to public policy concerns. These grounds, it follows, extend well beyond the grounds for annulment that parties to ICSID proceedings can cite to set aside an award. While comity and policy considerations have stopped domestic courts to date from exercising too much activism with respect to ICSID awards, nothing in law stops them from doing so in the future.

There is more: the list of non-compliant states continues to grow. As I have shown above, execution of an award is fraught with difficulties, whether or not a state waives immunity from attachment. When host states disregard BIT awards, they typically frame the awards as an affront to their sovereignty. In some instances, host states may follow through by denouncing BITs altogether. This leaves BIT investors in a precarious state of affairs.

These developments are to some degree unsurprising: respondent host states may not have realized what they were signing up for when they incorporated ICSID arbitration clauses into BITs. ICSID, in turn, was never meant to operate as a comprehensive remedy to a host state’s failure to

135. MIGA, World Investment and Political Risk 2013, *supra* note 65, at 44.
137. *Id.* at 10.
honor contractual or treaty obligations. World Bank Group risk mitigation products, particularly relating to PRI, were designed to supplement such obligations. Over time, the PRI market grew out of sync with developments in the international investment treaty law. But, the PRI market is growing robustly as more investors demand PRI products to insure investments abroad. PRI products can enhance a BIT investor's risk mitigation management program, and lower insurance costs.

It is, therefore, surprising that the literature reports an almost total lack of cross-fertilization between investor-state practitioners and PRI providers. This lack of cross-fertilization has, *inter alia*, stalled innovation in the PRI market. The lack of suitable PRI products, moreover, has led some BIT investors seeking to raise litigation funds down more desperate paths, none more so than TPF. While TPF can sometimes represent an investor's only hope of raising monies to litigate an investment arbitration claim, the absence of uniform rules disciplining recourse to TPF and a lack of transparency concerning the identities and motivations of funders at present may further heighten concerns over the fairness of investment arbitration.

It is hoped that PRI providers and BIT investors will better scrutinize the protections provided by a BIT when negotiating PRI product coverage. Selective PRI coverage can better insulate BIT investors from the risks of adverse government actions, particularly where such actions could threaten the very survival of the underlying investment. PRI providers, in turn, should factor the protections offered by BITs in their underwriting process, where such protections can be said to meaningfully reduce risks.

AAD and DOJ coverage, in particular, can make an investor whole where a host state refuses either to participate in arbitral proceedings or honor an arbitral award. There is no principled reason why PRI providers should not extend at least AAD coverage to BIT investors. Such policies can be introduced on a trial basis, priced conservatively, and subjected to maximum liability caps. Once the market for AAD products insuring BIT arbitrations matures, DOJ products can similarly be rolled out on a trial basis.

Going forward, investors and PRI providers will also need to come together to fundamentally rethink the pricing of PRI products. Rather than focusing on a purely actuarial approach, it may be more instructive to fall back on some common sense linked, in part, to the problem of obsolescence bargaining. If one accepts that the risk of adverse host state action may be greater in situations where an investor is perceived to give little back to the local communities (and there is no reason to assume otherwise), it follows that the converse must be true: if the investor gives the host state and local communities a more equitable piece of the proverbial pie, they are less likely to find themselves at the business end of an expropriation. PRI products should thus be priced according to the local benefits an investor's project stands to generate.

Although public PRI providers already consider the positive spillovers of a project, the criticism is that they either do so mechanically or are primarily
concerned with advancing national foreign policy objectives abroad\textsuperscript{138}—and in the narrower framework of deciding whether or not to grant funding in the first place. Were they to create incentive structures whereby risk premiums are lowered in inverse correlation with developmental impacts, they could economize on payouts, and deliver more fully on their environmental and social mandates.
